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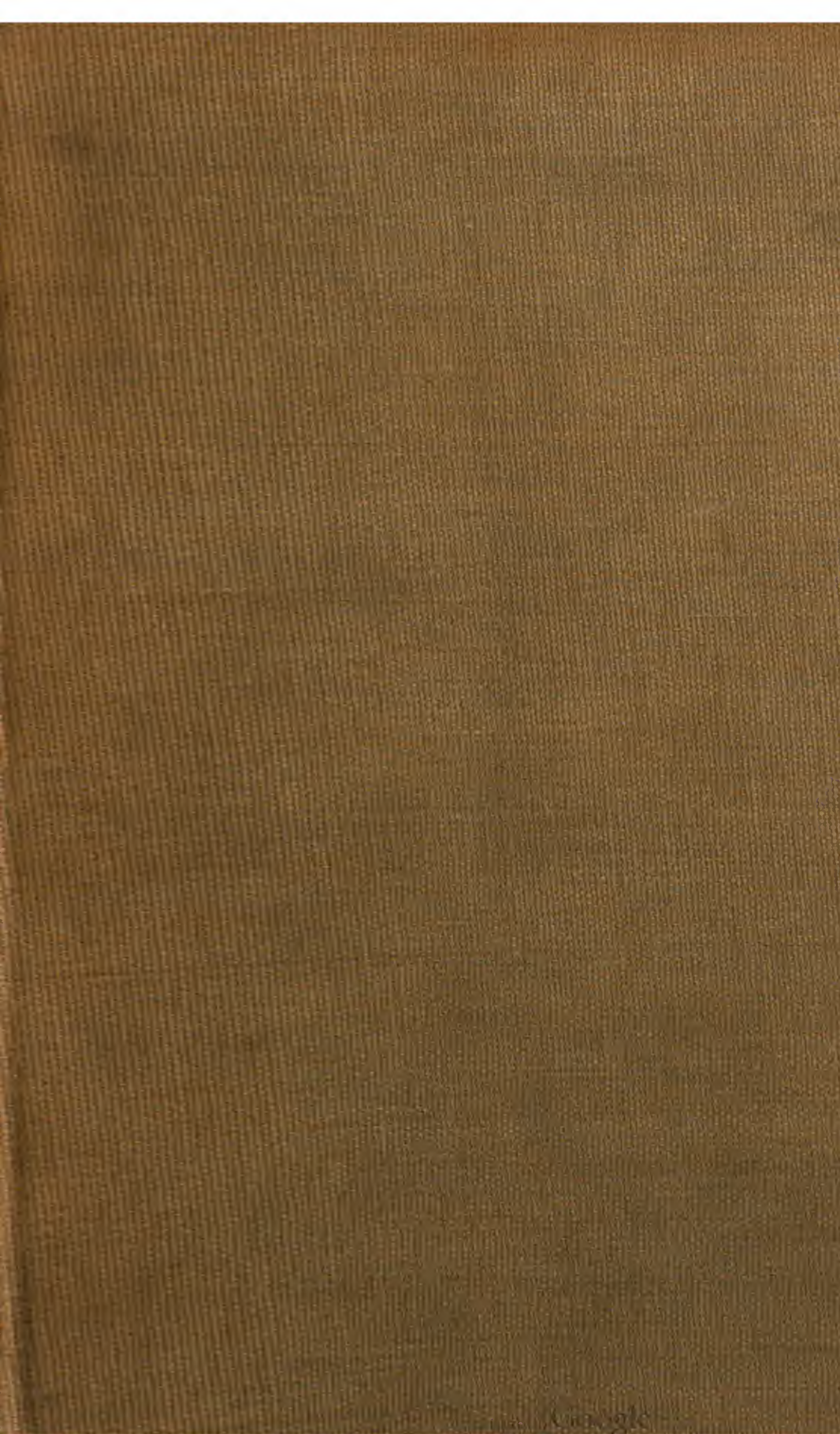
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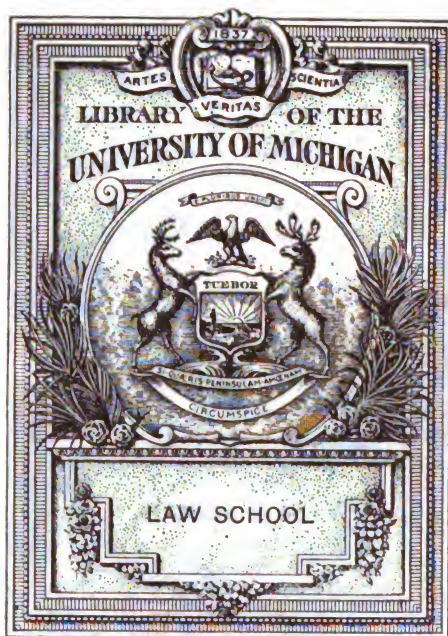
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SAMUEL T. DOUGLASS
JUSTICE
SUPREME COURT OF MICHIGAN

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Douglass & Walker

NOTES

TO

PHILLIPPS' TREATISE

ON THE

LAW OF EVIDENCE.

BY ESEK COWEN,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW-YORK;

Assisted

BY NICHOLAS HILL, Jr.

COUNSELLOR AT LAW.

PART SECOND.

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1839.



tions lies in such case. (*Champion v. Brooks*, 9 Mass. Rep. 228.) Parsons, C. J. in the case last cited, says: "The statute giving an appeal must be construed as taking away the remedy by error in all cases in which the party aggrieved had opportunity, and might have appealed. This construction, as a general rule, was settled in the case of *Savage v. Gulliver*, (*supra*.) And a case in which the party, against whom the issue is found, has tendered and had allowed a bill of exceptions, is within the reason of the rule. On appeal from a judgment rendered on verdict, amendments may be made in the declaration or pleadings, on reasonable terms, when the justice of the case requires it: and in consequence thereof, a new issue in fact may be joined and tried by the country. As no bill of exceptions will be necessary in that case, no disputes can arise respecting the manner in which it may be drawn, or the conduct of the judge below in allowing it. But if error lies instead of an appeal, because a bill of exceptions is allowed, all this useful and discretionary power of the court cannot be exercised; and our only authority will be to affirm or reverse the judgment of the court below. And if the error, on which a reversal is ordered, is such that a new trial may be had at the bar of this court, yet it will be a trial only of the former issue. Where an appeal lies, the judge below is not obliged to allow a bill of exceptions: and it would be unreasonable, that the party prevailing below should be obliged, against his consent, to submit to the less beneficial proceedings by error in the superior court, instead of an appeal, merely because the judge thought proper to indulge the adverse party with the allowance of his bill of exceptions, when he had no legal claim to any such allowance."

NOTE 544—p. 312.

The case cited in the text was decided upon the ground, that the court of chancery has full control over the issue, and may grant a new trial, if the former one was in any degree unfair or erroneous.

In Pennsylvania, on an issue directed by the register's court to try the validity of a will, it became a question, whether the statute authorizing issues to be directed by such court, and tried in the common pleas, precluded a writ of error, and consequently a bill of exceptions. The supreme court held it did not; and per Tilghman, C. J.: "I can see nothing in the act of assembly which looks like an intention to place the register's court on the footing of the chancellor of England, who exercises the right of ordering a second trial if he is discontented with the first. Now, unless that court can review the proceedings of the court of common pleas, it would be a great defect in the administration of justice, if errors could not be corrected in this court." (*Vansant v. Boileau*, 1 Binn. Rep. 444, 447.)

It seems, judgment had been rendered by the common pleas in the above case: if it had been otherwise, the chief justice admits there would have been a technical difficulty hard to be got over. For it is a well settled principle, that a writ of error only lies where a court of record have rendered final judgment, or made an award in the nature of a judgment. (*id.* *Commonwealth v. Judges of the Common Pleas*, 3 Binn. Rep. 273, 276. 9 Vin. Abr. 474, (A. 2.) § 6. See *Benjamin v. Armstrong*, 2 Serg. & Rawle, Vol. I.*

592.) But though the judgment is informal and defective, if it be one on which an execution could issue, the party aggrieved by it is entitled to his writ of error. (*Wilson v. Daniel*, 3 Dall. 401, 404.) In Pennsylvania, a writ of error will lie on an order arresting judgment. (*Skinner v. Robeson*, 4 Yeates, 575. *Benjamin v. Armstrong*, supra.) In New-York, however, where judgment has been arrested, the course of practice is for the party to move for judgment against himself, in order to bring error; for a writ of error, it is there held, will not lie upon an order arresting judgment. (*id.* *Bayard v. Malcom*, 2 John. Rep. 101. *Fish v. Weatherwax*, 2 John. Cas. 215.) Further, as to where error lies, see the next note.

NOTE 545—p. 313.

A bill of exceptions may be said to lie, generally, to any erroneous decision or opinion of the judge upon the trial, by which either party is prejudiced; as if he reject evidence tending in any degree to aid the jury in determining a material fact; or admit improper evidence; or refuse to nonsuit the plaintiff; or to notice material testimony; or to charge upon a question of law, where his attention is distinctly called to it. (*Coleman v. Allen*, 3 J. J. Marsh. 229. *Graham v. Camman*, 2 Cain. Rep. 169. *Van Gordon v. Jackson*, 5 John. Rep. 467. *Jackson v. Caldwell*, 1 Cowen's Rep. 622, 639. *Ex parte Bailey*, 2 *id.* 479. *Murray v. Judah*, 6 *id.* 484. *Dunlop v. Patterson*, 5 *id.* 243. *Dunlop v. McAllister*, 3 Cranch 298. *Smith v. Carrington*, 4 *id.* 62. *Rudd v. Thomas*, 1 J. J. Marsh. 209, 300. *State v. Catlin*, 3 Verm. Rep. 530. *Hanks v. Roberts*, 3 J. J. Marsh. 298.) And if the judge comment upon a piece of testimony to the jury, and leave it generally for them to pass upon, without adding such views as to its credibility as the law requires the jury to consider, a bill of exceptions will lie to the charge. (*Dunlop v. Patterson*, 5 Cowen's Rep. 243.) Thus, where the material fact in the cause depended for its proof upon the testimony of F., a single unsupported witness, who swore to that fact, but upon whose cross-examination, it was quite plain that he had perjured himself, either in the cause pending, or in a former cause relating to the same matter; and the court charged the jury that he was competent; that they might give his testimony such weight as they thought it deserved; and that it was in some measure supported by the testimony of R., (a witness who had agreed with F. in a collateral, immaterial fact,) and therefore entitled to that additional weight; held, that the judge should have instructed the jury to disregard F.'s testimony, and that an exception to his charge for such omission was well taken. (*id.*)

An exception, however, does not lie to the charge of the judge, in ordinary cases, upon mere matters of fact; nor to his commentaries upon the weight of evidence. Observations of that nature are understood to be addressed to the jury, merely for their consideration, as the ultimate judges of matters of fact; and are entitled to no more weight or importance than the jury in the exercise of a sound judgment choose to give them. They neither are, nor are they understood to be, binding upon them as the true and conclusive exposition of the evidence. And the only remedy for a party aggrieved by an erroneous opinion upon the facts, is by motion for a new trial; (*Carver v. Jackson d. Astor*, 4 Peters, 1, 80, 81; *Magniac v. Thompson*, 7 *id.* 348, 390; *Burd v. Dansdale*, 2 Binn. Rep. 80, 89; *Graham v. Graham*, 1 Serg. & Rawle, 330;

Hamilton v. Menor, 2 id. 70; Renn v. The Contributors to the Pennsylvania Hospital, id. 413; Poorman v. Smith's ex'r's, id. 464; Henwood v. Cheeseman, 3 id. 500;) or in a criminal case, by appeal to the pardoning power. (The People v. Vane, 12 Wend. 79.) But where there was evidence from which a jury would have been authorized to presume enough to sustain the plaintiff's action, and the judge charged peremptorily that the plaintiff had failed in sustaining his action, this was held a deviation not from fact, but law, and that therefore error would lie for it. (Long v. Ramsay, 1 Serg. & Rawle, 72.) A bill of exceptions does not lie because the court refuse to give an opinion upon the facts. (Hamilton v. Menor, 2 Serg. & Rawle, 70. Brown v. Campbell, 1 id. 176.) It is otherwise, however, if they refuse to give an opinion upon a point of law, material to the issue, where their attention is specifically called to it; (Brown v. Campbell, 1 Serg. & Rawle, 176; Hamilton v. Menor, 2 id. 70; Poorman v. Smith's ex'r's, id. 464; Dunlop v. Patterson, 5 Cowen's Rep. 243; State v. Catlin, 3 Verm. Rep. 530, 534; Shaeffer v. Landis, 1 Serg. & Rawle, 449; Vincent v. Lessee of Huff, 4 id. 298;) and it is equally erroneous, if they give their opinion in an equivocal or evasive manner; for the party is entitled to distinct and explicit instructions, upon every point of law propounded to the court. (Smith v. Thompson, 2 id. 49. Powers v. M'Ferran, id. 44.) But a refusal of instructions prayed for, on a mere abstract proposition, not bottomed on any colour of evidence, will be no ground of exception. (Greathouse v. Brown, 5 Monroe, 280, 282. Hamilton v. Russell, 1 Cranch, 309, 318.) So a charge or opinion of a judge which is entirely abstract, or out of the case so as not to affect it, though erroneous, cannot be insisted on by exception. If, however, it may have operated injuriously to the legal rights of the party excepting, it is otherwise, and a new trial will be granted. (Clarke v. Dutcher, 9 Cowen's Rep. 674. See also Smith v. Carrington, 4 Cranch, 62; King v. Kinny, 4 Hamm. 81; Wardell v. Hughes, 3 Wend. 418; Proffit v. Williams, 1 Yerg. 89; Norton v. Sanders, 1 Dana's Rep. 14, 15.) Where the exception was for the admission of improper testimony, and it appeared clearly that the party excepting could not have been injured by it, the proof being merely superogatory and such as the defendant in error was in no wise bound to make; held that error could not be sustained. (Reynolds v. Ex'r's of Rogers, 5 Hamm. Rep. 169, 171.) So also in M'Dougal v. Fleming, (4 id. 389,) the general principle is distinctly recognized, that the party taking a bill of exceptions must show that he might have been prejudiced by the decision excepted to, or the proceedings below will not be disturbed. (See King v. Kinny, 4 id. 81.) But where the sole question on a bill of exceptions turned on the competency of a witness produced to testify to a fact fully proved by other witnesses; held, that the court, in considering the bill, could not reject the evidence of such witness as unnecessary, for it was impossible to say that the jury disregarded it; and the witness being adjudged incompetent, the judgment in the court below was accordingly reversed. (Marquand v. Webb, 16 Johns. Rep. 89. See S. P. Osgood v. The President and Directors of the Manhattan Co., 3 Cowen's Rep. 612, 621; Anthoine v. Coit, 2 Hall's Rep. N. Y. C. P. 40, 48, 9, 50.) Decisions have been made which present a different aspect—and where, though improper evidence was clearly admitted, the court have refused to interfere, because there appeared to be enough, exclusive of such improper evidence, to sustain the verdict of the jury. (See Supervisors of Chenango v. Birdsall, 4 Wend. 458; Crary v. Sprague, 12 id. 44; Horford v. Wilson, 1 Taunt. 12; Doe d. Teyn-

ham, 6 Bing. 561.) These however will be found, on examination, to be instances where the question arose upon a case presenting all the facts, or where the peculiar office of a bill of exceptions was inadvertently overlooked. (See *Soulden v. Van Rensselaer*, 9 Wend. 293, 296.)

Where a judge has improperly refused to nonsuit a plaintiff because of a defect in the evidence on his side, the error is cured by the proof being subsequently given. (*Murray v. Judah*, 6 Cowen's Rep. 484, 490.)

A bill of exceptions does not lie to the decision of a court, upon matter entirely within their discretion; as the refusal to grant a new trial. (*Law v. Merrills*, 6 Wend. 268, 278. *Henderson v. Moore*, 5 Cranch, 11. *The Marine Ins. Co. of Alexandria v. Young*, id. 187. *Barr v. Gratz*, 4 Wheat. 213, 220. *Blunt's lessee v. Smith*, 7 id. 248. *Granger v. Bissell*, 2 Day's Rep. 364, 368. *Lewis v. Hawley*, 1 Conn. Rep. 49. *Magill v. Lyman*, 6 id. 59. *Wight v. Small's lessee*, 2 Binn. Rep. 93. *Burke v. Young's lessee*, 2 Serg. & Rawle, 383. *Bloss v. Kittridge*, 5 Verm. Rep. 28. *Littleton v. Moses*, Breese's Rep. app. 9.) But in Virginia, where the evidence was all consistent and detailed in the bill, and it clearly appeared that, excluding the evidence of the plaintiff in error entirely, and admitting the facts proved by the defendant in error, the verdict was contrary to evidence and justice, a bill of exceptions to the opinion of the court below refusing a new trial was sustained. (*Ewing v. Ewing*, 2 Leigh's Rep. 337.) It would have been otherwise, however, had there been room for reasonable doubt. (*Jackson's adm'r v. Henderson*, 3 id. 196. *Bennett v. Hardaway*, 6 Munf. 125. *Carrington v. Bennett*, 1 Leigh's Rep. 340.) The rule on this subject in Indiana is similar to that which prevails in Virginia. (*Lurton v. Carson*, 2 Blackf. 464.) A bill does not lie for granting or refusing an amendment, in a case in which the court exercises a discretion. (*Ordoneaux v. Prady*, 6 Serg. & Rawle, 510. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 306, 217.) Nor for granting or denying a motion to postpone the trial of a cause. (*Woods v. Young*, 4 Cranch, 237.) In Kentucky however it is otherwise, and the refusal to postpone in a proper case is error. (*M'Carty v. Patton's ex'rs*, 3 J. J. Marsh. 263. *Simms v. Alcorn*, 1 Bibb, 248.) So it seems in Tennessee. (*Cornell v. The State*, Mart. & Yerg. 147.) Whether a bill of exceptions lies to the refusal of a court to compel a party to join in a demurrer to evidence, *quere*. (*Young v. Black*, 7 Cranch, 565. See post, p. 215 of the text, and note 549.) *Quere* also whether, in Pennsylvania, error lies for a clear abuse of discretion. (*Duncan v. M'Cullough*, 4 Serg. & Rawle, 482.) A bill of exceptions does not lie to the decision of a court, in admitting or rejecting evidence upon a motion for summary relief. (*Shortz v. Quigley*, 1 Binn. Rep. 222.) It seems that in Vermont it lies for the court's refusing to receive a plea puis darrien continuance, or improperly taxing fees for travel and attendance of witnesses. (*Higgins v. Hayward*, 5 Verm. Rep. 73.) And in Tennessee, for the circuit court's refusing to allow a certiorari, to bring up proceedings of the county court. (*Lawson v. Scott*, 1 Yerg. 92. *Bob v. The State*, 2 id. 173.) But not for refusing to permit an attorney to appear, on the ground of a want of authority. (*Ex parte Gillespie*, 3 id. 325.) Nor for improperly granting an order discharging an insolvent. (*Donnelly v. Whitney*, 4 id. 475.) See the next preceding note.

As to the time and manner of excepting. The practice in New-York, in this respect, is regulated by statute. It must be done when the decision complained of is made, save in the single instance where the exception is to the charge of the court to

the jury, in which case the exception is in time, if tendered before the jury have delivered their verdict. (2 R. S. 422, § 73.) A subsequent section requires the exception to be in writing, but authorizes the court to allow such time as shall be deemed reasonable, to settle and reduce the same to form. (id. § 74.) And in pursuance of this authority, the supreme court, by general rule, have declared that the party shall not be required to prepare his bill of exceptions at the trial, but merely to reduce the exceptions to writing, and afterwards to draw up the bill and have the same settled, in like manner and under the same regulations as are made with respect to cases; i. e. the party must draw up his bill, and serve a copy thereof on the opposite party within four days after the trial, who may, within four days thereafter, prepare amendments thereto, and serve a copy on the party taking the exception, who may then, within four days thereafter, serve the opposite party with a notice to appear, within a convenient time, (to be specified in the notice, and not less than four nor more than twenty days after service of such notice,) before the judge who tried the cause, and have the bill and amendments settled. The judge shall thereupon correct and settle the bill as he shall deem to consist with the truth of the facts. (See Rules of S. C., Oct. 1829, Nos. 33, 34.) The time for preparing a bill of exceptions and amendments thereto, may be enlarged by the judge who tried the cause, or one of the justices of the supreme court, but not by any other officer. (id. No. 39.)

The rules of the district court of the U. S., for the northern district of New-York, are substantially the same as those adopted by the supreme court of New-York. (See Conklin's Pr. app. 480, 479.)

Independent however of any statutory provision on the subject, the nature and reason of the thing dictates that an exception to the charge of the court is in time, if made before the jury have pronounced their verdict; and also that exceptions as to evidence should be made as soon as the court have decided; not that in either instance they need be drawn up in form immediately, but the substance should be reduced to writing by the court or the party, while the matter is transacting. This doctrine is contained in a variety of cases, among which are the following: *Morris v. Bulkley*, 8 Serg. & Rawle, 211, 214; *Jones v. The Ins. Co. of North America*, 4 Dall. 249; 1 Binn. 38, S. C.; *Lanuse v. Barker*, 10 John. Rep. 312, 322; *Sikes v. Ransom*, 6 id. 279; *Pratt v. Malcolm*, 13 id. 320; *Midberry v. Collins*, 9 id. 345; *Law v. Merrills*, 6 Wend. 263; *Stewart v. The Huntingdon Bank*, 11 Serg. & Rawle, 267; *Walton v. The United States*, 9 Wheat. 651, 657; *Ex parte Bradstreet*, 4 Peters, 102, 107; *Gordon v. Ryan*, 1 J. J. Marsh. 54, 58; *Doe, dem. Woods, v. Kennedy*, 5 Monroe, 177, 8. *Cline v. Caldwell*, 4 Miller's Rep. 19; *Coxe v. Field*, 1 Green's Rep. 216; *Force v. Smith*, 1 Dana's Rep. 151. The propriety of requiring exceptions as to evidence, to be made at the time of the decision complained of, is obvious. The adverse party has it then at his option of waiving the evidence admitted, or admitting the evidence rejected, rather than have his cause involved in the hazard, delay, and expense of a writ of error; and where he exercises this right, by thus conceding to the views of the party excepting, error cannot be alleged. (*Legget v. The Bank of Pennsylvania*, 7 Serg. & Rawle, 218. *Lanuse v. Barker*, 10 John. Rep. 312. *Givens v. Bradley*, 3 Bibb's Rep. 192. *Marquand v. Webb*, 16 John. Rep. 89. *Thomas v. Tanner*, 6 Monroe, 52. *Doe, dem. Woods, v. Kennedy*, 5 Monroe, 177, 8.)

The party excepting must not only be careful that his exception be interposed at the proper time, but he should see that it be so specific as to point to the precise error intended to be relied on; for the court, in their decision upon questions arising at the trial, are not bound to do more than respond to the motion or objection made. They are under no obligation to modify the propositions of counsel, so as to make them suit the case, but may dispose of them in the terms in which they are propounded. Accordingly, where the defendant had reserved the right of moving for the exclusion of any part of the plaintiff's evidence which he might choose to designate as incompetent, and it did not appear from the bill that he designated any particular part, but moved for the exclusion of the whole; held, that though *part* of the testimony was incompetent, the court were right in refusing the motion, unless the *whole* were so. (*Elliot v. Piersol's lessee*, 1 Peters, 328.) So where the objection was general, that the plaintiff was not entitled to interest, and it appeared that he was entitled to interest on a part of the account, though not on the whole; held, that the objection was properly overruled. (*Reab v. M'Allister*, 8 Wend. 109, 111.) And where an exception was taken because of the admission of certain depositions, on the ground that they were not legally taken, the supreme court of Louisiana held that this was too general to allow the party to avail himself of a defect in respect to the official seal of the officer by whom they were taken. (*Ohio Ins. Co. v. Emondson*, 5 Miller's Rep. 295. See *Mandeville v. Perry*, 6 Call's Rep. 78, S. P.) So if there is any thing ambiguous in the charge of the court, calculated to mislead the jury, their attention should be specifically called to it at the time, or it cannot be alleged as error. (*id.* *Ball v. Mannin*, 3 Bligh's Rep. N. S. 22. *Taylor v. Willans*, 2 Barn. & Adol. 195. *Carver v. Jackson*, *ex dem.* *Astor*, 4 Peters, 1, 81.)

The form of the bill, its contents, &c. If the bill be not tacked to the record, it should set out the whole proceedings previous to the trial; but otherwise it begins with the proceedings after issue joined, and in either case it goes on to state the circumstances upon which it is founded; as, that a witness was called to establish certain facts, or evidence offered, or challenge made, or demurrer tendered; the allegations of counsel respecting the competency of the witness, the admissibility of the evidence, or legal effect of it, &c.; the opinion of the court or judge, the exception of counsel to the opinion and the verdict of the jury. (*Bull. N. P.* 317, 319. *Tidd's Pr.* 788. 2 *Dunlap's Pr.* 643. *Swift's Ev.* 168.)

For precedents of bills of exceptions, see *Bull. N. P.* 317, 319; *Brownl. Ent.* 181; *Tidd's Pr. Forms*, 161. *Tidd's Appendix*, 206; *Tillinghast's Forms*, 182, 3, 4, 5, 6, 7.

The bill is not designed to draw the whole matter again into examination, but only the points to which it is taken; the party excepting must therefore lay his finger on those points which arise, either in admitting or denying evidence, or matter of law arising from a fact not denied, in which either party is overruled by the court. (*Jackson, ex dem. Webb, v. Robert's ex'rs*, 11 Wend. 422, 430. *Van Gorden v. Jackson*, 5 John. Rep. 467. *Graham v. Camman*, 2 Caines' Rep. 168. *Frier v. Jackson*, 8 John. Rep. 495. *Jackson, ex dem. Saunders, v. Caldwell*, 1 Cowen's Rep. 622. *M'Donald v. Fisher, Kirby*, 339. *Soulden v. Van Rensselaer*, 9 Wend. 293, 296. *Law v. Merrills*, 6 Wend. 268, 274. *Swift's Ev.* 168. *Lovell v. Field*, 5 Verm. Rep. 218. *Hazletine v. Page*, 4 *id.* 49. *Coxe v. Field*, 1 Green's Rep. 215.) And no more of the case should be incorporated in the bill, than is necessary to raise the questions de-

cided, and to which the exception relates. (*Soulden v. Van Rensselaer*, 9 Wend. 293, 296.) 'The practice of spreading out the whole charge of the court on a bill of exceptions, instead of the points excepted to, is discountenanced. (*Evans v. Eaton*, 7 Wheat. 426. *Magnic v. Thompson*, 7 Peters, 348. *Gregg v. Lessee of Sayre*, 8 Peters, 244.)

But the party excepting must, at his peril, place so much in his bill as shows that the court did err to his prejudice; for the presumption is in favor of the rectitude of their proceeding, and all decisions made will be presumed correct, until the contrary appear. (*Richardson v. Denison*, 1 Aik. Rep. 210. *Adams v. Ellis*, id. 24. *Eaton v. Houghton*, id. 380. *Stearns v. Warner*, 2 id. 26. *Snowden v. Warder*, 3 Rawle, 101. *Harrisons v. Baker*, 1 J. J. Marsh. 317, 318. *King v. Kinny*, 4 Hamm. 81. *M'Dougal v. Fleming*, 4 id. 388. *Ingraham v. White*, 2 Miller's Rep. 294, 298. *Reynolds v. Ex'rs of Rogers*, 5 Hamm. 169, 171.) In other words, nothing must be left to conjecture, and if the bill be so loosely drawn as to leave the matter in doubt, the proceeding below will be sustained, notwithstanding there be some reason to *suspect* that error might have intervened. (*Adams v. Ellis*, 1 Aik. Rep. 24. *Eaton v. Houghton*, id. 380.) In Virginia, where the bill is so imperfectly drawn that no satisfactory opinion can be formed upon it, the course is to remand the cause for trial. (*Beattie v. Tubb's adm'rs*, 2 Munf. Rep. 373. *Hairston v. Cole*, 1 Rand. Rep. 461. *Barrett v. Tazewell*, 1 Call's Rep. 187. *Fowler v. Lee*, 4 Munf. Rep. 373. *Thompson v. Cumming*, 2 Leigh's Rep. 321.) But this practice seems not to have been generally adopted, most of our courts having acted upon the principle above stated, of presuming that the court below did right, until the contrary expressly appear. Accordingly it has been held, that if the evidence on which instructions to the jury were intended to bear, be not presented by the bill, the court will not adjudge such instructions erroneous. (*Harrisons v. Baker*, 1 J. J. Marsh. 317, 318.) And where instructions were asked for, upon certain facts, it appears necessary to set forth in the bill, that evidence of such facts was given to the jury. (*Vassee v. Smith*, 6 Cranch, 226, 233, note.) So, if the exception involves the sufficiency of the facts proved, it should be shown that the evidence detailed is *all* which was given to the point. (*Stearns v. Warner*, 2 Aik. Rep. 26. *Richardson v. Denison*, 1 id. 210.) Where the copy of a deed appeared by the bill to have been received, after objection, instead of the original, and the bill did not profess to detail the whole evidence, the court presumed that other evidence was given, making out a good title, independent of the deed. (*Hodges v. Crutcher*, 1 J. J. Marsh. 504.) In another case, the ground of error relied on, was the admission of a bond on the trial, variant in respect to the time of payment from the one set out in the declaration; and though the bill of exceptions did not profess to set out the whole evidence, the court refused to presume that another bond, corresponding with the one declared on had been introduced, inasmuch as it appeared pretty clearly from the bill, that the instrument so introduced was the foundation of the judgment rendered. (*Rudd v. Thomas*, 1 J. J. Marsh. 299, 300.)

It has been intimated, in a previous part of this note, that error cannot be sustained on the ground that the court omitted to charge on any given point, unless their attention was specifically called to such omission. Where an exception is taken for such cause, the fact that their attention was so called to the omission, and that they were requested to supply it, but neglected, or refused, should appear expressly and affirmatively by the bill. (*Pennock v. Dialogue*, 2 Peters, 15, per Story, J. *Law v. Mer-*

rills, 6 Wend. 268, 274. *Fisher v. Larick*, 7 Serg. & Rawle, 99, 102, per Tilgham, C. J. *United States v. Burnham*, 1 Mason, 57, 69. *Dunlop v. Patterson*, 5 Cowen's Rep. 243. *Douglass v. M'Allister*, 3 Cranch, 298. *Smith v. Carrington*, 4 id. 62. *Burch v. Nickerson*, 17 John. Rep. 217, 218. *State v. Catlin*, 3 Verm. Rep. 530.)

If the error relied on consist in the exclusion of evidence offered, the bill should show clearly that such evidence was relevant at the time when the decision complained of was made. (*Turner v. Fendall*, 1 Cranch, 132. *Jackson, ex dem. Webb, v. Robert's ex'rs*, 11 Wend. 422, 428. *Eaton v. Houghton*, 1 Aik. Rep. 380. *Gratz v. Gratz*, 4 Rawle, 411, 430.) And though a matter may possibly have been relevant, yet this is not enough; it must be made distinctly to appear how it was so; and the court will not interfere on account of its rejection, unless the relevancy be shown affirmatively. Accordingly, where, on a question of forging a bond in 1807, a person, not the alleged forger, said, speaking of the bond, some 13 years after its date, "my pen has not forgot to write," which might, by some possibility, have been made material; yet not appearing affirmatively to have been so on the bill of exceptions, the court refused to adjudge its exclusion erroneous. (*Rowt's adm'r, v. Kile's adm'r*, 1 Leigh's Rep. 216, 223, 4.)

It should be remarked, however, that there is no necessity for stating specifically the object of evidence offered and overruled, unless the opposite party had asked for such object. If the bill does not state the precise object, the plaintiff in error has a right to make it appear that the evidence would, in any manner, have been relevant; (*Richardson v. Stewart*, 4 Binn. 198;) or, in any degree aided in enabling the jury to determine a material fact. (*Coleman v. Allen*, 3 J. J. Marsh. 229.) Nor is a party bound, when he calls a witness who is competent, to announce the fact which he intends to prove by him before he is sworn; and if the court reject such witness, it is error, although it do not appear whether his testimony would have been material, or not. (*Force v. Smith*, 1 Dana's Rep. 151, 2.)

The evidence offered should likewise appear to have been competent, as well as relevant; and in Maryland, where it was left doubtful, by the bill of exceptions, whether the entire testimony offered and rejected was not hearsay, part being unquestionably so, the appellate court made a comparison of the several parts of the testimony, and adjudged the whole hearsay, and therefore incompetent. (*Williamson v. Dillon*, 1 Harr. & Gill, 444.) So, where a book of accounts of one party was offered against another, to prove a debt, without other proof appearing by the bill of exceptions to have been proposed, verifying the book; held, that the book was properly rejected. (*The People v. Genung*, 11 Wend. 18, 21.) And where parol evidence has been excluded which might have been competent, in connection with a record, the bill should state that such record was offered. (*Dowell v. Burrill's adm'r*, 4 Rand. Rep. 317.) And if the book of a teller in a bank was admissible, in connection with the teller's evidence, and was excluded, a bill of exceptions founded upon such exclusion should clearly show that the book was offered in connection with the evidence of the teller. (*Courtney v. The Commonwealth*, 5 Rand. Rep. 666.)

If the bill be founded upon the improper admission of evidence, the party must show that it was introduced, and set forth such evidence at length, or the court on error will not interfere. (*Snowden v. Warder*, 3 Rawle, 101. *Thomas v. Tanner*, 6 Monroe, 52, 53.)

And where the evidence consisted of a deposition, to which an exception was taken for impertinency, the court refused to interfere, because the deposition was not set out upon the record. (*Stearns v. Warner*, 2 Aik. Rep. 26, 28. See *Gratz v. Gratz*, 4 Rawle, 411, 430, S. P.) In such cases, if the court can suppose any possible state of facts to which the testimony admitted might have been relevant, it shall be presumed that such state of facts existed; (*Swift's Ev.* 168;) and care should therefore be taken in framing the bill, to exclude such presumption.

The bill, too, ought, in strictness, to show that the exceptions were taken at the trial, and at the proper time. (*Walton v. The United States*, 9 Wheat. Rep. 651. *Law v. Merrills*, 6 Wend. 268. *Law v. Jackson*, 8 Cowen's Rep. 746. *Ex parte Bradstreet*, 4 Peters, 107. *Biggs v. M'Ilvaine's ex'x*, 3 Marsh. Ky. Rep. 360.) But in New-York, the court will intend, from the fact of the judge or judges having signed the bill, that the exception was taken at the proper time. This was so held, where, from the order of statement in the bill, the exception appeared to have been made to the charge after the verdict had been pronounced. (*Harlow v. Humiston*, 6 Cowen's Rep. 189. *Wakeman v. Lyon*, 9 Wend. 241, 242, S. P.) So also where the bill presented various objections to the admissibility of evidence, and the charge of the judge, though it did not expressly show that any exceptions were taken, the court said they would look into the case, notwithstanding the omission, upon the presumption that exceptions had been taken, from the fact of the bill being sealed. (MS. May term, 1831, cited in *Graham's Pr.* 284.)

The practice of the supreme court of the United States seems to require indispensably that the bill should be so constructed, in point of form, as to appear to have been signed at the trial, whether it was so in point of fact or not. (*Walton v. The United States*, supra.) And the court of errors in New-York have gone far toward approving of this practice. (*Law v. Merrills*, supra.) The supreme court in New-York, however, have not adopted it; and per *Savage, C. J.*: "It seems to me it is a compliance with the statute, if it (the bill) appear to have been settled before judgment rendered." (*Dean v. Gridley*, 10 Wend. 254, 256.) But as this part of the bill is mere matter of form, and to avoid conflict with what is deemed correct practice in the court of errors, leave was given to the plaintiff in error to amend in the case last cited, pursuant to 2 R. S. 425, § 8, 9. (*id.*)

Signing the bill, &c. The New-York statute on this subject is as follows: "If the truth of the case be fairly stated in such exceptions, it shall be the duty of the person or persons composing the court, or the major part of those who were present when the decision excepted to was made, to sign and seal such statement; and they may be compelled to do so by the court to which any writ of error may by law be brought upon the judgment rendered in such cause, or which shall have authority to decide on such exceptions, when returned to them." (2 R. S. 422, § 75.)

By this provision, the bill is to be signed by the person or persons composing the court, &c. And before the statute, where the bill was signed by the chief justice instead of the circuit judge before whom the trial was had, the court of errors refused to notice it, considering it a nullity; but they allowed the assignment of errors to be withdrawn on payment of costs, that the plaintiffs in error might move in the court below to have the bill corrected and bring it up on certiorari. (*Law v. Jackson*, 8 Cowen's Rep. 746.)

If not signed by *all* the persons composing the court, it may be signed by *the major part of those who were present when the decision complained of was made*. Under a statute previous to the one above referred to, it was held that the bill must be signed by a sufficient number to constitute a court, or it would not be noticed. (*Pratt v. Malcolm*, 13 John. Rep. 320.) So in Virginia. (*Gordon v. Browne's ex'r*, 3 Hen. & Munf. 219.) Whether this is so now in New-York since the above statute, quere.

The bill must also be *sealed*. (2 R. S. 422, § 75.) And in Maryland, where a bill was signed, but not sealed, it was held a nullity. (*Davis v. Wilson*, 2 Har. & John. 345.)

It has been decided in New-York, that if the bill is signed by the judges of a court of common pleas, in vacation, they must be together acting as a court, or it will be irregular. (*Clark v. Dutcher*, 19 John. Rep. 246. *Midberry v. Collins*, 9 John. Rep. 345.) But where a bill of exceptions had been presented in open court for signature, and the judges refused to sign it, *solely* on the ground that it was presented too late, and they were afterward commanded to sign and did sign it in vacation without being together, the supreme court refused to quash it, holding it properly signed. (*The People, ex rel. Etheridge, v. Herkimer C. P.*, 7 Wend. 536.)

By the English practice, if the judges refuse to sign the bill, the party aggrieved by the denial may have a writ upon the statute commanding the same to be done. This writ recites the form of the exception taken and overruled, and it follows *vobis præcipimus quod si ita est tunc sigilla vestra apponatis*; and if it be returned *quod non ita est*, an action will lie for a false return, and thereupon the surmise will be tried; and if found to be so, damages will be given, and upon such recovery a peremptory writ issues. (2 Bull. N. P. 316.) In *Sikes v. Ransom*, (6 John. Rep. 279,) it is said that though there is no case to be found, in which the king's bench had issued a mandamus to the common pleas, directing them to seal a bill of exceptions, (such writ having been issued from chancery only,) yet they legally might do it. (See *Reg. Brev.* 182.)

The supreme court of New-York issue such writ. (*Sikes v. Ransom*, *supra*. *The People v. The Judges of Westchester*, 2 John. Cas. 118. *The People v. The Judges of Washington*, 2 Cain. Rep. 97.) They do not, however, grant a peremptory mandamus in the first instance; and the above cases will, in some measure, show for what cause, and under what circumstances, a peremptory mandamus will be denied after an alternative one has issued. See also on this subject, *Clark v. Dutcher*, 19 John. Rep. 246; *Midberry v. Collins*, 9 id. 345; *Lanuse v. Barker*, 10 id. 312; *Pratt v. Malcolm*, 13 id. 320; *Shipherd v. White*, 3 Cowen's Rep. 32; *Marsh v. Rulifson*, 7 id. 102; *Pomroy v. Preston*, 2 Cain. Rep. 373; *Porter v. Harris*, 4 Call's Rep. 485; *Springer v. Peterson*, 1 Blackf. 188.

In Kentucky, a practice somewhat anomalous prevails. If the inferior court refuse to sign a bill of exceptions, a certificate of the by-standers that it was presented to the court, and that the judges refused to sign it, and that the statement in the bill is true, is sufficient to give it validity. (*Wright v. Nichols*, 1 Bibb's Rep. 298.) *Aliter*, if the by-standers omit to certify the truth of the statement in the bill. (*id.*) If the by-standers certify the truth of the statement, and the court admit it of record, without certifying why they refused to sign it, it will be taken as true on the mere certificate; but if the court certify, as the ground of their refusal, that the statements in the bill are

untrue, the by-stander's certificates must be supported by affidavits. (id.) If the judge admit the bill of exceptions to record, and certify, as the ground of his refusal to sign it, that its statement of the evidence is garbled, and certify wherein the statement differs from the evidence given, and seal and certify his statement; the bill of exceptions, as corrected by the judges' certificate, will be taken as part of the record, although not certified as true by the by-standers; nor supported by affidavits. (id.)

When a bill of exceptions operates as a stay of proceedings. In the supreme court of New-York, after the bill is drawn and amendments proposed, and both are delivered to the judge for the purpose of settlement, this operates as a stay of proceedings until it is settled. (Rosevelt v. The Heirs of Fulton, 7 Cowen's Rep. 107.) After it is settled, it operates, per se, a stay of proceedings. (id.) But until it is delivered to the judge, with the amendments, time should be obtained by an order. (id.) Even this, however, will not prevent a rule nisi for judgment. (Moran v. Dawes, 4 Cowen's Rep. 22.)

Since the above decisions were made, however, a statute has been passed, which supersedes them almost entirely, so far as personal actions are concerned; and allows the party, in whose favor the verdict was rendered in such action, to proceed to judgment and execution, notwithstanding the bill of exceptions, unless the proceedings be expressly stayed. (L. N. Y. 1832, sess. 55, c. 128, § 1.)

Where there is an order to stay proceedings till the settlement of a bill, the party tendering the bill is entitled to a reasonable time, after attending before the judge for settlement, to engross the same, and obtain the signature of the judge; and until the judge's signature is obtained, the bill is not settled; and a judgment entered previous thereto will be set aside as irregular. (Pelletreau v. Moore, 9 Wend. 493.)

NOTE 546—p. 313.

In New-York, it is provided by statute that a bill of exceptions, signed in a cause, shall not prevent the argument of a motion to set aside the verdict in such cause, on the ground that such verdict was against evidence; but such motion may be argued, either before or after the decision of the court on the bill of exceptions, as the court shall direct. (2 R. S. 422, § 76.) The following remarks of the revisors, in proposing this section, explain the reason of it: "By the existing practice, the court will not allow both a bill of exceptions and a case to be argued. But a bill does not present the question, whether the verdict was contrary to evidence, (vide Foot v. Wiswall, 14 John. Rep. 304,) which, it is conceived, a party should not be prohibited from presenting, because he has also objections to the testimony itself." (4 Rev. Rep., chap. 7, title 4, art. 4, p. 67.)

NOTE 547—p. 313.

See 8 Cowen's Rep. 754, note (a), S. C. In Willans v. Taylor, (6 Bing. 512,) the defendant sent the plaintiff, at the suggestion of the chief justice, the bill of exceptions, in order that he might agree to it, or suggest alterations before it was signed. On

the same day, the defendant, who had also brought a writ of error, gave a rule to transcribe. The plaintiff having taken no notice of the bill, a judge's order was obtained, calling on him to return it to the defendant. Cross, serg't, obtained a rule nisi to discharge this order, on the ground that the defendant, by bringing a writ of error, had waived his bill of exceptions, and relied on *Dillon v. Parker*, cited in the text. But the court held that the plaintiff had no right to retain the bill in this way, and that it would be for the court of error to say whether they would notice it or not. Afterward, the case coming before the king's bench, the bill, on consideration of the special circumstances, was allowed to be tacked to the record. (*Taylor v. Willans*, 2 Barn. & Adolph. 845.)

NOTE 548—p. 314.

No joinder in demurrer can be required, while there is any matter of fact in controversy between the parties. It is not the proper office of such proceedings, to bring before the court an investigation of the facts in dispute, or to substitute them in the place of the jury for the purpose of weighing the force of the testimony, or the presumptions arising from the evidence. The true and proper object of such a demurrer is to refer to the court the law arising from the facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. If there is parol evidence in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts, of which the evidence is so loose, indeterminate and circumstantial, before the court can compel the other side to join therein. (*Fowle v. The Common Council of Alexandria*, 11 Wheat. 320, 321, per Story, J. *Young v. Black*, 7 Cranch, 565, 568. *Lessee of Maus v. Montgomery*, 11 Serg. & Rawle, 329. *Duerhagen v. The United States Ins. Co.*, 2 Serg. & Rawle, 185, 187.) Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely the testimony which may conduce to prove them. It is to admit whatever the jury might reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. (*Fowle v. The Common Council of Alexandria*, 11 Wheat. 320, 323.) And where a party, by demurring, will take the question from the proper tribunal, the court is not scrupulously nice, to adjust the balance of evidence, but will be extremely liberal in their inferences from the testimony, as against such party. (*Bank of the United States v. Smith*, 11 Wheat. 171. *Patrick v. Hallett*, 1 John. Rep. 241.) It is true, forced and violent inferences are not allowed. (*Pawling v. The United States*, 4 Cranch, 219, 222. *Hansborough's ex'rs v. Thom*, 3 Leigh's Rep. 147. *Stephens v. White*, 2 Wash. Rep. 203, 210.) But any inference, which the jury might, with the slightest degree of propriety, make from the evidence, is to be conceded; for it never was intended that by a demurrer the court should become triers of the facts. (*Dickey v. Schreider*, 3 Serg. & Rawle, 413, 416.) If the evidence be uncertain, or circumstantial, the party by whom it is offered may specify the facts which he wishes to have admitted, and the demurrant should then concede

all that the evidence could possibly establish, before the opposite side can be compelled to join in demurrer. (*Duerhagen v. The United States Ins. Co.*, 2 Serg. & Rawle, 185, 187.) And if one fact tends to the induction of another, the last fact should also be expressly admitted. (*id.* per Tilghman, C. J.)

But if the party against whom the demurrer is offered, joins in demurrer, neglecting to insist on these admissions as a preliminary, the court will proceed, and draw the same inferences against the demurrant which the jury might have drawn. (*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 389. *United States Bank v. Smith*, 11 *id.* 171, 179. *Patrick v. Ludlow*, 3 John. Cas. 10, 14, 15. *Forbes v. Church*, *id.* 159, 160. *Lewis v. Few*, 5 Johns. Rep. 1, 34. *Lessee of Ross v. Eason*, 4 Yeates' Rep. 54. *Steinbach v. Columbian Ins. Co.*, 2 Cain. Rep. 129, 134. *Smith v. Steinbach*, 2 Cain. Cas. in Err. 158, 171. *Lowry v. Mountjoy*, 6 Call's Rep. 55. *Snowden v. Phoenix Ins. Co.*, 3 Binn. Rep. 457. *Pawling v. The United States*, 4 Cranch, 219.) Though it is said, in *Fowle v. The Common Council of Alexandria*, (11 Wheat. 923,) that "if there be such a joinder, without such admission, leaving the facts unsettled and indeterminate, it is sufficient reason for refusing judgment upon the demurrer; and the judgment, if any is rendered, is liable to be reversed for error."

In Virginia the practice seems to be different from what it is in most of the courts in this country, or in England. The difference will be explained by the following extract from the opinion of Green, J., (the other judges concurring) in *Whittington v. Christian*, 2 Call's Rep. 353, 357: "From the authorities showing the original practice of the English courts, it appears that the former practice was, to require the party demurrant to admit upon the record the existence of all facts which the evidence offered by the other party conduced to prove. Those facts were to be ascertained by the court; and in this respect, the court might err in opinion, and if so, and the party refused to make the admission, he lost the benefit of his demurrer; or if he made the admission on record, it bound him irrevocably. In the latter case, the error of the court could never be corrected; and in the former, not without a protracted litigation, attended with great delay and expense, to wit, by bill of exceptions and appeal. To avoid this inconvenience, the modern practice is, especially in Virginia, where it has been sanctioned by repeated decisions of this court, to allow either party to demur, unless the case be clearly against the party offering the demurrer, or the court should doubt what facts should be reasonably inferred from the evidence demurred to, in which case the jury is the most fit tribunal to decide; to put all the evidence on both sides into the demurrer; and then to consider the demurrer, as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence which do not necessarily flow from it." The propriety of this rule, allowing the whole evidence to be put into the demurrer, and then compelling the other party to join, without calling upon the demurrant to concede what the evidence conduced to prove, has been questioned. Carr, J. in *Green v. Judith*, (5 Rand. Rep. 1, 4,) expressed his regret that it had been so settled, and considered it a departure from the practice elsewhere. He said, "I confess the English practice seems to me much the safest and best. The facts being settled one by one, the parties distinctly see the naked case, and understand precisely on what facts the court will act; and passing

these facts thus in review, the demurrant can more clearly see, before the step is irrevocably taken, whether he can safely demur; and the adversary is likewise enabled to discover whethere there be not some weak point in his evidence, which he has it in his power to strengthen. This analysing process, reducing the case to its elements, would also have a strong tendency to discourage demurrers to evidence; an effect which courts have generally thought would be beneficial." But he admitted the practice was too firmly established there, to be disturbed. (*id.* See also *Hansborough's ex'rs v. Thom*, 3 Leigh's Rep. 147. *Hyers v. Green*, 2 Call's Rep. 468. *Hyers v. Wood*, *id.* 483, 494, 5, and note. *Whittington v. Christian*, 2 Rand. Rep. 553. *Norvell v. Camm*, *id.* 68. *Harrison v. Brock*, 1 Munf. Rep. 22.)

In Connecticut it has been held, that neither party is bound to join in a demurrer to parol evidence, though it is otherwise as to written evidence. (*Town of Hampden v. Town of Windham*, 2 Root's Rep. 199, 200. *Fowler v. Maccomb*, *id.* 388. *Bromster v. Dana*, 1 *id.* 266. See *vide* *Swift's Ev.* 173.)

In Indiana, one party has a right to demur to the evidence of the other, though it be parol; and his adversary is bound to join in demurrer. (*Shields v. Arnold*, 1 Blackford, 109. *Dougherty v. Campbell*, *id.* 39.)

In New-York, a demurrer to evidence is a proceeding inapplicable to a justice's court. (*Reynolds v. Bedford*, 3 Cain. Rep. 140.)

NOTE 549—p. 315.

Whether the refusal of a court to compel a party to join in a demurrer to evidence, can be made the subject of a bill of exceptions; *quere*. (*Young v. Black*, 7 Cranch, 565.) *Livingston, J.*, expressed in this case a very strong conviction that it could not; for "such applications must ever be made to the discretion of the court which tries the cause; and such court will generally be in a situation to decide more correctly, having all the circumstances of the case before it, than an appellate tribunal. And if it should commit a mistake, in the exercise of its mere discretion, in refusing to compel a party to join in a demurrer to evidence, or in refusing to grant a new trial, or in refusing to continue a cause, or in any other matter resting solely in discretion, I have no hesitation in saying that less mischief and injury will arise from obliging parties now and then to submit to such inconveniencies, than to open a door to the endless litigation which will be produced by permitting appeals in all the variety of cases of this nature, which must necessarily arise, in the progress of every contested action, and which, in Great Britain, have never yet been assigned for error." (*id.* 569.) *Johnson, J.*, and *Marshall, Ch. J.*, declined giving any opinion. *Story, J.*, concurred in opinion with *Livingston, J.*

Several cases are to be found in which exceptions for this cause have been taken and passed upon, but none, we believe, where the precise question has been decided. (See the cases cited in the next preceding note.)

NOTE 550—p. 317.

Whether an instrument produced is in truth a record or not, has been held to be always open to inquiry. Thus, in *Brier v. Woodbury*, (1 Pick. Rep. 362,) parol evidence was admitted to show that an execution which was returned and filed, had been fraudulently altered, by inserting a direction to a constable. "It cannot be doubted," says Parker, J., delivering the opinion of the court, "that any thing produced as a record may be shown to be forged or altered; if it were not so, great mischiefs might arise. A record is conclusive evidence, but what is or is not a record is matter of evidence, and may be proved like other facts." (id.) And if words have been struck out of a record so as to render it erroneous, witnesses may be examined to shew such words were improperly struck out; but not to falsify the record by shewing that an alteration, whereby the record was made correct, was improperly made. (2 Ev. Poth. 154. *Dickson v. Fisher*, 1 Bl. Rep. 664. 4 Burr. 2267, S. C. *Adams v. Betz*, 1 Watts' Rep. 425, S. P.) Where, on an issue of *nul tiel record*, the defendant offered evidence to show that a recognizance, purporting to be taken before the prothonotary, was in fact taken before another person, it was held that the court might decide on view of the record, and were not bound to receive the evidence. (*Patton v. Miller*, 13 Serg. & Rawle, 254.) This decision goes upon the ground, that inasmuch as the court are presumed to know the hand-writing of their officers, and of those persons employed by their officers to write for them, they were able to determine the point in issue by inspection; if, on inspection, they are satisfied, then are they under no obligation to receive evidence aliunde; but otherwise, it seems, they may and doubtless would receive such evidence. (id. and see *Brier v. Woodbury*, 1 Pick. Rep. 368.)

It ought to be observed, that nothing can receive the consideration and respect due to a record, until it shall have been entered as such or enrolled. (*Jenk. Cent.* 25. *Knight's case*, 1 Salk. 329. *Moor v. Risdell*, 1 Ld. Raym. Rep. 243.) Accordingly where, on an issue of *nul tiel record*, a judgment was produced, and to rebut that evidence the plaintiff produced a rule setting aside the judgment for irregularity, the court held that the writing on the minutes could not be received as evidence against the record. (*Croswell v. Byrnes*, 9 John. Rep. 287. See *Den v. Downam*, 1 Green's Rep. 135.)

NOTE 551—p. 317.

S. P., *Den v. Downam*, 1 Green's Rep. 135; *Berks & Dauphin Turnpike Co. v. Hendel*, 11 Serg. & Rawle, 123; *Hess v. Heeble*, 6 id. 57; *Leech v. Armitage*, 2 Dall. 125; *Green v. Ovington*, 16 John. Rep. 58; *Commonwealth v. Churchill*, 5 Mass. Rep. 174, 182; *Whiting v. Cochran*, 9 id. 532; *Wright v. Mott*, Kirby's Rep. 152; *Witter v. Brewster*, id. 422; *Butler v. Butler*, 1 Root's Rep. 275; *Bush v. Byvanks*, 2 id. 248; *Austin v. Rodman*, 1 Hawks' Rep. 71; *Foster v. Dean*, 4 id. 299. The rule stated in the text and recognized in the foregoing cases has been sometimes carried to great lengths. Thus, in *Field v. Gibbs*, (1 Peters' C. C. Rep. 155,) it was held that a party to a judgment rendered in Pennsylvania, in the record whereof it appeared that he had pleaded by attorney, could not allege, in an action on such judg-

ment in another state, that he had no notice of the original suit, and never authorized any one to appear for him. In Massachusetts, also, if the record states that the defendant had notice of the original suit, or appeared in defence to the action, it seems no averment is allowed to the contrary; but where, in the record of a judgment against W. & F., it appeared from the officer's return that no process had been served on F., and that the plea was filed by one G., attorney for W., and the record did not show that F. had ever been within the state where the judgment was rendered, held, that a recital by the clerk, before the entry of judgment, that "W. & F. came by their said attorney," &c. could not be taken to be an assertion of record that F. appeared to the action. (*Hall v. Williams*, 6 Pick. Rep. 232.) Other authorities assume a different, and, as we think, a more consistent aspect. Thus in Connecticut, in an action on a judgment rendered in another state, evidence on the part of the defendant that he had no legal notice of the suit and did not appear was held admissible, though the record stated expressly that the *defendant appeared and pleaded by attorney*. (*Aldrich v. M'Kinney*, 4 Conn. Rep. 380.) So in New-York, in a similar case, where the record stated that the defendant *appeared to the suit*, held that such statement was mere *prima facie* evidence of appearance, and in an action on the judgment, the defendant might aver and prove that he did not appear. (*Starbuck v. Murray*, 5 Wend. Rep. 148.) The case proceeds expressly upon the broad principle, that an appearance, under the circumstances, was necessary to confer jurisdiction over the person of the defendant; and that any fact stated in the record, upon which jurisdiction depends, may be put in issue and controverted with the same freedom as other facts to which the record has no relation. Marcy, J., who delivered the opinion of the court, speaking with reference to the objection that as the record imports perfect verity, no averment could be heard in opposition to it, exposes the impropriety of applying that doctrine in such instances, with great clearness and force. "It appears to me," he says, (*id.* 158,) "that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to shew that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the state courts, with one exception, agree in opinion that the paper introduced, as to him, is no record; but if he cannot shew, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant;—the paper declared on is a record because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of state authority shows it to be a proper issue) is the validity of the record, and yet it is contended that he is estopped, by the unimpeachable credit of that very record, from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped by any allegation in that record from proving any fact that goes to establish the truth of a plea, alleging want of jurisdiction. So long as the question of jurisdiction

is in issue, the judgment of a court of another state is, in its effect, like a foreign judgment; it is *prima facie* evidence; but, for all the purposes of sustaining that issue, it is examinable into to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit." The same may be said respecting any judgment, sentence or decree. A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record, has no sort of application to the case. (*Latham v. Edgerton*, 9 Cowen's Rep. 227. *Mills v. Martin*, 19 John. Rep. 33. *Borden v. Fitch*, 15 id. 141, per Thompson, C. J. *Slocum v. Wheeler*, 1 Conn. Rep. 429. *Buttrick v. Allen*, 8 Mass. Rep. 273. *Bissell v. Briggs*, 9 id. 462. *Jacobs v. Hall*, 12 id. 25. *Kilburn v. Woodworth*, 5 John. Rep. 37. *Fenton v. Garlick*, 8 id. 194. *Pawling v. Bird's ex'rs*, 13 id. 192. *Phelps v. Holker*, 1 Dall. 261. *Kibbe v. Kibbe*, Kirby's Rep. 119. *Stoyel v. Westcott*, 3 Day's Rep. 349. *Mills v. Duryee*, 7 Cranch, 481. *Hampton v. M'Connell*, 3 Wheaton, 234, note (c). *Haydock v. Cobb*, 5 Day's Rep. 527. *Smith v. Rhoades*, 1 Day's Rep. 168. *Dennison v. Hyde*, 6 Conn. Rep. 528.)

NOTE 552—p. 317.

For a very full collection of the English authorities, showing what are public and what are private statutes, the reader is referred to 9 Petersd. Abr. 190, note.

Though a statute contains provisions of a private nature, as to incorporate a bank, &c. yet if it also contain provisions for the forfeiture of penalties to the state, or for the punishment of public offences in relation to such bank, it is a public statute. (*Rogers' case*, 2 Greenl. Rep. 303. *Rex v. Bagg, Skinn.* 429.) It seems, however, that all laws incorporating banks are public statutes, which need not be specially pleaded; for these institutions are public in their nature and character, and their operations affect the entire community. (*Bank of Utica v. Smedes*, 3 Cowen's Rep. 662, 684, per Sanford, chancellor. See *Young v. The Bank of Alexandria*, 4 Cranch, 334, 338.) The act incorporating the United States Bank is so; (*Rogers' case*, 2 Greenl. Rep. 303. *McCulloch v. The State of Maryland*, 4 Wheat. Rep. 316;) and whether it be public or not, there is no necessity of setting it forth in an action brought by the bank. (*President, &c. of the United States Bank v. Haskins*, 1 John. Cas. 132. See *Farmers' & Mechanics' Bank v. Jarvis*, 1 Monroe, 4, 5.) So also an act incorporating a turnpike company, with a clause vesting the road in the people on a certain event, is, it seems, a public act; for "all highways, as contradistinguished from *private* ways, are common to all the people of the state, and concern them generally. A new creation of a highway, or a new modification of an ancient way, does not affect the mode of using it generally. It is still a highway, in the preservation of which all citizens are interested. It contributes essentially to their convenience. The toll is merely exactable for its construction, maintenance and repair." (Per Lansing, chancellor, in *Jenkins*

v. Union Turnpike Co., 1 Cain. Cas. in Err. 86, 93.) Laws regulating the taking of fish are made for the public benefit to preserve the fish, and are public statutes of which judges will ex officio take notice; (Burnham v. Webster, 5 Mass. Rep. 266;) especially those imposing penalties on all persons offending against them. (Commonwealth v. M'Curdy, id. 324.)

NOTE 553—p. 318.

S. P., Bogardus v. Trinity Church, 4 Paige, 178, 197; Legrand v. Hampt. Sid. College, 5 Munf. Rep. 324; Pearl v. Allen, 2 Tyl. Rep. 311; Whetcroft v. Dorsey, 3 Har. & M'Hen. 357; Portsmouth Livery Co. v. Watson, 10 Mass. Rep. 91; Duncan v. Dubois, 3 John. Cas. 125; and see the cases cited in the next preceding note.

In Kentucky, however, the courts judicially notice private as well as public acts, without their being formally pleaded. (Halbert v. Skyles, 1 Marsh. Ken. Rep. 368. Farmers' & Mechanics' Bank v. Jarvis, 1 Monroe, 4, 5.)

In Virginia private statutes need not be specially pleaded; yet they must be exhibited to the court as documents, and are not noticed judicially like public statutes. (Legrand v. Hampt. Sid. College, 5 Munf. Rep. 324.)

The courts will judicially notice all statutes prescribing the limits of counties and towns. (Commonwealth v. Springfield, 7 Mass. Rep. 9.) And they will notice not only the tenor of a public statute, but the time of its passage also, when such time becomes material. (The People v. Herkimer, 4 Cowen's Rep. 345.)

The public statutes of one state, however, will not be taken notice of judicially in the courts of another; but are to be shown in the same manner as private statutes. (Pearsoll v. Dwight, 2 Mass. Rep. 84. Legg v. Legg, 8 id. 99. Walker v. Maxwell, 1 id. 104. Beauchamp v. Mudd, Hardin's Rep. 165. Herring v. Selden, 2 Aik. 12. Elliott v. Ray, 2 Blackf. Rep. 31. Cone v. Cotton, id. 82. Stout v. Wood, 1 id. 71. Canal Company v. Rail Road Company, 4 Gill & John. 1, 63, per Bland, chancellor. Haven v. Foster, 9 Pick. 112, 130. Talbot v. David, 2 Marsh. Ken. Rep. 603, 609. Tarlton v. Briscoe, 4 Bibb, 73, 75. Thomas v. Robinson, 3 Wend. Rep. 267. Sheldon v. Hopkins, 7 id. 435.)

And as it respects the union at large, the act of congress relative to *insolvent debtors within the district of Columbia* is a private act, of which the courts in the several states are not bound to take notice, unless it is specially shown to them in pleading. (Wright v. Paton, 10 John. Rep. 300. See Canal Company v. Rail Road Company, 1 Gill & John. 1, 63, per Bland, chancellor.)

NOTE 554—p. 318.

"The facts recited in the preamble of a private statute may be evidence between the commonwealth and the applicant or party for whose benefit the act passed. But as between the applicant and another individual, whose rights are affected, the facts recited ought not to be evidence." (Elmendorf v. Carmichael, 3 Litt. Rep. 472, 480.)

The court, in their opinion in this case, observe: "We well know that such applications are frequently made *ex parte*; and if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The legislature, in all its inquiring forms by committees, make no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by the rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even *prima facie* evidence against private rights, and many individual controversies may be pre-judged and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are, to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence such a preamble as the present, ought, in such a controversy, to be taken to answer the purpose for which it was intended; that is, an apology for the passage of the act, and the reason why the legislature so acted. Such a preamble is evidence that the facts were so represented to the legislature, and not that they really existed." (*id.*) Nor will an act, private in its nature, be admissible in evidence as against strangers, though it contain a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." Such a clause relates merely to the forms of pleading, and does not vary the nature and operation of the act. (*Brett v. Beales*, 1 *Mood. & Malk.* 421, 425.)

NOTE 555—p. 319.

So of various other defences, founded upon statutes—as, for instance, the statute of limitations, which the defendant cannot avail himself of under the general issue. (See 2 *Starkie's Ev.* 162, note (r). *Graham's N. Y. Pr.* 195.)

NOTE 556—p. 319.

S. P., Levy v. Gadsby, 3 *Cranch*, 180; *Graham's N. Y. Pr.* 195.

NOTE 557—p. 321.

This principle is universally acknowledged. See *Burrill v. West*, 2 *N. Hamp. Rep.* 190; *Wood v. Davis*, 7 *Cranch*, 271; *Davis v. Wood*, 1 *Wheat. Rep.* 6; *Paynes v. Coales*, 1 *Munf.* 373; *Turpin v. Thomas*, 2 *Hen. & Munf.* 139; *Jackson v. Vedder*, 3 *John. Rep.* 8; *Case v. Reeves*, 14 *id.* 79; *Ryer v. Atwater*, 4 *Day's Rep.* 431; *Killinsworth v. Bradford*, 2 *Overt. Tenn. Rep.* 204; *Wood v. Stephen*, 1 *Serg. & Rawle*, 175; *Estep v. Hutchman*, 14 *id.* 435; *Tabor v. Perrott*, 2 *Gall. Rep.* 565; *Twambly v. Henley*, 4 *Mass. R.* 441; *Respublica v. Davis*, 3 *Yeates' Rep.* 128; *Johnson v.*

Bourn, 1 Wash. Rep. 187; Stevelie v. Read, 3 Wash. C. C. Rep. 274; Cleaton v. Chambliss, 6 Rand. Rep. 86; Neal v. M'Comb, 2 Yerg. Rep. 10, 12; Blount v. Darrach, 14 Serg. & Rawle, 184, 186, note; Este v. Strong, 2 Hamm. Rep. 401; Fisk v. Weston, 5 Greenl. 410; Cowles v. Harts, 3 Conn. Rep. 516; Lessee of James v. Stookey, 1 Wash. C. C. Rep. 530; Chapman v. Chapman, 1 Munf. 399; Frazier v. Frazier's ex'rs, 2 Leigh, 642, 650; Burke v. Granberry, Gilmer's Rep. 25; Munford v. Overseers, 2 Rand. Rep. 313, 318.

NOTE 558—p. 322.

Vooght v. Winch, cited in the text, has become a standing reference to prove that a judgment is never conclusive in its effect, unless specially pleaded. And if the *dicta* of the learned judges are to be our guide, we should certainly be constrained to adopt that proposition in its utmost amplitude. But how far was it embraced in the decision actually made? The defendant, in the first action, prevailed upon the general issue; in the second, after giving the record in evidence, he insisted that it was conclusive *per se*, and operated as an estoppel; and the question presented, therefore, was, whether the plaintiff on this ground should be nonsuited. With the disposition which was made of that question, we have no fault to find; for the defendant was clearly far from having entitled himself to a nonsuit by the simple production of the record, inasmuch as the judgment evinced by it was, in no legal or rational sense, necessarily inconsistent with any right claimed by the plaintiff in the second suit. It might have been rendered because the plaintiff had failed to show himself injured by the widening of the water channel, or because he had released his cause of action, or had given the defendant licence to do the acts complained of; or, in short, upon any of the various grounds covered by the general issue in a special action on the case. (See *per Dorsey, J.* in *Shafer v. Stonebraker*, 4 Gill & John. 345, 355, 6.) But the judges, in the opinions delivered by them, assume as the basis of their reasoning, that the defendant could have rendered the judgment conclusive by pleading it specially as an estoppel, had he elected so to do—a position not countenanced, as is confidently believed, by any other authority, and the direct contrary of which has, in this country at least, been expressly and deliberately adjudged. (*Shafer v. Stonebraker*, *supra*. See also *Evelyn v. Haynes*, cited by *Ld. Ellenborough*, 3 East, 365.) It was doubtless their intention to follow the doctrine laid down in *Trevivian v. Lawrence*, (1 Salk. 276,) which is, substantially, that a party by neglecting to plead an estoppel when he may, thereby *consents* to waive the same, and submit the whole controversy upon its merits; and in this respect *Vooght v. Winch* is illusory, and eminently calculated to mislead; for the defendant there had no option—no election to make—no *consent* to give. The record relied on by him as conclusive, was not so from its very nature; standing alone, unaided by evidence aliunde, it was mere ground for a presumption, unfavorable to the plaintiff it is true, but like all other presumptions, liable to be overcome by counter testimony. The difficulty was intrinsic, and if nothing but the record itself was used, it must have been just as inconclusive in a special plea, as when brought forward under the general issue. Distinguishing, therefore,

between what was *said* in this case, and what the court were called upon to decide, and did decide, we may still venture the proposition, that a judgment does not depend for its effect upon the manner in which it is introduced, but that when fairly admissible under general pleadings, it is entitled to the same operation as if pleaded specially. Such was the opinion expressed by our author in the previous editions of the text; (see 1 Phill. Ev. 242, 3, Amer. ed. of 1820; id. 223, 4, Amer. ed. of 1816;) and we believe it has been too hastily omitted to give place to the case of Vooght v. Winch.

In Pennsylvania, this subject has been much considered and very ably discussed; and the propriety of those decisions which have admitted a judgment in a former suit to be given in evidence to the jury on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by it, because it was not specially pleaded, has been very seriously questioned. Thus, where the defendant, in an action for use and occupation, gave in evidence under the general issue, a former verdict and judgment in replevin, rendered on the issue of no rent in arrear, the court held them a bar; and per Duncan, J. delivering the opinion: "I know there are recent *English* decisions, that if the former judgment is not pleaded, but given in evidence on the general issue, it is not conclusive; yet the law appears to have been settled to the contrary by many authoritative decisions, which I am not inclined to disturb." (Cist v. Zeigler, 16 Ser. & Rawle, 282, 285.) In a subsequent case the action was for the continuance of a nuisance, to which the defendant pleaded not guilty, licence, and the statute of limitations; the plaintiff replied no licence, *actio non accrevit*, &c.; and on the trial, to maintain the issue on his part, adduced the record of a former judgment rendered in his favor in a suit, where there were the same parties, the same pleas, and as the court presumed, the same matters in controversy. As to the effect of the judgment, it was held, that though it was powerful evidence for the jury, yet the plaintiff having neglected to rely on it by way of replication to the defendant's plea of licence, had thereby chosen to leave the matter at large, and they were not estopped from saying the truth. (Kilheffer v. Herr, 17 Serg. & Rawle, 319, 322.) "These principles, however," observes Rogers, J. delivering the opinion of a majority of the court, "only apply where special pleading is required, for I agree that where the parties are not bound to plead or reply specially, the record of a former recovery is conclusive evidence, binding the plaintiff, the court and the jury. In such case the party has no choice, and shall not be considered as having elected to have a re-investigation of the facts. And this is the meaning of chief justice D'Grey, when he says, 'this is, as a plea, a bar, and as evidence conclusive between the same parties.'" (id. 322.) In a still later adjudication, an action of replevin was brought by P. against M., for a large quantity of logwood; M. pleaded "property," and on the trial sought to give in evidence the record of a suit in the superior court of the city of New-York, in which P. prosecuted N., under whom M. claimed title, and obtained judgment for the price of the same logwood. The court held this admissible not only, but conclusive, even though P.'s judgment against N. was obtained during the pendency of the suit in which it was so offered as evidence. (Marsh v. Pier, 4 Rawle, 273. See Garvin v. Dawson, 13 Serg. & Rawle, 246.) "Although," says Kennedy, J. deliv'ing the opinion in Marsh v. Pier, *supra*, "the judgment of the superior court of the city of New-York was rendered during the pendency of the present action, still I think it was not necessary

to plead it, in order to make it admissible evidence, because it was in effect the decision of a competent court of jurisdiction, given in affirmance of the sale of the logwood, mentioned in the record of the judgment made by the defendant therein named, before the commencement of this action, under which the defendant here claims a right to the logwood. Neither do I conceive that it was necessary to plead it, in order to make it *conclusively* binding upon the jury against the plaintiff below; for it was properly admissible under the plea of property, of which I entertain no doubt, as it went directly to establish the validity of the sale of the logwood, under which the defendant below claimed it; it being the judgment of a competent court, must be considered the conclusion or sentence of the law on the facts of the case, and therefore not to be set aside, reversed or disregarded by either court or jury in this action. This doctrine, as I conceive, is not inconsistent with the rule laid down by a majority of the court in *Kilheffer v. Herr*, (17 Serg. & Rawle, 322,) but comes within the qualification there mentioned, that wherever the party is not bound to plead specially to enable him to give the record of a former recovery in evidence, it will, when given in evidence, although not pleaded, be conclusive and binding upon the plaintiff, the court and the jury. 1 Phill. Ev. 223, 4, (New-York, 1816.) When a subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed." (*Marsh v. Pier*, supra, p. 287.)

In *Kilheffer v. Herr*, supra, Huston, J. denies that the doctrine of estoppel is strictly applicable to the case of a judgment. He says: "an estoppel is always something personal—the party is estopped from recovering his claim, or proving his defence by some act in law or in deed, or *in pais*, which precludes him from going beyond it and proving all the case. It always arises from the act of the party estopped by it; but if the opponent, instead of relying on this act, will go beyond it, and put the cause at issue on other and especially anterior facts, the estoppel being waived by him who had a right to avail himself of it, ceases to operate." He then proceeds to illustrate the proposition by the same example given in *Trevivian v. Lawrence*; after which he observes: "But a former trial, verdict and judgment, is not the act of the party, but of the tribunal which decided it, and to call it an estoppel, is a misapplication of terms; it has not the distinguishing mark of an estoppel; it is not the consequence of some act of the party bound by it; it is a bar to future recovery in any court on the same point, between the same parties or privies, until reversed on appeal or writ of error; and it is as much a bar in chancery, where an attempt is made to re-examine the matter once decided at law, as it is in a court of law; it is as much a bar in actions where we cannot plead specially, as ejectment, as in any other action; and as much a bar in an inferior tribunal where there are no pleadings, as in one where the pleadings are, or may be drawn out at length. Such are my impressions on this point, believing that the courts in this, and the other states, and the supreme court of the United States, have put the matter on its true ground, viz., that the peace and order of society, the structure of our judiciary system, and the principles of our government are the true grounds why such a judgment is conclusive. I am not willing to leave this ground and rest it on the narrow and inapplicable one of estoppel." (*id.* p. 325, 6.)

To the same effect are the remarks of Kennedy, J. delivering the opinion of the court in *Marsh v. Pier*, supra. "The maxim *nemo debet bis vexari, si constet curia quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the benefit and protection of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence it would seem to follow, that wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action between the same parties, or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all farther inquiry in the cause; otherwise the rule or maxim, *expedit republicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as it seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet, to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors, to the preservation of the public tranquillity and happiness. The result among other things would be, that the tribunals of the state would be bound to give their time and attention to the trial of new actions for the same causes, tried once or oftener, in former actions between the same parties or privies, without any limitation other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes which never have passed in *rem judicatem*. The effect of a judgment of a court having jurisdiction over the subject matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself in making a deed of indenture, &c. which may or may not be enforced, at the election of the other party; because whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, so long as it shall remain in force and unreversed." (id. p. 288, 9. See also 2 Starkie's Ev. 184, 5.)

In Massachusetts, the courts professing to follow *Trevivian v. Lawrence* have laid down the following as the general rule: that "When, in the course of the pleadings, the party who relies on matter of estoppel has no opportunity to plead it, he may shew it in evidence, and it will in general have the same effect as if pleaded. But when the matter to which the estoppel applies, is distinctly averred or denied by one party, and the other, instead of pleading the estoppel, as he may in that case, takes issue on the fact, he waives the estoppel; and the jury are at liberty to find the truth." (*Howard v. Mitchell*, 14 Mass. Rep. 241. *Adams v. Barnes*, 17 id. 365.) Accordingly, where the defendant in trespass upon lands pleaded in abatement, that one H. was co-tenant with the plaintiff, upon which issue was joined; and at the trial, the plaintiff claimed

that the defendant was estopped from showing the truth of his plea, because of a former judgment, whereby the contrary was established, it was held that the plaintiff should have replied such judgment specially; and not having done so when he might, the defendant was not estopped. (*Howard v. Mitchell*, supra.) In *Adams v. Barnes*, supra, the other branch of the rule is illustrated. There it appeared that an action had been brought by a mortgagee to obtain possession of the mortgaged premises; the mortgagor had defended on the ground of usury; but failing in his defence, the mortgagee obtained judgment. Afterwards the mortgagor conveyed to a third person all his right, who brought a writ of entry against the mortgagee, which he endeavored to sustain by proof of the usury; and it was held, that he was estopped by the judgment against his assignor; and that the mortgagee might avail himself of the estoppel without pleading it. "The declaration," says Jackson, J. delivering the opinion of the court, (id. 369,) "contains no intimation of the origin of the demandant's title; and it would have been irregular if it had. The demandant counts on his own seisin in fee, and alleges a disseisin by the tenant. The latter could not know, from such a declaration, that the demandant's title was from J. (the mortgagor.) He was not bound, nor would it even be safe for him to rely merely on the estoppel to J. and his assigns. Under such a declaration and the general issue, the demandant was at liberty to shew a right of possession in himself by any title, and any evidence in his power; and the tenant might in like manner rebut the demandant's evidence, and shew a right of possession or entry in himself. If an estoppel, by judgment or otherwise, made part of the tenant's title, it was no more necessary for him to plead it, than it would have been to set forth in a special plea all his title deeds, and every other part of his evidence. A case might have arisen out of this transaction which would have required the estoppel to be specially pleaded. Suppose that, in the first suit, the mortgage had been proved to be usurious, and J. had accordingly recovered judgment; this would have been an estoppel to B. (the mortgagee) and all persons claiming under him. If, then, he had assigned the mortgage to a stranger, and the assignee had brought a new suit on it, the assignee ought regularly to set forth in his declaration the mortgage to B. and the assignment of it to himself. In such case, J. would know that the plaintiff had no title but as assignee of B. He might therefore plead the usury with a verification, as at common law; and if it was denied by the plaintiff, J. might rejoin the former judgment by way of estoppel. If, instead of such rejoinder, he should take issue on the replication; or, if he should plead the usury in the manner provided by statute, offering to prove it by his own oath; he would, in either case, waive and lose the advantage of estoppel." (id.)

In Connecticut the rule has been laid down without any qualification, that a former verdict and judgment are never conclusive, unless specially pleaded by way of estoppel. (*Church v. Leavenworth*, 4 Day's Rep. 274.) This case, however, proceeds upon authorities which do not maintain the position in the broad manner there stated. (Per *Duncan, J.*, *Kilheffer v. Herr*, supra.) And indeed, the same court apparently disregarded it, at least to a very considerable extent, in the more recent case of *Betts v. Starr*, (5 Conn. Rep. 550.) That was ejectment by a mortgagee against the mortgagor, to recover possession of the mortgaged premises: On the trial, the defendant, under the general issue, set up usury; and the plaintiff to meet that defence, offered in

evidence the record of a former judgment in a suit brought by him against the defendant on the note for the mortgage debt, to which the defendant had pleaded non-assumpsit, with notice of the usury, and in which the plaintiff recovered. This was held not only admissible, but conclusive; and Bristol, J., delivering the opinion in which the other judges concurred said, "Though verdicts must generally, if not always, be specially pleaded, when they are relied on as conclusive, yet a *judgment* of court, when properly given in evidence is as conclusive as though specially pleaded." (id. p. 553; see also per Peters, J. in *Fowler v. Savage*, 3 Conn. Rep. 90, 99; *Canaan v. Greenwood's Turn. Co.*, 1 id. 1; *Denison v. Hyde*, 6 id. 508.)

The Virginia courts at an early period inclined to regard a former verdict and judgment as conclusive, though not specially relied on in pleading. (*Preston v. Harvey*, 2 Hen. & Munf. 55. *Shelton v. Barbour*, 2 Wash. Rep. 64.) In a recent case, however, where the subject was incidentally mooted, Carr, J., citing *Outram v. Morewood*, (3 East, 346,) and *Vooght v. Winch*, supra, says: "We know that even a judgment between the same parties, upon the same point, and which, if pleaded, would have been a perfect bar, is, when used as evidence under the general issue, not conclusive upon the jury, but only evidence to be weighed by them; the doctrine being that though the party is estopped if the matter be pleaded, yet that the jury, upon the general issue, are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment." (*Cleaton v. Chambliss*, 6 Rand. Rep. 86, 94.)

In Indiana also, the same doctrine has been held as in *Cleaton v. Chambliss*, supra, and upon the same authority. (*Picquet v. M'Kay*, 2 Blackf. 465.)

But in Maryland the rule has been stated as follows: "That a verdict and judgment upon the merits in a former suit, is, in a subsequent action between the same parties, where the cause of action, damages or demand is identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar, or given in evidence under the general issue, where such evidence is legally admissible; and that such prior verdict and judgment need not be pleaded by way of estoppel." (*Shafer v. Stonebraker*, 4 Gill & John. 345, 360.)

In Tennessee, the supreme court formerly held, that a judgment, in order to be conclusive, must be pleaded. (*Edwards v. M'Connell*, 1 Cooke's Rep. 305.) But the rule has recently been laid down there, thus: "Where the decision is directly upon the point, it may be pleaded in bar, in cases where special pleading is required, and in other cases given in evidence on the general issue, as conclusive between the same parties on the same matter, whether the same come in question directly or incidentally: for the maxim is *nemo debet bis vexari pro eadem causa*:" (*Estill v. Taul*, 2 Yerg. 467, per Peck, J.) And per Catron, J., (id. 471;) "I am of opinion that verdicts and judgments, in all actions where they are admissible as evidence, without being pleaded in bar as an estoppel, are equally conclusive of the fact directly adjudged, as if pleaded."

The New-York decisions have not been entirely uniform on this subject. In *Gardner v. Buckbee*, (3 Cowen's Rep. 120,) the law was regarded by the supreme court as "well settled," that a former verdict and judgment upon the same point, and between the same parties, were conclusive as evidence, without being specially pleaded; and in support of that principle they rely upon the *Dutchess of Kingston's case*, cited ante,

p. 321 of the text. *Burt v. Sternbergh*, (4 Cowen's Rep. 559,) is expressly to the same import. The cases of *Vooght v. Winch*, and *Outram v. Morewood*, were there adverted to by counsel, as maintaining the opposite doctrine, but the court considered the rule previously laid in *Gardner v. Buckbee* too well supported, both by principle and authority, to admit of discussion. In *Jackson v. Wood*, (3 Wend. Rep. 27,) *Marcy, J.*, delivering the opinion of the court, without expressly noticing the previous decisions above referred to, distinctly repudiated that part of the rule laid down in the *Dutchess of Kingston's* case, which recognizes the conclusiveness of a former judgment, when offered as evidence, and adopted the adverse principle, viz. that if the former judgment was not brought forward by plea, it would be inconclusive. This was in a case too, where the usual course of pleading did not allow the party relying on the judgment to plead the same; but it was deemed that circumstance made no difference. (id. p. 41.) Afterwards the cause went before the court of errors, where the determination of the supreme court was unanimously reversed. (*Wood v. Jackson*, 8 Wendell's Rep. 1.) This seems to have been, however, mainly upon the ground of the supreme court having erroneously held, that evidence aliunde was not admissible in aid of the record of the previous suit. The other point, nevertheless, underwent considerable discussion, and the chancellor, in relation to it, said: "There is a certain class of cases in which the party may avail himself of an estoppel, by pleading the same in bar to a suit, or in reply to allegations set out in a plea. In such cases, if he neglects to make the objection in that manner, and puts the facts directly in issue, without pleading the former verdict or decree as an estoppel, the jury may find according to the truth of the case. *Vooght v. Winch*, 2 Barn. & Ald. Rep. 662. *Trevivian v. Lawrence*, 1 Salk. Rep. 276. But this principle is only applicable to those cases where special pleading is required; it does not extend to actions of assumpsit, where an estoppel, as a former recovery or bar, is embraced within, and may be given in evidence under the general issue. *Young v. Black*, 7 Cranch's Rep. 565. Neither does it apply to cases where the plaintiff's title is by estoppel; or where the party relying upon the estoppel has had no opportunity to plead the same specially, as a bar. From these principles it necessarily follows, that in ejectment, where special pleading is not allowed, the defendant, in support of his possession, may give in evidence any matter which would have operated as a bar, if pleaded by him, by way of estoppel, to a real action, brought for the recovery of the same premises, or to an action of trespass, brought to try the right to the same property. And the lessor of the plaintiff, on the other hand, may give in evidence any matter which might have been replied by him, as an estoppel to a plea of title by the defendant in a real action, or in a suit for trespass." (id. p. 35.) See also the remarks of *Seward, sen.*, (id. p. 37, et seq.) The like doctrine has received a passing sanction from the supreme court and court of errors in two other cases. (*Wright v. Butler*, 6 Wend. Rep. 284, 288, 9. *Lawrence v. Hunt*, 10 id. 80, 83.)

NOTE 559—p. 323.

S. P. See Bull. N. P. 222; Swift's Ev. 17, et seq.; Betts v. Starr, 5 Conn. Rep. 550, et seq., per Bristol, J.

A *special verdict*, which has been set aside, because a fact was not sufficiently found, cannot be given in evidence upon a second trial of the same cause. "The second trial should, as far as possible, be conducted as if no prior trial had taken place." (Mahoney v. Ashton, 4 Har. & M'Hen. 322.)

In another case, the defendant offered in evidence, the admission of the plaintiff's counsel in the *special verdict* taken at the former trial, to prove the existence of a mortgage. Chase, J.: "Facts are often admitted and stated, for the purpose only of bringing a particular point of law before the court. As the finding of the jury, in the special verdict, was on the admissions of counsel, it is not evidence to prove the existence of the mortgage." Affirmed on appeal. (Dorsey v. Gassaway, 2 Har. & Johns. 402, 3.)

NOTE 560—p. 323.

S. P. 2 Starkie's Ev. 201; see Burton v. Dees, 4 Yerg. 4.

NOTE 561—p. 324.

See S. C. reported as Kitchen v. Campbell, 3 Wils. Rep. 304.

Where H. sues L. and B. for the contract price of wheat, and recovers, such recovery will bar a suit by L. alone, against H., for damages consequent upon the non-performance of H.'s contract to deliver the wheat. (Lawrence v. Hunt, 10 Wend. Rep. 80.) In this case, Nelson, J. delivering the opinion, after adverting to the doctrine contained in the text, post, p. 327, relative to a verdict and judgment offered by a stranger against a party, says: "The reasons for the exclusion of the record in the last case, would seem to have some application to the present, for although the plaintiff had an opportunity to defend the former suit, yet it was in conjunction with a third person, which fact might have varied the evidence, and embarrassed the defence. Be this as it may, I think it cannot be doubted that if the wheat, upon the contract in question, had been the only subject in dispute in the former suit, and the plaintiff had recovered upon the merits, it would have put an end to the litigation. Two facts would necessarily have been established by it, to wit, the liability of both defendants, and the fulfilment of the contract by the plaintiff. Without these, he would not have been entitled to recover, and while they remained found by the former verdict, the present plaintiff could not have recovered damages for the non-performance by the present defendant of his part of the contract; the subject would be *in rem judicatem*. Any other conclusion might present the anomaly of two adverse recoveries by the respective parties upon the same subject matter and evidence; the present defendant,

in the one case, recovering the value of the wheat on the ground of the fulfilment of the contract, and the present plaintiff, in the other, recovering damages for the non-fulfilment of the contract by the defendant. This case may be distinguished, perhaps, from the one to which I have supposed it as above, somewhat analogous, upon this ground; that as to the joint liability or partnership, the present plaintiff had every opportunity of contesting it, which can exist in any case where that fact is attempted to be established; and when found against him, it is conclusive, as between him and the adverse party. So far, then, as the contract or subject matter of the former suit is involved in the subsequent one, in judgment of law it should be deemed to be between the same parties."

NOTE 562—p. 324.

Upon this principle the equitable assignee of a chose in action has been held estopped by a verdict and judgment thereon, in the same manner as if he were a party to the record, the suit having been prosecuted in the name of another for his benefit, and at his request and expense. (*Rogers v. Haines*, 3 Greenl. Rep. 362.)

Where the same person was in fact a party to the former suit, having been sued by a wrong name, the mere misnomer is not sufficient to prevent the admission of the record in evidence; and parol proof will be received to show that notice in the former suit was served upon the party in the latter, though the name was different, and that he appeared in such suit, and attended the taking of depositions therein. (*Stevellie v. Reid's adm'r*, 2 Wash. C. C. Rep. 274; contra, *Allen v. Hall*, 1 Marsh. Ky. Rep. 526.)

NOTE 563—p. 324.

In ejectment between A. and B., the record of a former judgment in an action of trespass between B. and the *cestui que trust* of A., has been held admissible in Pennsylvania. (*Calkoun's lessee v. Dunning*, 4 Dall. Rep. 120.) This was upon the ground that the parties were really, though not nominally, the same in both suits. (See *Rogers v. Haines*, 3 Greenl. Rep. 362, cited in the next preceding note.)

The omission to strike out the name of the casual ejector, and insert that of the real defendant, is amendable after verdict; and if the real defendant enters into the common rule, proceeds to trial, &c., the judgment will be as conclusive against him as if the issue had been corrected. (*Bailey v. Fairplay*, 6 Binn. Rep. 450.)

NOTE 564—p. 324.

In *Outram v. Morewood*, (3 East's Rep. 366,) *Ld. Ellenborough* questioned the *admissibility* of the former record, in *Kinnersley v. Orpe*, cited in the text; and in *Case v. Reeves*, (14 John. Rep. 82,) *Spencer, J.*, pronounced it reconcilable with the rules of evidence only on the ground that both suits were substantially against the same parties.

In *Strutt v. Bovingdon*, (5 Esp. Rep. 56,) it was held, that where a question of right of water has been tried in an action on the case, the record of that trial is evidence in a second action, against the same defendant and others for a subsequent injury, if such others justify under the defendant. And *Ld. Ellenborough*, who presided, said that though the record could not be deemed a legal estoppel, so as to conclude the rights of the parties by its production; yet it was binding so far that he should consider himself under obligation to tell the jury to regard it as conclusive.

NOTE 565—p. 324.

See *Estep v. Hutchman*, 14 Serg. & Rawle, 435.

NOTE 566—p. 324.

Where the appelle brought assault and battery to try his right to freedom, and on the trial the appellant offered in evidence a verdict and judgment in a former suit between the mother of the appellee and the person under whom the appellant claimed, by which verdict it was found "that the plaintiff (the mother) was the slave of the defendant," held, in Virginia, that such verdict was conclusive against the appelle, unless he could show that he or his mother had been manumitted subsequent to its rendition. (*Shelton v. Barbour*, 2 Wash. Rep. 64.)

But verdicts and judgments in such cases are not *conclusive*, except as between parties and privies. (*Wood v. Davis*, 7 Cranch, 271; but see *Alexander v. Stockey*, 7 Serg. & Rawle, 299.)

Nor are they even *admissible* between others, unless perhaps when common reputation would be received to establish the same point. (*Davis v. Wood*, 1 Wheat. Rep. 6. *Wood v. Stephen*, 1 Serg. & Rawle, 175.) And as to this doctrine see ante, note 432, p. 558, et seq.; post note 577, p. 819.

NOTE 567—p. 325.

But a verdict against a tenant for life, will not bind a reversioner; for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid is prayed. It is said, however, that if the reversioner come in upon aid-prayer, he may have an attain; and consequently the verdict will be evidence against him. (*Bull. N. P.* 232. 1 Stark. Ev. 192.)

Accordingly, in Connecticut the rule has been laid down that the reversioner cannot be affected by a verdict against the tenant in dower, unless he come in upon aid-prayer. (*Adams v. Butts*, 9 Conn. Rep. 79.)

If a party, after verdict and judgment against him, assign his interest, the assignee is bound by the verdict. Thus, after verdict against J. S. and judgment, he aliened to

J. N.; and it was held that the verdict was evidence against J. N.; for it would have been evidence against J. S. at the time of the transfer, and the substitute cannot be in a better condition than the principal. (2 Roll. Abr. 680. Bac. Abr. Ev. F. 617. 2 Starkie's Ev. 194.)

And where a mortgagor, when sued for possession, defended on the ground of usury, but failed in his defence, and afterwards assigned his rights to A., who brought a writ of entry against the mortgagee, and attempted to support his action by proof of the usury; the former judgment was held admissible and conclusive against him. (Adams v. Barnes, 17 Mass. Rep. 365.) "It is such an estoppel as runs with the land, and extends to all who are privies in estate to either of the parties to that judgment. A judgment which affects directly the estate and interest in the land, and binds the rights of the parties, is at least as effectual as a release or confirmation by one party to the other. Such an estoppel makes part of the title to the land, and extends to all who claim under either of the parties to it." (id. per Jackson, J. delivering the opinion of the court.)

In an action for mesne profits, the record of recovery in the ejectment suit is conclusive evidence for the plaintiff against the defendant, or any person deriving possession from him. Such was the doctrine held as against one to whom the defendant in ejectment had transferred the possession, during the pendency of the ejectment suit. (Jackson v. Stone, 13 John. Rep. 447. See Jackson, dem. Church, v. Hills, 8 Cowen's Rep. 290; Dewey v. Osborne, 4 id. 329; Adams on Ej. 331; Woodf. L. & T. 511; and post, vol. 2, of the text, p. 314, et seq. and the notes.)

NOTE 568—p. 326.

There is no privity between an executor or administrator and the heir or devisee of the *land*, and a judgment against the former is not evidence against the latter, to charge the real estate. (Mason's devisees v. Peters' adm'rs, 1 Munf. Rep. 437. Deaneale v. Archer, 8 Peters' Rep. 523. Osgood v. Manhattan Company, 3 Cowen's Rep. 612, per Sudam, senator. Neal v. M'Combs, 2 Yerg. Rep. 10.) Whether there is any privity between an executor or administrator and a legatee of *personals*—*quere*. (Mason's devisees v. Peters' adm'rs, *supra*, and see a note to that case by the reporter.)

A decree for the specific execution of a covenant real, in a suit commenced by the covenantee, and afterwards revived in favor of his heirs, is no bar to a suit brought by the administrator of the covenantee, to recover damages for the breach of such covenant, if he was not made a party to the suit. The covenantor has no means of relieving himself from the double burthen of executing the agreement and paying damages for the breach, in such case, save by resorting to a court of equity. (Combs v. Tarlton's adm'r, 2 Dana's Rep. 474.)

In New-York, a judgment against an heir or devisee, will bar a subsequent suit against the executor or administrator of the ancestor or devisor, for the same debt or damages, unless the plaintiff shall show an execution against such heir or devisee, re-

turned unsatisfied, or that no sufficient lands or tenements have descended or been devised to such heir or devisee. This is so provided by statute. (2 R. S. 114, § 10.)

And a judgment against an heir or devisee, for a debt or legacy expressly charged on the estate descended or devised, is made a bar to any subsequent suit against the executor or administrator for the same debt or legacy. (id. § 8.)

There is at common law no privity between an executor and the administrator *de bonis non cum testamento annexo*, and a judgment recovered by the former will not bar a suit brought by the latter. (Grout v. Chamberlin, 4 Mass. Rep. 611, 612.) So where the administrator recovers a judgment and dies, the succeeding administrator may bring a new action. (id. See Pastal v. Wards, Latch's Rep. 140. Barnhurst v. Yelverton, Yelv. Rep. 83. Gates v. Gough, id. 33. Allen v. Irwin, 1 Serg. & Rawle, 549.)

NOTE 569—p. 326.

The rule stated in the text has been recognized in many cases, among which are the following: Paynes v. Coales, 1 Munf. 373; Jackson v. Vedder, 3 John. Rep. 8; Case v. Reeves, 14 id. 79, 81; Twambly v. Henley, 4 Mass. Rep. 441, 2; Wood v. Stephen, 1 Serg. & Rawle, 175; Johnson v. Bourn, 1 Wash. Rep. 187; Cowles v. Harts, 3 Conn. Rep. 516. And it is no less applicable to criminal than to civil cases. Accordingly, where two were indicted separately for the same arson, one convicted and judgment passed; held, that the record was not admissible evidence against the other. (Kazer v. The State, 5 Hamm. Rep. 280.)

On a bill in chancery against the executors of A., seeking to charge the estate with a debt due from the firm of A. & B., and stating the insolvency of B., the surviving partner; held, that a judgment at law against B., as surviving partner, in favor of the complainant, was no evidence of the existence of a debt due from the firm, as against the executors, for there was no privity between B. and the executors; and the latter had no opportunity of being heard in the suit against B. (Sturges v. Beach, 1 Conn. Rep. 507.) The judgment, however, was allowed to be evidence so far as to prove the fact that the complainant had sued B. and recovered. (id.)

When defendants, on being sued, plead in abatement the non-joinder of others as partners, and succeed, the record cannot be used in a subsequent suit, in which such others are joined, to charge them as liable with the rest. Against those who pleaded, the record is evidence that all who are alleged to be partners are so in fact; but the others must be proved partners in the ordinary way. (Witmer v. Schlatter, 2 Rawle, 359.)

Mr. Starkie says that "a record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced;" and as authority for the position, he refers to Bac. Ab. Ev. F. 616; (2 Starkie's Ev. 195; and see as to depositions, ante, note 438, p. 573.)

An agreement between several persons, liable upon the same instrument to be bound by a verdict against one, may so far connect the rest with the proceeding as to render the verdict admissible in an action against them. Thus a special verdict, given

in another action on the same policy of insurance, but against a different underwriter, has been received, where it was shown that all the underwriters had agreed to be bound by one verdict; for under the agreement they were each entitled to interfere on the former trial and cross-examine witnesses. It was held, however, not conclusive. (*Patton v. Caldwell*, 1 Dall. Rep. 419.)

But a person is not to be in any measure affected by a decision between others, merely because he was present at the trial and cross-examined the witnesses. He must, like a *party*, have had a full, fair and *previous* opportunity to meet the question in controversy. (*Per Roane, J., Turpin v. Thomas*, 2 Hen. & Munf. 139, 147.)

By the civil law, the case of principal and surety is not within the rule of *res inter alios acta*, and if the creditor recover against the principal, he may use the judgment to conclude the surety. (1 Evans' Poth. 562. *Kip v. Brigham*, 6 John. Rep. 159. *Laralde v. Derbigny*, 1 Miller's Lou. Rep. 85. *Munford v. Overseers*, 2 Rand. Rep. 313, 319.) But this is upon reasons and principles peculiar to that system, which in fact regards the principal and surety as the same party, and allows the latter "to appeal against the judgment, or to form an opposition to it, if it is in the last resort." (1 Evans' Poth. 562. *M'Kellar v. Bowell*, 4 Hawks' Rep. 34. *Munford v. Overseers*, *supra*.)

At common law a different doctrine prevails; accordingly, where the sureties of a guardian were prosecuted to subject them upon the guardian bond for the default of their principal, the record of recovery against the guardian was held, in North Carolina, not admissible for the plaintiff. (*M'Kellar v. Bowell*, 4 Hawks' Rep. 34. S. P., Chairman of Mecklenburgh v. Clark, *id.* 43.)

So in Pennsylvania, the record of a verdict and judgment in an action on a recognizance for good behaviour, against the principal, was held not admissible to prove that he had broken his recognizance in an action against the surety. (*Respublica v. Davis*, 3 Yeates' Rep. 128.)

In *Carmack v. Commonwealth*, (5 Binn. Rep. 184,) however, it was decided that a judgment in an action against the sheriff alone, of which his sureties had no notice, was *prima facie* evidence of the amount of damages, in a subsequent suit upon the recognizance against the sheriff and sureties jointly, but not conclusive.

But in Virginia a wider range has been apparently given to the judgment against the principal; and it seems there to be allowed as *prima facie* evidence against the surety on all points established by it. (*Munford v. Overseers*, 2 Rand. Rep. 313; see *Baker v. Preston*, 1 Gilmer's Rep. 235; *Jacobs v. Hill*, 2 Leigh's Rep. 393; *Braxton v. Winslow*, 1 Wash. Rep. 31.)

So in Ohio; and if the sureties have notice of the suit against the principal, and an opportunity to defend, the judgment will be *conclusive*. (*State v. Colerick*, 3 Hamm. Rep. 487.) See the next note.

NOTE 570—p. 326.

F So in covenant upon a general warranty in a deed of land, a judgment by a person claiming title against the vendee, of which the vendor had no notice, was held competent evidence to prove an eviction, but not to establish that such eviction was

by title paramount. (*Booker v. Bell*, 3 Bibb, 175. *Prewit v. Kenton*, id. 280. See *Radcliff v. Ship*, *Hardin's Rep.* 292; *Somerville's ex'rs v. Hamilton*, 4 *Wheaton's Rep.* 230.)

So in actions by the vendee of personal property against the vendor, upon a warranty of title, a judgment obtained for the property against the vendee by a third person claiming to be the rightful owner, in a suit of which the vendor had no notice, cannot be given in evidence to prove that the latter had not title. (*Stevens v. Jack*, 3 *Yerg. Rep.* 403. *Sanders v. Hamilton*, 2 *Hayw. Rep.* 226. *Jacob v. Pierce*, 2 *Rawle's Rep.* 204.)

And where the assignee sued the assignor of a chose in action, held, that a verdict and judgment in favor of the maker at the suit of the assignee, in which the jury found that the demand assigned had been paid previous to the assignment, could not be given in evidence to prove the fact thus found, unless the assignor had due notice of the first action, and an opportunity to meet the defence there set up. (*Maupin v. Compton*, 3 Bibb, 214.) But where it is necessary that the assignee, in the exercise of due diligence, should prosecute the maker to judgment and execution, the judgment would be evidence to prove the fact of such diligence. (id. 215. See post, notes 582, 3.)

So where the endorsee of a note sued the maker and failed because the consideration was usurious, held that the verdict and judgment were not evidence for the endorsee, in an action against the endorser, (who was also the original payee,) in order to establish the usury. (*Copp v. M'Dugall*, 9 *Mass. Rep.* 1, 4.) "The record is proof of the proceedings and judgment, and nothing more." (id. per Sewall, J.)

The like doctrine prevails in actions for indemnity; as where A. sued B., on a promise by the latter to save him harmless for selling certain goods as a constable under an execution against C.; held, that a judgment against A. for selling the goods, obtained by D. in a suit of which B. had no notice, was not evidence of C.'s want of title; though it might be received to prove that D. had asserted his right to the goods, and that what A. had paid, he was compelled to pay by legal process. (*Burrill v. West*, 2 *N. Hamp. Rep.* 190, 192, 3. See *Coventry v. Barton*, 17 *John. Rep.* 142; *Sanders v. Hamilton*, 2 *Hayw. Rep.* 232; *Stone v. Hooker*, 9 *Cowen's Rep.* 154. There are other authorities which seem to favor the admissibility of the judgment, under such circumstances, as prima facie evidence upon all points. (*Train v. Gould*, 5 *Pick. Rep.* 380. See *Bond v. Ward*, 1 *Nott & M'Cord*, 201; *Leather v. Poultney*, 4 *Binn. Rep.* 352, 356; *State v. Colerick*, 3 *Hamm. Rep.* 487; *Tyler v. Ulmer*, 12 *Mass. Rep.* 163, 166, per Parker, C. J.) But we believe the doctrine, with its proper qualifications, to be as laid down in *Burrill v. West*, supra.

Where, however, as in the foregoing and similar cases, a party has a right of recovery over, secured to him either by operation of law or express contract, and he has given the person so responsible due notice of the suit, the judgment, if obtained without fraud or collusion, will be *conclusive* evidence for him against such person upon every fact established by it. The latter, then, cannot be viewed in the light of a mere stranger, but has the same means of controverting the adverse claim, as though he were the nominal and real party on the record. (*Leather v. Poultney*, 4 *Binn. Rep.* 352, 356. *Hamilton v. Cutts*, 4 *Mass. Rep.* 349, 353. *Bender v. Fromberger*, 4 *Dall. Rep.* 436.

Witmer v. Schlatter, 2 Rawle's Rep. 204. Bond v. Ward, 1 Nott & M'Cord, 201. Jacob v. Pierce, 2 Rawle's Rep. 204. Clark's ex'rs v. Carrington, 7 Cranch, 322. Waldo v. Long, 7 John. Rep. 173. Blasdale v. Babcock, 1 id. 517. Barney v. Dewey, 13 id. 226. Kip v. Brigham, 6 id. 158. Pinney v. Gleason, 5 Wend. Rep. 535. Tarlton v. Tarlton, 4 Maule & Sel. 20. But see Henderson v. Sevey, 2 Greenl. Rep. 139; Porter v. Cole, 4 id. 20.)

NOTE 571—p. 327.

See S. P., *Lansing v. Montgomery*, 2 John. Rep. 382; *Paynes v. Coles*, 1 Munf. 873; *Worcester v. Green*, 2 Pick. Rep. 425; *Ryer v. Atwater*, 4 Day, 431, 434, 5, per Swift, J.; *Case v. Reeve*, 14 John. Rep. 79, 83; *M'Kellar v. Bowell*, 4 Hawks' Rep. 34; *Kazer v. The State*, 5 Hamm. Rep. 280, 282; *Maybee v. Avery*, 18 John. Rep. 352, 354.

In *Hurst's lessee v. M'Neil*, (1 Wash. C. C. Rep. 70, 75,) the defendant's counsel offered to read the record of a trial between the lessor of the plaintiff and one Pemberton; it does not appear what the precise object of this evidence was, nor in what relation Pemberton stood to the matter in dispute; but, per Washington, J., "Such evidence is inadmissible. If there be a point completely settled, and at rest, it is this: that a verdict between different persons cannot be given in evidence in a suit of one of the parties against a stranger. It is true, that in that case, Hurst, against whom the verdict is offered, had an opportunity of cross-examining; yet it cannot be offered against Hurst, unless he might have offered it had it been in his favor. This is the settled rule. *Non constat* that the evidence necessary, or supposed necessary by Hurst, in that case, was the same as in this. He might have been unsuccessful there, for many reasons which do not now exist—the absence of witnesses, or the like."

And though, in the second suit, one of the plaintiffs and all of the defendants are the same as in the first, yet, if there are new plaintiffs in the second suit, against whom the judgment in the first suit could not have been used, had it been adverse, it shall not be admitted in their favor. (*Baring v. Fanning*, 1 Paine's Rep. 549. S. P. *Chapman v. Chapman*, 1 Munf. 398.) And it makes no difference that the new parties, as assignees of a chose in action, are endeavoring, together with the assignor, to enforce the same right that was established in the former suit in favor of the assignor. Thus, where C. shipped on board a vessel, belonging to the defendants, a cargo of merchandise, consigned to the latter, who were merchants, at New-York, to be sold for the account of C.; and on its arrival, C. assigned the cargo and its proceeds to B., M. and R.; held, that on a bill filed by C., B., M. and R. against the defendants, praying an account of the proceeds of the shipment, &c. a decree in a cause between C. and the defendants, in which a large balance was established against the latter, could not be given in evidence by the plaintiffs. (*Baring v. Fanning*, supra.)

NOTE 572—p. 327.

See ante, note 439, p. 575; also ante, note 438, p. 572, et seq.

NOTE 573—p. 327.

See the cases cited ante, notes 569, 570; also *Maybee v. Avery*, 18 John. Rep. 352, 354.

NOTE 574—p. 327.

See the cases cited ante, note 571; also *Lawrence v. Hunt*, 10 Wend. Rep. 80, 82, stated ante, note 561.

In many cases it is possible, moreover, that the one thus seeking to avail himself of a verdict between others was a witness in the suit, and that the verdict was obtained upon his testimony. As it would be inconvenient to call parol proof to such fact, the only consistent principle is to reject the verdict altogether. (Per Swift, J., *Ryer v. Atwater*, 4 Day's Rep. 431, 434, 5. 2 Starkie's Ev. 196, 7.) This is one reason why a conviction upon an indictment, at the suit of the King, is not evidence in a civil action. (2 Starkie's Ev. 197. See post, p. 336, of the text.)

But in New-York, the fact that the individual offering the conviction was a witness, must be proved; the mere possibility that he was so will not exclude it, but it will be received as *prima facie* evidence, where it comes directly in question, and conclusive where it comes in question collaterally. (*Maybee v. Avery*, 18 John. Rep. 352. See *Case v. Reeve*, 14 id. 78, 83; see post, p. 336, et seq. of the text and the notes.)

NOTE 575—p. 327.

S. P., M'Kellar v. Bowell, 4 Hawks, 34, 53, per Taylor, C. J.

NOTE 576—p. 328.

In *Fowler v. Savage*, (3 Conn. Rep. 90, 96,) Chapman, J. says that a judgment, though sometimes admissible to prove the existence of a public highway, is never so, except when the party claims by prescription; and then merely to corroborate the presumption of there having been a grant. A user of sufficient length of time to create a presumption must first be proved, and then, in aid of that user, the judgment, &c. is admissible. But when the grant itself is produced, (or, as in this case, the survey itself,) such evidence is wholly irrelevant. It is not admissible to give a construe to the grant; nor to make valid that which, on the face of it, is invalid.

NOTE 577—p. 328.

See *S. P., Canaan v. Greenwood's Turnp. Co.*, 1 Conn. Rep. 1, 7, et. seq.; *Church v. Leavenworth*, 4 Day, 274, 278, per Swift, J.

NOTE 578—p. 329.

S. P., *Baring v. Fanning*, 1 Paine, 555.

By analogy to the cases cited in the text, the supreme court of Tennessee held that a judgment in favor of the freedom of a maternal aunt of the plaintiff, on account of her descent from Indian ancestors, might be received in evidence, in a suit for freedom, so far as to show the prevailing reputation of the existence of the right claimed. (*Vaughan v. Phebe*, Mart. & Yerg. 5, et seq. See *Pegram v. Isabel*, 2 Hen. & Munf. 193; *Free Jack v. Woodruff*, 3 Hawks' Rep. 106.) But you cannot prove a *particular fact* in this way; as that the ancestor of the person claiming freedom was a free woman. *Davis v. Wood*, 1 Wheat. Rep. 6. See *Wood v. Davis*, 7 Cranch, 271; and ante, note 566, p. 813.)

As to the distinction between general reputation and mere tradition of a particular fact, see ante, note 492, p. 558, et seq.

NOTE 579—p. 328.

See S. P., *Chapman v. Chapman*, 1 Munf. Rep. 402, per Tucker, J.; *Lovell v. Arnold*, 2 Munf. Rep. 174; *Bordecau v. Montgomery*, 4 Wash. C. C. Rep. 186; and see as to depositions in respect to pedigree, ante, note 458, p. 612.

NOTE 580—p. 329.

See post, p. 354, et seq. of the text and notes.

NOTE 581—p. 331.

S. P., *Kazer v. The State*, 5 Hamm. Rep. 331; *Stephens v. Jack*, 3 Yerger, 403.

NOTE 582—p. 331.

It is admissible and *conclusive* evidence against the accessory, of *the fact* that the principal felon has been convicted. The accessory, however, may deny that the principal committed the crime, and he may also controvert the allegation of his being accessory to its commission; for, in relation to those points, the record is only *prima facie* evidence. (*The State v. Chittum*, 2 Dev. Rep. 49. *The State v. Sims*, 2 Bailey, 29.)

This leads us to notice a distinction which our author has not very distinctly pointed out, but which enables the legal student readily to reconcile many seeming anomalies in this branch of the law of evidence. A verdict or judgment is offered, either to establish the *mere fact of its own rendition*, and those legal consequences which result

from the fact, or it is offered with a view to a collateral purpose; that is, to prove not only the fact that such a verdict has been rendered or such judgment pronounced, and so let in all the necessary legal consequences, but as a medium of proving some fact as found by the verdict, or upon whose supposed existence the judgment is based.

“For the first of these purposes, that is for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible, as the proper legal evidence, but usually conclusive evidence to prove that fact; for it must be presumed that the court has made a faithful record of its own proceedings. And, in the next place, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered; for where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, according to circumstances. For instance if B., being indicted, be convicted of beating A., the record of the judgment would be incontrovertible evidence of the fact that B. had been so convicted; it would be conclusively presumed that the court had kept a faithful record of its own proceedings. It would, in like manner, be conclusive as to all the legal consequences of such a conviction. For instance, one of such consequences is, that B. shall not be punished a second time for the same offence, and consequently the record would be conclusive when shown to the court, to protect him from a second prosecution for the same offence. So if B. had been acquitted, and had brought an action against A. for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here again the record would have been conclusive evidence to show that fact. But next suppose that upon B.’s conviction, A. brought an action to recover damages for the assault, and offered to prove the assault by the record of conviction; he would then be offering the judgment, not with a view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose, that is, to prove the fact upon whose supposed existence the judgment was founded. With respect to such facts, that is the facts upon which a judgment professes to be founded, the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.” (2 Starkie’s Ev. 183, 4. Stephens v. Jack, 3 Yerg. Rep. 403.) See the next note.

NOTE 583—p. 332.

The cases instanced in the text properly range themselves within the principle spoken of in the next preceding note, viz. that a judgment is always admissible with a view to the proof of the judgment itself *as a fact*, and its *legal consequences*. This will be found illustrated by many of the authorities cited ante, notes 569, 570, p. 815, 816, and others of familiar recurrence in the books. Thus, a verdict against the sheriff for the default of his deputy is evidence in an action by the sheriff against the deputy. (Tyler v. Ulmer, 12 Mass. Rep. 166, said per Parker, C. J.) It would doubt-

less be evidence as to the amount of damages; and probably, if the deputy defend the first suit, or have notice of it, the verdict would be evidence of the default. Accordingly, in *Kip v. Brigham*, (6 John. Rep. 158, 7 id. 168,) where the sheriff, who was sued for an escape of a prisoner, to whom the jail liberties had been granted, gave notice of the suit to the prisoner's sureties, and they in conjunction with the sheriff defended it, and judgment passed against the sheriff; this judgment was held, in an action by the sheriff against the sureties on their bond, to be conclusive evidence of the escape. (See *Carmach v. Commonwealth*, *State v. Colerick*, and other cases cited ante, note 569, p. 816.)

So a verdict in an action for a negligent escape against an officer, will be conclusive of the amount of damages to be recovered by him in an action against the debtor. (*Griffin v. Brown*, 2 Pick. Rep. 304.) And in a suit by a sheriff against the county, for damages sustained in consequence of no jail being provided, the record of a suit by the party injured against the sheriff for an escape is admissible to ascertain the damages. (*Commissioners of Brown County v. Butt*, 2 Hamm. R. 348.)

A record *inter alios* is frequently evidence, as stated in the text, (p. 332,) by way of inducement to the action or prosecution. A trite instance is the case of an indictment for perjury, where, if the perjury was committed on the trial of a cause, the record of the trial must be produced, to show that such trial was had. (4 Starkie's Ev. 1136. 2 id. 190.) In an action against the sheriff for negligence in the service of an execution, the creditor's judgment is of course admissible. (*Adams v. Balch*, 5 Greenl. Rep. 188.) So in an action for an escape on execution, or a false return. (4 Starkie's Ev. 1344.)

And in an action for a malicious prosecution, an indictment against the plaintiff is evidence to show the act done by the defendant in the prosecution of his malicious intention, as well as to show the plaintiff's acquittal. (2 Starkie's Ev. 190.)

So a verdict, &c. in a former cause *inter alios*, is frequently admitted for the purpose of introducing evidence to show that a witness testified differently there from what he now does. (*Clarges v. Sherwin*, 12 Mod. Rep. 343. Bull. N. P. 16, 233, 239. 2 Starkie's Ev. 189.) So, to prove that he testified alike on both trials, after his credit has been assailed. (*Foster v. Shaw*, 7 Serg. & Rawle, 156. *Moore v. Smith*, 14 id. 388.)

And a judgment rendered by a person having competent authority, is admissible to protect him against actions for any thing judicially done within the scope of that authority. The judgment in such cases is not received to prove the truth of the facts upon which it is founded; for, with a view to the defence mentioned, the truth of those facts is not material; but in order to prove the fact of a judgment pronounced by competent authority, and so to establish the immunity of the judge, which is a legal consequence of the judgment. (2 Starkie's Ev. 188. See post, vol. 2, "Action against Justices of the Peace.")

So where a sheriff is sued for trespassing, and he justifies under an execution, the judgment upon which the execution issued, though *inter alios*, is admitted. (2 Starkie's Ev. 189.)

The same doctrine prevails with regard to a judgment or decree which is of the muniments of a party's estate; as where it is necessary to establish the validity of a deed made under the authority of a decree in chancery; there the decree may be given in evidence by or against a stranger. (*Barr v. Gratz*, 4 Wheat. Rep. 213.) So also in

ejectment, where a title is derived from a sheriff's sale under execution, the judgment upon which the execution issued is admissible. (*Witmer v. Schlatter*, 2 Rawle, 359, 366, per Huston, J. *Barney v. Patterson's lessee*, 6 Har. & Johns. 182. *Lovell v. Arnold*, 2 Munf. Rep. 167. *Jackson v. Wood*, 3 Wend. Rep. 27, 34.) In these and similar cases the judgment comes in as a fact—a link in the chain of title—upon the same ground with a conveyance; (*Fowler v. Savage*, 3 Conn. Rep. 90, 96, per Chapman, J.;) but it is not receivable to prove the facts upon whose supposed existence it was rendered, nor indeed any thing beyond its own existence, and the legal consequences resulting from it. (See the next preceding note; also *Lovell v. Arnold*, 2 Munf. Rep. 167. *Hollingsworth v. Barbour*, 4 Peters' Rep. 466.)

And where the recovery of a judgment operates to change or create a title, the same doctrine prevails. On this principle the decisions of courts of admiralty are admitted, as they transfer property. (*Fowler v. Savage*, 3 Conn. R. 90, 96, per Chapman, J. See post, p. 346 of the text et seq.; *Davis v. Nest*, 6 Carr. & Payne, 167.) So in Pennsylvania, by recovering a judgment in trespass for carrying away goods, the plaintiff's property in them becomes divested; and consequently such judgment is admissible in favor of a stranger, who is subsequently sued in assumpsit by the same plaintiff for the proceeds or price of the goods. (*Floyd v. Brown*, 1 Rawle's Rep. 121. See *Marsh v. Pier*, 4 id. 273, 285; 4 Stark. Ev. 1281, and notes (a) (b).)

And where a party may sue several joint trespassers in separate suits, but is entitled to but one satisfaction; if he sues A., and levies his money by execution, and afterwards sues B., the latter may give in evidence the first judgment, though no party to it, to prove the plaintiff satisfied. (*Witmer v. Schlatter*, 2 Rawle, 359, 366, per Huston, J. See *Osterhout v. Roberts*, 8 Cowen's Rep. 43; *Curtis v. Groat*, 6 John. Rep. 168; *Livingston v. Bishop*, 1 id. 290; *Wright v. Lathrop*, 2 Hamm. Rep. 33, 52; *Wilkes v. Jackson*, 2 Hen. & Munf. 355; *Ammonet v. Harris*, 1 id. 488; *White v. Philbrick*, 5 Greenl. Rep. 147.)

So where judgment has been obtained against A., one of the makers of a note, and such judgment satisfied, and afterwards B., a co-signer of the same note, is sued on it; B. may use the former judgment against A., upon the same ground that he could prove payment in any other way by A. (*Farwell v. Hilliard*, 3 N. Hamp. Rep. 318. *Gilmore v. Carr*, 2 Mass. Rep. 171.) If the note be *joint*, and not *joint and several*, and there has been a recovery against one, such recovery may be used by both, if they are sued; for the liability of the one sued first, is merged in the judgment; the note, as it respects him, is extinguished, and there is no longer any joint liability upon it. (*Ward v. Johnson*, 13 Mass. Rep. 148.)

In case a party has his election to sue either of two persons, but not both; after judgment against one, the other, if he be sued, may give the record in evidence to show the election. (*Witmer v. Schlatter*, 2 Rawle's Rep. 359, 366, per Huston, J.) This principle prevails where the sheriff is sued for the act of his deputy, and there has been a judgment, though unsatisfied, against the deputy for the same act; in such case there is no joint and several liability, and the plaintiff having recovered against the deputy, has made his election, and his right to sue the sheriff is gone. (*Campbell v. Phelps*, 1 Pick. Rep. 62. See *Draper v. Arnold*, 13 Mass. Rep. 449.) So where a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have occurred in the time of his predecessor; but the

plaintiff has his election to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff; and if he makes that election by suing the old sheriff to judgment, such judgment may be used by the new sheriff as a bar to a subsequent suit against him. (*Rawson v. Turner*, 4 John. Rep. 469. See *White v. Philbrick*, 5 Greenl. Rep. 147; *Regan v. Kennedy*, 1 Overt. Tenn. Rep. 91.)

A judgment *inter alios* is also sometimes admitted to prove that a particular person has not abandoned his title, or suffered it to be barred by the statute of limitations; as in ejectment, after the defendant has given evidence of a valid subsisting title in a third person, and it is claimed that such title is barred by the statute of limitations or has been abandoned. (*Witmer v. Schlatter*, 2 Rawle's Rep. 359, 366, per Huston, J.)

So where a person has a right to revoke a deed of property, a judgment in a suit brought by him may be evidence, *inter alios*, as an expression of his intention to revoke. (*Disnukes v. Musgrove*, 8 Mart. Lou. Rep. N. S. 375.)

NOTE 584—p. 332.

In an action for rent against the defendant, who claimed as assignee of F., who, as alleged, was the assignee of one W., of a lease given by the plaintiff; the plaintiff on the trial, offered to prove a judgment recovered by him against F., for rent, as assignee; this was objected to by the defendant, but held admissible, in the same way that an act or declaration of one under whom the defendant entered would be. (*Adams v. Smith*, 2 N. Hamp. Rep. 387.)

NOTE 585—p. 333.

Whately v. Menhein, cited in the text, seems to have been decided without attending to the rule, that no one can use a verdict as evidence for him, who would not have been prejudiced by it had it been the other way. Accordingly, it has been generally disapproved of by writers on the law of evidence. (See 2 Starkie's Ev. 195, 6, note (1); Norris' Peake, 74 and note; also ante, p. 326, 7, of the text, and note 571, p. 818, and the cases there cited.) This case, moreover, has been repudiated in Maine upon the same ground. (*Burgess v. Lane*, 3 Greenl. Rep. 165.)

It seems that a special verdict and judgment finding a partnership is not admissible *inter alios*, like special verdicts finding a pedigree, custom, &c. (*Burgess v. Lane*, *supra*.)

NOTE 586—p. 333.

This rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments in

the same courts, or to decisions of courts of concurrent jurisdiction. (Per Livingston, J. in *Hopkins v. Lee*, 6 Wheat. Rep. 109, 114.) It has been applied to decrees of the orphan's court of Pennsylvania; (*The President of the Orphan's Court v. Goff*, 14 Serg. & Rawle, 181; *M'Pherson v. Cunliff*, 11 id. 422;) to a discharge under the insolvent laws; (*M'Kinney v. Crawford*, 8 Serg. & Rawle, 351; *Sheets v. Hawk*, 14 id. 173;) to a decision of the court of probates, though admitted to be erroneous; (*Brown v. Lanman*, 1 Conn. Rep. 467; *Goodrich v. Thompson*, 4 Day's Rep. 215; *Jackson v. Robinson*, 4 Wend. Rep. 436;) to a decree of the county court upon a complaint pursuant to the statute, by which decree it was found the duty of a town to repair certain bridges; (*Canaan v. The Greenwoods Turnp. Co.*, 1 Conn. Rep. 1;) to a decision of a court of common pleas, upon a complaint made pursuant to the statute, for overflowing lands; (*Adams v. Pearson*, 7 Pick. Rep. 341; *Gay v. Welles*, id. 217;) to a decree of the county court, awarding money to a claimant, arising from the sale of lands by the sheriff, though the decree was made upon a mistaken notion of law, and though the case admitted of no remedy by writ of error; (*Grätz v. The Lancaster Bank*, 17 Serg. & Rawle, 278;) to a record of the forfeiture of a recognizance, where debt was brought upon such recognizance; (*Shriver v. The Commonwealth*, 2 Rawle's Rep. 206;) to decrees of a court of equity; to sentences of courts of admiralty, and of ecclesiastical tribunals; and in short, to every court which has proper cognizance of the subject matter, so far as they profess to decide the particular matter in dispute. (*Hopkins v. Lee*, 6 Wheat. 109, 114, per Livingston, J.)

But in the strictly legal sense and full operation, the rule can hardly be said to embrace those decisions which are made by courts acting in a summary way, upon an application addressed to their discretionary jurisdiction. In such cases, if the facts upon which relief is claimed, be the same upon a second application, that they were in the first, the party, by analogy to proceedings in the ordinary course of judicial investigation, will generally be held precluded. (*Schuman v. Weatherhead*, 1 East, 537. *Greathead v. Bromley*, 7 Durn. & East, 451.) But still the matter rests in the discretion of the court; and if justice requires it, they may doubtless hear the second application, and decide it differently from what they did the first, without invading any principle of positive law; so the court of chancery may be resorted to in a proper case, notwithstanding a previous decision of the same question by a court of law upon a summary application. (*Sampson v. Hart*, 14 John. Rep. 63.)

With respect however to *judgments*, properly so called, i. e. those solemn decisions of courts of justice, made in the exercise of their rightful jurisdiction, after giving the parties an opportunity to be heard, and upon due deliberation, the law, proceeding upon the maxim that "*interest reipublicæ ut sit finis litium*," will regard them as conclusive upon all points directly involved in them, and necessarily determined. And whether the tribunals rendering them are clothed with limited or general powers, whether they are courts of record or otherwise, makes no sort of difference; so long as they act within the sphere which has been assigned them, their adjudications are binding upon the parties in all future controversies relating to the same matter. (*Gahan v. Maingay*, 1 Irish T. Rep. 20, 43, et seq. *Gratz v. The Lancaster Bank*, 17 Serg. & Rawle, 278, 281. *Starkie v. Woodward*, 1 Nott & M'Cord, 329. *Cotton v. Cotton*, 4 Rand. Rep. 192. *Hughes v. Blake*, 1 Mason's Rep. 515. *Brown v. Gibson*, 1 Nott & M'Cord, 326. *Blount v. Darrach*, 14 Serg. & Rawle, 184, note. *Kil-*

heffer v. Herr, 17 id. 319. Hume v. Burton, 1 Ridg. Cas. 204, et seq. 2 Starkie's Ev. 211, 212.)

But note, that all which is said as to the conclusiveness of a former judgment, must be understood with this proviso; that the court rendering the judgment had jurisdiction: for if a court transcends the limits which the law has prescribed for it, and assumes to act where it has no jurisdiction, its decisions will be utterly void, and entitled to no consideration, either as evidence or otherwise. (Borden v. Fitch, 15 John. Rep. 121. Mills v. Martin, 19 id. 33. Latham v. Edgerton, 9 Cowen's Rep. 227. Snyder's lessee v. Snyder, 6 Binn. Rep. 483. Messinger v. Kinter, 4 id. 97. Blin v. Campbell, 14 John. Rep. 432. Sumner v. Parker, 7 Mass. Rep. 79. Wales v. Wilford, 2 id. 120. Smith v. Rice, 11 id. 507. Cleveland v. Rogers, 6 Wend. Rep. 438. Gorrill v. Whittier, 3 N. Hamp. Rep. 265. Bowman v. Russ, 6 Cowen's Rep. 234. Slocum v. Wheeler, 1 Conn. Rep. 429. Weston v. Weston, 14 John. Rep. 428. Sherman v. Ballou, 8 Cowen's Rep. 304. Cunningham v. Bucklin, id. 178. Newdigate v. Davy, 1 Raym. Rep. 742. See also ante, note 551, p. 799, et seq.)

NOTE 587—p. 333.

S. P., Hopkins v. Lee, 6 Wheat. Rep. 109; Harvey v. Richards, 2 Gall. Rep. 216; Minor v. Walter, 17 Mass. Rep. 237; 2 Starkie's Ev. 201, 2; 2 Evans' Poth. 456; Harg. Law Tracts, 458; Blackham's case, 1 Salk. 290, per Holt, C. J.

A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. They shall not be allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed, it is final as to the points decided; not so, however, with respect to matters which the judgment itself shows were not in question; and hence, where the cause has gone off upon some defect, which precluded an inquiry into the merits, the judgment is usually no bar to a second action. (See the next note.) So the reversal of a judgment proves nothing but its own correctness; it operates no farther than to nullify what has been done; and in other respects the parties are generally left by it in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. Therefore, where a decree of the supreme court of probate reversed that of the inferior court, decreeing distribution, such reversal was held no bar to a bill in chancery for the same matter. (Harvey v. Richards, 2 Gall. Rep. 216.) And upon the same principle the dismissal of a bill in chancery is not always conclusive as to the complainant's right in a court of law, although the bill may have been filed for the same matter; for if the complainant seeks in a court of equity to enforce a strictly legal title, when his remedy is at law, the dismissal of the bill amounts merely to a declaration that he has no equity; but it casts no reflection upon his legal title; it decides nothing in relation to it, and consequently can conclude nothing. (Lessee of Wright v. Deklyne, 1 Peters' C. C. Rep. 198, 202. Pleasant v. Clements, 2 Leigh, 474, 483. See Burchet v. Faulkner, 1 Dana's Rep. 99, 100; Lancaster v. Laire, id. 109.) And though a decree in express terms profess to affirm a particular fact, yet if such fact was immaterial in the case, the decree will not conclude the parties in relation to it. (Hotchkiss v. Nichols, 3 Day's Rep. 138. Coit v. Tracy, 8 Conn. Rep. 268.)

In Swift's Ev. p. 17, it is said, that "where the cause and object of both actions are the same, a judgment in the prior bars the subsequent suit. Where the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action; but the verdict is matter of evidence to prove such point."

But although a prior judgment may be no *bar*, strictly and technically speaking, where the cause or object of both actions are not identical, it does not follow that either party in the second action can be allowed to contradict what was expressly adjudicated in the first. (Per Bristol, J. delivering the opinion in *Betts v. Starr*, 5 Conn. Rep. 550, 553.) In *Hopkins v. Lee*, (6 Wheat. Rep. 109,) the facts were, that Lee sold Hopkins an estate, called "Hill and Dale," then under certain incumbrances, which Lee agreed to remove; and Hopkins was to pay therefor \$1800, partly in military lands and partly in some other way, as soon as the incumbrances were removed. Hopkins filed a bill in chancery against Lee, stating that Lee had omitted to pay the incumbrances, and that he, Hopkins, had been compelled to pay them. Upon hearing the bill, the court found that Hopkins had satisfied the incumbrances, but with the funds of Lee, advanced for that purpose; and thereupon decreed, that Hopkins should pay Lee the overplus remaining in his hands after paying off the incumbrances. Lee then brought an action of covenant against Hopkins, for not conveying the military lands agreeable to covenant; to which Hopkins pleaded that Lee had never discharged the incumbrances on the estate of *Hill and Dale*. "No lawyer can suppose that, let the judgment or decree on the bill in chancery have been either way, it could have been pleaded in bar to the last action of covenant brought by Lee against Hopkins. The object of the bill in chancery was to get refunded money, which the purchaser of an estate alleged that he had been obliged to expend, to free the estate from incumbrances which the seller was bound to remove. The object of the action at law was to recover damages for not conveying the military lands, which were to be taken in part payment. Nothing could have been more distinct than the object of the two suits; they were not for the same matter, cause and thing, and let the issue of the bill in chancery have been as it might, the decree could not have been pleaded in bar of the action at law. But *by way of evidence*, the decree in chancery was held conclusive to prove that Lee had discharged the incumbrances on the estate; that being the matter directly adjudicated upon in the suit in chancery." (Per Bristol, J., *Betts v. Starr*, supra.) And where a mortgagee brought ejectment to recover the mortgaged premises, and the mortgagor, on the trial, offered evidence to prove that the note which the mortgage was intended to secure, was usurious and void; to which the mortgagee objected, on the ground that the mortgagor was estopped to shew the alleged fact, by reason of a former judgment; the record of that judgment was produced, and it appeared from it, that the mortgagee had sued the mortgagor on the note, that the latter had pleaded non-assumpsit therein, with notice of the usury, and that a verdict and judgment were rendered for the mortgagor. It was conceded that the sole question litigated in the former suit, was the same sought to be again controverted in the last. The judge thereupon sustained the objection, holding the first judgment *conclusive* in relation to the usury; and the supreme court afterward, on motion for a new trial, affirmed the decision. (*Betts v. Starr*, supra.) So, though nothing can certainly be more distinct than the object of an ejectment in England, and the action of trespass on

the case for mesne profits; yet, the judgment in ejectment is conclusive against the defendant *upon the right of possession*, at the time of the demise laid in the declaration. (Per Bristol, J., *Betts v. Starr*, supra; and see post, p. 336 of the text, and note 598.) And where A. filed a libel in the district court of the United States, alleging title to a vessel, by virtue of certain conveyances in January and February, 1824; and the defendants appeared and contested the matter; whereupon a decree was made finding directly that A., by virtue of the conveyances, was owner and proprietor of the vessel at the time of filing the libel, which was in August, 1824; held, that in a subsequent action of trespass, for taking the vessel on the 4th of March, 1824, the decree was conclusive evidence of A.'s title, not only at the time of filing the libel, but at the time when the libel alleged it to have accrued, and for all the intermediate time. (*Dennison v. Hyde*, 6 Conn. Rep. 508.) So where A., during the pendency of an action of assumpsit, brought by C. against A. & B., filed his bill in chancery against B. and C. for a discovery, alleging that he had agreed with B. to pay the debt for which the action was brought, and that B. had paid it; and the court found these facts not true, and dismissed the bill; after which A., on the trial of such action, offered testimony to prove the same facts which he had alleged in the bill; on the objection of C., supported by the record of the chancery suit, it was held that the testimony offered was inadmissible, the decree being founded upon and conclusive as to those facts. (*Coit v. Tracy*, 8 Conn. Rep. 268. See *Starkie v. Woodward*, 1 Nott & M'Cord, 329.)

Indeed, the principle will be found to run through nearly all the American cases, that the judgment of a court of competent jurisdiction, directly upon a particular point, is, as between the parties, conclusive in relation to such point, though the purpose and subject matter of the two suits be different; and hence that "a judgment may not only be *evidence*, but *conclusive evidence*, and still be no bar to a second action." (See per Bristol, J., *Betts v. Starr*, 5 Conn. Rep. 550, 554; also *Lessee of Wright v. Deklyne*, 1 Peters' C. C. Rep. 198, 202; *Starkie v. Woodward*, 1 Nott & M'Cord, 329; *Canaan v. Greenwood's Turnp. Co.*, 1 Conn. Rep. 1, 7; *Cist v. Zeigler*, 16 Serg. & Rawle, 282; *Gardner v. Buckbee*, 3 Cowen's Rep. 120; *Wright v. Butler*, 4 Wend. Rep. 234, 238.)

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A former verdict and judgment for the defendant, *in trespass* for taking goods, will bar a subsequent action of *assumpsit* for the price or value of the goods. (*Rice v. King*, 7 John. Rep. 20.) But in North Carolina, where the plaintiff sued an officer in trespass for selling a negro, and recovered judgment for thirty pounds, and afterwards brought detinue against another person for the same negro, it was held, that unless the former recovery was for the property, and not for the trespass merely, it was no bar to the second suit; and the judge who tried the cause, left to the jury the circumstances, from which it might be inferred that the judgment against the officer was for the trespass only, who found a verdict for the plaintiff, upon which judgment was rendered accordingly. (*Belch v. Holloman*, 2 Hayw. Rep. 329.) This decision proceeds, doubtless, upon the ground, that unless the former recovery was intended to be an equivalent, not only for the trespass but for the property also, it would not

divest the plaintiff of his title; and in South Carolina, the court of appeals has recently gone further, and held that in trespass there must be a recovery of what was supposed and intended to be found as the value of the chattel taken, *and a satisfaction of such recovery*, before the property will vest in the defendant. (Jones v. M'Neil, 2 Bailey, 466, 473; but see Johnson v. Parker, 1 Nott & M'Cord, 1.)

A judgment for the plaintiff in replevin, in the detinet for damages, vests the property of the goods in the defendant; (Moore v. Watts, 1 Ld. Raym. 613, 614; see Murrell v. Johnson's adm'r, 1 Hen. & Munf. 449;) and of course, wherever this is the case, such judgment will bar any other action for the same damages, or the price or proceeds of the goods.

A judgment in trover, for a permanent conversion changes the property. (4 Starkie's Ev. 1508. Bull. N. P. 49. 2 Starkie's Ev. 198, note (b), and the cases there cited.) But it seems to be competent for the plaintiff to show, that the damages were given merely for the temporary conversion, and not as the value of the chattel; (4 Starkie's Ev. 1508; Gilb. L. Ev. 265, 2d ed.; Trials Per Pais, 224;) and hence, in order to constitute a bar to a second action for the value of the chattel, the verdict must have found a sum intended to cover the value of the chattel. (Jones v. M'Neil, 2 Bailey, 466, 477, per O'Neill, J.) Whether there should also be a satisfaction of the judgment, quere. (id. See Osterhout v. Roberts, and other cases in connection with it, cited ante, note 583, p. 823.)

A judgment, in an action at law upon a covenant, will not bar a suit in chancery for the specific performance of a stipulation in the same covenant to convey land, where it is manifest that the failure, though assigned among other breaches, was not investigated, nor any damages assessed therefor in the trial at law. (Givens v. Peake, 1 Dana's Rep. 225.) But matters once investigated in a court of law, cannot be reheard in chancery; and hence, where in trover a recovery was had against the defendants, who afterward filed their bill to enjoin the judgment, alleging, as part of the ground of the application, the identical matters litigated in the former suit at law, the bill was dismissed. (Price v. Boyd, 1 Dana's Rep. 434, 5.)

A verdict and judgment for the defendant, in an action *on the case*, for cutting and carrying away wheat, is a bar to the action of trespass, *quare clausum fregit*, for the same cause. (Johnson v. Smith, 8 John. Rep. 383.) And a judgment in an action on the case, in the nature of a conspiracy, is conclusive, and a bar to any new action in a different form. (Livermore v. Herschell, 3 Pick. Rep. 33.) So a judgment for the defendant in covenant, where the plaintiff alleged, as the breach, that the defendant had not delivered a good and sufficient New-Orleans boat, was held a bar, *prima facie*, to an action of fraud, founded on the circumstance of the defendant having neglected to disclose certain latent defects in the boat at the time of delivery. (Cutler v. Cox, 2 Blackf. 178.) Whether, if it were clearly shown that the fraud was not averred or investigated in the action of covenant, the judgment therein would then have been a bar to the subsequent suit, quere. (id. 181, per Blackford, J.)

If the demand, upon which the plaintiff prosecutes, has been litigated in a previous suit between the same parties, by way of defence, the judgment rendered in such first suit, is a bar to the second. Accordingly, where A. brought an action of assumpsit upon a promissory note given by B. for the purchase money of a patent right, and B. defended on the ground of fraud in the sale of the right; held, that a judgment in that

suit in favor of A., for the amount of the note, was a bar to a subsequent suit by B. against A. for the fraud. (*Jones v. Scriven*, 8 John. Rep. 453. See *Curtis v. Cole*, 6 id. 168.) And where A. brought an action for use and occupation of premises; and on the trial, the defendants gave in evidence the record of a former suit, in replevin, brought by them against A., in which A. avowed for the same rent claimed in the second suit, and in which there was a verdict and judgment against him on the issue of no rent in arrear; held, that such record was conclusive against A.'s right to recover. (*Cist v. Zeigler*, 16 Serg. & Rawle, 292.)

And it is proper to notice here, that judgments are not merely final as to the facts actually litigated and decided, but they are usually, (except in proceedings directly instituted in the same suit to obtain their reversal) conclusive evidence of their own rectitude and justice; and no allegation or evidence, tending to impeach them, will be allowed in any subsequent distinct controversy between the parties. (*Hartshorne v. Johnson*, 2 Halst. Rep. 108. *Allison v. Rankin*, 7 Serg. & Rawle, 269, 271. *M'Neil v. Bright*, 4 Mass. Rep. 282, 303. *Hoyt v. Gelston*, 13 John. Rep. 139, 153. *Perkins v. Fairfield*, 11 Mass. Rep. 227. *Dow v. Warren*, 6 id. 328, 9. *Commonwealth v. The Pejepscut Proprietors*, 7 id. 399. *Loring v. Bridge*, 9 id. 124. *Foster v. Jones*, 15 id. 185. *Hawes v. Hathaway*, 14 id. 233. *M'Kinney v. Crawford*, 8 Serg. & Rawle, 351. *Hawley v. Mancius*, 7 John. Ch. Rep. 174, 182.) It is upon this principle that no action will lie for obtaining a decree or judgment by false or forged evidence. (*Peck v. Woodbridge*, 3 Day's Rep. 30. *Smith v. Lewis*, 3 John. Rep. 157; see also *Smith v. Lowry*, 1 John. Ch. Rep. 322.) And where A., having caused B. to insure a vessel for him, upon which there was a loss, afterward sued B. and recovered judgment for the loss, and obtained satisfaction by execution; in a subsequent suit brought by B. to recover back the money, on the ground that A. knew of the loss at the time when the insurance was made, but concealed the knowledge of it from B., and that the fraud was not discovered until after the execution was satisfied; held, that the former judgment was a bar to B.'s right of action. (*Homer v. Fish*, 1 Pick. Rep. 435.)

And the principle applies in almost every instance, where a suit is sought to be sustained upon allegations which would have constituted proper ground of defence to a previous action between the parties. Thus, in *Marriott v. Hampton*, (7 Durn. & East, 265,) H., the defendant, had formerly sued M., the plaintiff, for goods sold and delivered, for which M. had before paid H. and obtained his receipt; not being able, however, to find the receipt at the time, and having no further proof of the payment, he was obliged to pay the money again, and gave a cognovit for the costs: afterwards he found the receipt, and prosecuted to recover back the sum so wrongfully enforced in payment; and it was held, on motion for a new trial, that the action could not be sustained. Per Lord Kenyon, Ch. J.: "After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent, even to grant a rule to show cause, lest it should imply a doubt." Lawrence, J. alluding to a case relied on by the plaintiff's counsel, says: "It goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment; which is too preposterous to be stated." The other judges delivered

opinions to the same import. (See *Kist v. Atkinson*, 2 Campb. Rep. 63. *Moody v. Thurston*, 1 Strange, 431. *Bateman v. Willoe*, 1 Sch. & Lef. 201.)

This doctrine has been recognized and similarly applied in several American cases. Thus in *Le Guen v. Gouverneur et al.* (1 John. Cas. 436,) the appellant had formerly recovered judgment in the supreme court against the respondents. Afterwards the respondents filed a bill in chancery, alleging fraud in the contract for the sale of certain parcels of goods, for the amount or value of which they were held liable by that judgment, and claimed relief on this ground. On appeal from the decree of the chancellor, granting the relief prayed, the court of errors decided against the respondents, holding, that as the fraud alleged was proper matter of defence in the previous suit, and the respondents had neglected to avail themselves of it, the judgment therein was final. Radcliff, J. (id. 492,) lays down the rule in very broad terms. "The general principle," he says, "that the judgment or decree of a court possessing competent jurisdiction shall be final, as to the subject matter thereby determined, is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, see 1 Blackf. 360, and which they might have decided. The reasons in favor of this extent of the rule appear to me satisfactory; they are founded in the expedience and propriety of silencing the contentions of parties, and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort; and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims? This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous, and often oppressive. It might tend to unsettle all the determinations of law, and open a door for infinite vexation." And per Kent, J. (id. 502 :) "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded. The only cases which I can recollect, as forming exceptions to this general rule, are,

"1. The case of mutual dealings between the parties, where the defendant omits to set off his counter demand, and may still recover in a cross-action; and

"2. The case of an ejectment, in which the defendant, neglecting to bring forward his title, is not precluded by the recovery against him from availing himself of it in a new suit.

"The general rule is intended to prevent litigation and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice; and judgments solemnly and deliberately given might cease to be revered, as being no longer the end of controversy and the evidence of right." (*Le Guen v. Gouverneur et al.*, 1 John. Cas. 501, 2.) Upon the same principle, a junior mortgagee, made a party to the bill of the elder and neglecting to defend, will be barred. (*Cooper v. Martin*, 1 Dana's Rep. 23, 27.) So where B. sued G. for not doing work in a skilful and proper manner; and it appeared that G. had before sued B. to obtain pay for the identical work, in which suit B's claim set up in the present ac-

tion was urged by him, and erroneously rejected by the court, who gave judgment for G.'s work at the price stipulated between the parties; yet held, that B. could not sustain his action, for the ground of it was matter of defence in the former suit, and he should have pursued his remedy directly there by certiorari to reverse that judgment, and could not overhale it in a collateral proceeding. (*Grant v. Button*, 14 John. Rep. 377; S. P., *Kist v. Atkinson*, 2 Campb. Rep. 63.) And where P., having given his promissory notes to L., paid the same without taking them up; and after such payment, and subsequent to the time of the notes becoming due, L. transferred them to S. L., who sued G. thereon and had judgment for the amount; held, that as P. had neglected to avail himself of the payment by way of defence to the suit of S. L., he could not maintain an action against L. for the money thus recovered by S. L. (*Loomis v. Pulver*, 9 John. Rep. 244.) So also where A., being charged with taking B.'s bridle, gave B. a note, the latter promising that if it should turn out that A. had not taken the bridle, he would give up the note; when the note became due, B. sued A. upon it and obtained judgment for the amount, which was accordingly paid; and the court held, that such judgment, while it stood in full force, should prevent A. from recovering the money so paid on B.'s judgment, though A. offered to prove his entire innocence of the charge respecting the bridle. The ground of the second action, say the court, was proper matter of defence to the first suit, and if A. was not in a situation at that time to make out that defence by proof, it was his misfortune. (*White v. Ward*, 9 John. Rep. 232. See S. P., *Batley v. Button*, 13 id. 187. *Canfield v. Munger*, 12 id. 347.) The same rule has been adopted in New-Hampshire. Thus C. and D. sold H. a patent right, for which H. gave them his notes; one of the notes was paid voluntarily, but the other was sued by C. and D., and a judgment obtained for the amount, which H. accordingly paid. H. subsequently brought an action to recover back the consideration money, on the ground that the patentees were not the original inventors of the thing patented, and the court held him concluded by the previous recovery; for when sued for the consideration, he enjoyed an opportunity to defend himself by establishing this fact; and if such defence was not made, "the omission arose from such accident as would entitle him to a new trial, or from such ignorance and neglect as are irremediable." (*Holden v. Curtiss et al.*, 2 N. Hamp. Rep. 61, 64. *Tilton v. Gorden*, 1 id. 33.) So also in Massachusetts. (*Thatcher v. Gammon's ex'rs*, 12 Mass. Rep. 268. *Homer v. Fish*, 1 Pick. Rep. 435. *Holmes v. Avery*, 12 Mass. Rep. 136.) And in Pennsylvania. (*Shriver v. The Commonwealth*, 2 Rawle, 206.) So far indeed has this respect for former decisions been carried, that where an action was brought for malicious prosecution, the court held a record of conviction in the suit charged as malicious, conclusive evidence of probable cause. (*Whitney v. Peckham*, 15 Mass. Rep. 243. *Williams v. Woodhouse*, 3 Dev. Rep. 257, S. P. *Mellor v. Baddeley*, 6 Carr. & Payne, 374.) The courts in New-York, however, have repudiated this doctrine. (*Burt v. Place*, 4 Wend. Rep. 591.)

But although the second suit is predicated upon matter which might have been used as a defence in the first, yet if it involves no inquiry into the merits of the former judgment, and is sustainable on ground entirely independent of such judgment, the rule does not apply. This exception was distinctly recognized by the court, in *Whitcomb v. Williams*, (4 Pick. Rep. 228.) There the plaintiffs had purchased goods of the defendants, and paid for them partly in cash and partly by their note; they subsequently

discovered that they had paid for more than they had received ; but nevertheless, suffered a judgment to go against them on the note, without objecting any want of consideration ; and it was held, that an action lay to recover back the amount overpaid ; for the giving of the note, under the circumstances, being equivalent to payment in cash, a cause of action originated immediately thereupon which steered entirely clear of the judgment ; and " although the mistake might have been corrected in that action, the present plaintiffs were under no obligation," says Wilde, J. delivering the opinion, " to avail themselves of that mode of seeking relief. A new remedy arising on a contingency will not deprive a party of a pre-existing right of action. The plaintiffs had the right of election, like a party entitled to the privilege of set-off." (*id.* 228, 231.) And where A. sued B. before a justice, and prior to the return day of the summons, B. settled with A., and paid him \$3, in full, A. promising to discontinue his suit ; instead of doing so, however, he appeared on the return of the summons, and obtained judgment in B.'s absence of \$25 ; B. then brought an action of assumpsit against A. before another justice for a breach of the promise to discontinue, and recovered the same amount which A. had recovered against him ; and the supreme court held the recovery correct ; for the suit was not to overhale the first judgment, or to recover back the amount of it, on the ground that it was not due, but to recover for a breach of the agreement, and this breach would have been the same, even if the former recovery had been for a just debt. (*Cobb v. Curtiss*, 8 John. Rep. 470.) So where money has been paid and a receipt taken, and afterwards the party to whom it was paid brings an action for the same money and recovers, no defence being made ; though the neglect of the defendant in not availing himself of the receipt in that suit, will forever preclude him from recovering the money thus paid, yet there being a moral obligation on the part of the plaintiff to repay, the defendant may recover on a subsequent promise of the plaintiff to that effect. (*Bentley v. Morse*, 14 John. Rep. 468.) And where A. extended an execution on B.'s real estates, and thereby became tenant in common with C. ; and then obtained judgment against C. for a share of the rents and profits accruing subsequent to the extent ; but after C. had paid A.'s judgment, the judgment against B., upon which A.'s execution issued, was reversed ; held, that C. could recover against A. the money thus paid by him for rents and profits, though A.'s judgment against him remained in full force. The court say, that judgment was right, " nor does the present action impeach it ; but the defendant has no right, from posterior circumstances, to retain the proceeds of it. And when one wrongfully detains money, although it was rightfully received, the action for money had and received furnishes a just and appropriate remedy." (*Lazell v. Miller*, 15 Mass. Rep. 207.) So where A. recovered judgment by default against B., upon an account annexed to his writ, in which account B. was credited for certain goods ; held, that such judgment was no bar to an action by B. against A. for the same goods, if they were not credited at their full value by A. in the first suit. For though the value of the goods credited by A. was a question which B. might lawfully have litigated there, yet he was not bound to do so at his own expense, when by commencing a new action the expense would fall on A. If A. intended to avoid this, he should have credited the goods at their full value. (*Minor v. Walter*, 17 Mass. Rep. 238.) And where an attorney received a partial payment from a debtor, on a note left with him for collec-

tion, paid it over to the creditor without endorsing it, and afterwards proceeded and took judgment for the whole amount apparently due; he was held liable to the debtor for the amount of such payment in an action for money had and received. (*Fowler v. Shearer*, 7 Mass. Rep. 14.) The same principle was applied where the person receiving the partial payment was plaintiff in the first suit and defendant in the second, the substantial details of the case being in other respects like the preceding; and Parker, C. J. delivering the opinion, thus explains the ground upon which both decisions proceed: "Here the creditor, by his own fault, recovered judgment for his whole debt, when a part of it had been paid. It was his duty to have credited the sum paid on the note, and not having done it, he is to be considered as retaining the money for the use of his debtor. The debtor might well lie by, and suffer judgment by default, relying upon a deduction of the sum paid before judgment. The case of *Fowler v. Shearer* cannot be distinguished from this; for in that, as well as this, the plaintiff might have given evidence of his payment; but he confided in the attorney, that the sum paid should be endorsed upon the note. In the case of *Marriott v. Hampton*, the plaintiff brought his action to recover money paid under legal process, which was thought dangerous. In the case before us there is no such technical difficulty. It is not attempted to disturb the judgment; it is not complained of; it is not alleged that too much has been recovered. The ground of the action is, that the defendant has received fifty dollars of the plaintiff which he is not entitled to retain. He might have retained it if he had chosen to endorse it on the note, or to deduct it from his damages; but not having done either, he cannot conscientiously retain the money." (*Rowe v. Smith*, 16 Mass. Rep. 306.) The contrary, however, of this, has been expressly and deliberately held in New-Hampshire; thus, in *Tilton v. Gordon*, (1 N. Hamp. Rep. 33,) where a party made certain payments on a note, and afterward, on being sued, suffered judgment to pass against him by default for the whole amount, without any deductions, he was adjudged incapable of recovering for the monies so paid in a subsequent action. And even in Massachusetts, where *Rowe v. Smith*, and *Fowler v. Shearer*, *supra*, were decided, the principle has been restricted to those cases where a trust and confidence existed between the parties, which the defendant in the first suit acted upon, and such as was deemed sufficient under the circumstances, to excuse his neglect in not availing himself of the payments by way of defence in the former action. And therefore, where the plaintiff in the second suit appeared in the first and contested the point of damages, he was held not entitled to recover. (*Loring v. Mansfield*, 17 Mass. Rep. 394.)

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It is only where the question between the parties has been once decided upon confession, or verdict, that the judgment can be pleaded to bar another action. Hence, if a party fails by reason of a defect in his declaration, or by misconceiving his action, or by suing as executor when he was administrator, the judgment will be no bar in another action for the same cause. Accordingly, where the defendant in *scire facias*, on noli tuel record pleaded, prevailed because the *scire facias* stated a judgment against James H. Green, and the record was of a judgment against James Green; held, that

this constituted no bar to a second *scire facias*. (*Benton v. Duffy*, Cam. & Norw. 98.) So if a prisoner be acquitted of burning the barn of *Josiah T.*, he cannot plead this to an indictment for burning the barn of *Josias T.* (*The Commonwealth v. Mortimer*, 2 Virg. Cas. 325) So, a judgment in favor of the defendant, upon a demurrer to the declaration, is no bar to a subsequent suit for the same cause; (*Stevens v. Dunbar*, 1 Blackf. R. 56;) or on any other pleadings not going to the *foundation* of the action. (*Lane v. Harrison*, 6 Munf. Rep. 573.) And where the judgment was rendered on the ground of the insufficiency of the declaration, but by mistake or design was entered with a *nil capiat*, &c. instead of an *eat sine die*; held, that the defendant could not use it as a bar to a second action. (*Lampen v. Kedgewin*, 1 Mod. Rep. 207; and see *Kendal v. Talbot*, 1 Marsh. Ky. Rep. 321, 322.) If, however, notwithstanding the imperfections of the declaration, the defendant, without demurring, joins issue, and a trial is had between the parties upon the merits, a judgment against the plaintiff, while it stands unreversed, will bar any other suit for the same cause. (*Hughes v. Blake*, 1 Mason's Rep. 515, 519, per Story, J.) But it must appear that the trial was on the merits; for if the cause went off on a technical defect, it would virtually negative the averment that the causes of action were the same. (*id.*) So, if the cause went off because the debt was not due, or because the court had not jurisdiction, the judgment will constitute no bar to a recovery on the merits in another suit. (*Estill v. Taul*, 2 Verg. 467, 470, per Catron, J.) And upon the same principle, a judgment in a suit brought against the endorser of a note, rendered in favor of the endorsee, upon the ground that the suit was prematurely commenced, before notice had been given, will constitute no bar to a suit after notice. (*The New-England Bank v. Lewis*, 8 Pick. Rep. 113.) In these and similar cases, the merits of the second suit cannot be said to have been tried in the former, but were necessarily excluded, and therefore the plaintiff ought not to be barred. (See *M'Donald v. Rainor*, 8 John. Rep. 442; *Hutchins v. Fitch*, 4 id. 222; *The New-England Bank v. Lewis*, 8 Pick. Rep. 118, per Wilde, J., and see post, note 590, p. 837, 8.)

So, where judgment for the defendant has been rendered, on the ground of some temporary disability of the plaintiff to sue, as that he is an alien enemy, such judgment will form no bar to a suit brought after the disability shall have been removed. But the judgment changes the *onus probandi*, and in the second action the plaintiff will have to show that the disability no longer exists. This was said by Phelps, J., delivering the opinion of the court in *Dixon v. Sinclear*, (4 Verm. Rep. 354, 361.) The leading features of the case presented were as follows; a judgment had been rendered for the plaintiff by the mutual agreement of the parties, subject to the award of certain arbitrators, upon an offset pleaded; the arbitrators failing to make any award, the plaintiff brought debt on the judgment: the defendant pleaded that the judgment had been rendered on the condition above mentioned, and that he was ready and willing to proceed with the arbitration, but the plaintiff refused; the plaintiff replied, admitting the agreement, but denied the defendant's readiness and willingness to proceed with the arbitration, and alleged that he had refused to do so, though requested. Upon this, issue was joined, a trial had, and verdict and judgment rendered for the defendant. The plaintiff afterwards brought another action on the original judgment, and the defendant pleaded in bar the former judgment of the court in his favor. The plaintiff replied, setting forth the foregoing facts, and insisted that the former

judgment was not rendered upon the merits; and on demurrer to the replication, the court held that the defence relied on in the former suit was of a permanent character, and the replication insufficient. (*id.*)

A *discontinuance* of a former suit for the same cause, is no bar to a second action; (*Hull v. Blake*, 13 Mass. Rep. 153, 155;) nor is it evidence to show that the plaintiff, when he instituted the first suit, did not consider himself entitled to recover; no legal conclusion is to be drawn from so imperfect a proceeding. (*Sweigart v. Frey*, 8 Serg. & Rawle, 299, 305.) But a *retraxit*, it is said, is a bar; for it is an open and voluntary renunciation of the suit in court. (3 Black. Com. 296. Co. Litt. 138, b., et seq.) A *nonsuit*, however, is like a discontinuance; and even if rendered after a hearing upon the merits, it is no bar to a subsequent suit. (*Bridge v. Sumner*, 1 Pick. Rep. 371. *Melchart v. Halsey*, 3 Wils. Rep. 149. *Morgan v. Bliss*, 2 Mass. Rep. 113.) This rule however has some exceptions, and a nonsuit is, in a few instances, peremptory: thus, "in a quare impedit, if the plaintiff be nonsuit after appearance, the defendant shall make a title, and have a writ to the bishop; and this is peremptory to the plaintiff, and a good bar to another quare impedit." (Co. Litt. 139, a.) So in a writ *de nativo habendo*, in an appeal of murder, rape, robbery, &c. and in an attainder or an appeal of mayhem, if the plaintiff become nonsuit after appearance, it is peremptory; and a discontinuance will have the same effect. (*id.*) But "*exceptio probat regulam*"; for these cases excepted, stand upon their special and particular reason, and fall not within the general reason of the rule." (*id.*) In ordinary cases it is otherwise, and a judgment of nonsuit leaves the plaintiff at liberty to prosecute a new suit for the same cause. (*Bennett v. Hull*, 10 John. Rep. 364. *Brintnell v. Foster*, 7 Wend. Rep. 103. *Elwell v. M'Queen*, 10 *id.* 519.) A *nolle prosequi* is no bar. (*Lindsay v. The Commonwealth*, 2 Virg. Cas. 345.)

And a decision of the court in favor of the defendant, upon an agreed statement of facts, and a nonsuit entered with judgment thereon for the costs of the defendant, constitute no bar to a subsequent action. (*The Inhabitants of Knox v. The Inhabitants of Waldoborough*, 5 Greenl. Rep. 185.) But a judgment, in Kentucky, dismissing a suit "agreed," (which means that the parties have by their agreement adjusted the subject matter in controversy in that suit,) is a bar to any other suit for the same cause. (*The Bank of the Commonwealth v. Hopkins*, 2 Dana's Rep. 395.) And a judgment of the United States district court, affirmed by the supreme court, which concludes in these words, "judgment must be given for the defendant, and the plaintiff's petition must be dismissed," will be considered not as a nonsuit merely, but final in favor of the defendant, and as *res adjudicata* in another action for the same demand. (*Keene v. M'Donough*, 8 Mart. Lou. Rep. 185, 187.)

In New-York, where there is a trial before a justice of the peace, the plaintiff may elect to become nonsuit at any time before the cause is finally submitted to the judgment of the court; but after it is so submitted, the plaintiff cannot become nonsuit, nor withdraw his action; and though he endeavor to do so, the judgment, whatever may be the particular form of it, will be a bar to a second action. (*Hess v. Beckman*, 11 John. Rep. 457. *Elwell v. M'Queen*, 10 Wend. Rep. 519. *Brintnall v. Foster*, 7 *id.* 103.) But where there had been a trial on the merits, and a final submission for decision, yet nothing appearing upon the docket of the justice, save an entry in these words: "on hearing plaintiff's proof, ordered judgment of nonsuit; costs, \$1,88;"

held, that the judgment was no bar to a new suit for the same cause, notwithstanding the justice entered the judgment by mistake, supposing that no other than a judgment of nonsuit was proper, under the circumstances. (*Brintnall v. Foster*, 7 Wend. Rep. 103.) This was upon the ground, however, that the verity of the justice's docket could not be attacked collaterally, and that parol evidence to show that the justice went into the merits of the controversy, and should have given judgment final, was inadmissible. (*id.* 104.) In a subsequent case, where the docket showed a trial on the merits and submission for judgment, though the justice had entered judgment of nonsuit, yet the court held that it was a bar to a new suit for the same cause. (*Elwell v. McQueen*, 10 Wend. Rep. 519.) And though a plaintiff may elect to become nonsuit in a justice's court, after a trial by jury and before verdict, as in the higher courts; (*Platt v. Storer*, 5 John. Rep. 346;) yet, after verdict, the justice is bound peremptorily to render judgment according to it; and if he do not, the plaintiff is nevertheless barred of a new action for the same cause. (*Felter v. Mulliner*, 2 John. Rep. 181. *Young v. Overacker*, 2 *id.* 191.)

The record of a voluntary confession before a justice, and payment of the whole penalty, may be pleaded in bar to an action *qui tam*. These voluntary confessions of breaches of the minor statutes in the criminal code, the court will generally sanction; especially where the penalty is defined and fixed by law. But the court would hardly incline to screen an offender who had committed perhaps a violent battery, and induced the magistrate to impose a fine every way inadequate to the offence. (*Hamilton v. Williams*, 1 Tyler's Rep. 15.) This latter has been directly resolved in Virginia. (*The Commonwealth v. Jackson*, 2 Virg. Cas. 501.)

NOTE 590—p. 334.

So, where B. brought trespass against C. for an injury done to two horses, in consequence of which one of them died; the trespass on one of them was on one day, and on the other at another day; and the court, on motion of the defendant, compelled the plaintiff to elect for which trespass he would proceed, who thereupon elected to go for the injury done to the horse that survived, and he had a verdict accordingly. The executors of B. afterward brought another action for the trespass on the horse which died; the plaintiff, in his replication to the defendant's plea of a former recovery, set forth the above facts by way of protestando; and held, that though the replication was insufficient, in not denying a former recovery for the same matter, yet the former recovery was no bar, since it appeared that the injury done to the horse which died, was not taken into consideration by the jury. (*Snider v. Croy*, 2 John. Rep. 227. See S. P., *Phillips v. Berrick*, 16 *id.* 136; *Hale v. Andrus*, 6 Cowen's Rep. 225; *Wheeler v. Van Houten*, 12 John. Rep. 311, 313.) *Snider v. Croy*, supra, has been very seriously questioned in Pennsylvania, on the ground, that as the plaintiff in the first suit had thought proper to blend distinct and independent causes of action in the same count, thus treating them as constituting one indivisible claim, it was not competent in the second suit to show that both were not litigated and determined, for that would be in contradiction of the former record. (*Hess v. Heeble*, 6 Serg. & Rawle, 57, 60; S. C., 4 *id.* 246.) For this reason, Gib-

son, J., who delivered the opinion, deemed the decision against principle, and not authorized by *Seddon v. Tutop*, cited in the text, which it professes to follow. But quere; for *Seddon v. Tutop* was decided upon no such technical distinction, but upon the broad ground, that the cause of action in the second suit had not in fact been litigated in the first. And the judges, delivering their opinions, refer to *Hitchin v. Campbell*, (2 W. Black. 827, 3 Wils. 304, S. C.,) where the principle is conceded, that if the real merits of the second action have not been decided in the first, the prior judgment is no bar. (See 2 Starkie's Ev. 199, 200, S. P.; also the next preceding note; and *Godson v. Smith*, 2 Moore's Rep. 157.)

And this leads us to observe, that whenever, as in the foregoing cases and others of a kindred character, a question is made respecting the identity of the matters litigated in the first suit, parol evidence is admissible to show what transpired upon the former trial, and thus explain the record. (*Parker v. Thompson*, 3 Pick. Rep. 429. *Cist v. Zeigler*, 16 Serg. & Rawle, 282, 285. *Stevens v. Payne*, 2 Root's Rep. 83. *Wood v. Jackson*, 8 Wend. Rep. 9. *Burt v. Sternburgh*, 4 Cowen's Rep. 559. *Gardner v. Buckbee*, 3 id. 120.) If the record shows that the first suit was *apparently* for the same cause of action sought to be litigated in the second, it will be *prima facie* evidence that such cause of action has once passed in *rem judicatem*; and hence the onus will devolve upon the party, against whom the record is used, to show the contrary. (*Phillips v. Berrick*, 16 John. Rep. 136. *Hale v. Andrus*, 6 Cowen's Rep. 225. *Snyder v. Croy*, 2 John. R. 227. *Wilson v. Hamilton*, 9 Serg. & Rawle, 424. *Cutler v. Cox*, 2 Blackf. 178. *Squires v. Whipple*, 2 Verm. Rep. 111, 114. *Pickett v. Clairborne*, 4 Call's Rep. 99, 106. *Young v. Black*, 7 Cranch, 565. *Lord Bagot v. Williams*, 3 Barn. & Cress. 239. *Roscoe on Ev.* 101.) And this he should do in no equivocal manner, but by clear and decisive testimony, which shall remove all reasonable doubt. (See per Lord Kenyon, C. J., *Seddon v. Tutop*, cited in the text; also per *Duncan, J.*, *Wilson v. Hamilton*, 9 Serg. & Rawle, 424, 429.)

There are cases which seem to discountenance the admissibility of evidence aliunde in aid of a record: thus, in *Sintzenick v. Lucas*, (1 Esp. N. P. C. 43,) the action was for unskillfully varnishing certain prints. On the trial, Garrow, for the defendant, after the plaintiff had stated his case, took a preliminary objection, which, if sufficient, went to the ground of the action: it was this, that an action had been brought by the present defendant against the present plaintiff, in the common pleas, for work and labor, which work and labor was the varnishing of these identical prints. He contended that the present plaintiff might have set up, as matter of defence to the first suit, that the prints had been spoiled, and hence that the verdict in that action was conclusive evidence that the varnishing of these prints had been done in a skilful and workmanlike manner, agreeably to the doctrine, ante, note 588, p. 830. He therefore tendered the record, in that action, as conclusive evidence in this. *Erskine*, for the plaintiff, said that the pleadings in that action were for work and labor generally, with a plea of the general issue. And Lord Kenyon "was clearly of opinion, that the record offered in evidence could not conclude the present action, or prove any thing in the case. That in order to make a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself; nor should evidence be admitted, that under such a record, any particular matter came in question. That the record of the cause in the common pleas was general, applying to every case of

work and labor; and to inquire whether the object of it was to recover for the work done in varnishing the prints; and whether the defendant in that action had availed himself of the circumstance of their having been unskilfully done, would be to try that cause over again in this court. His lordship therefore rejected the evidence." (id.; and see *S. P., Church v. Leavenworth*, 4 Day's R. 274, 277, per Swift, J.; *Ryer v. Atwater*, id. 431, 433, per Swift, J.; *Smith v. Sherwood*, 4 Conn. R. 276, 282, per Hosmer, C. J.; *Bradford v. Bradford*, 5 id. 127.) But the great preponderance of American authority is in favor of the admission of parol evidence, as will be seen by the cases before referred to in this note. Indeed, this principle of admitting evidence aliunde, to explain a record of a former suit, and identify the matters to which it relates, would appear to be indispensable to the efficient administration of justice. Suppose, for instance, A. has brought an action against B., in which he declared for goods, wares and merchandise, sold and delivered, and recovered judgment. He then brings an action of trover against B., for taking and converting the identical property, the value of which he obtained satisfaction for in the first suit. But this identity does not appear by the former record, for the declaration there was general, specifying nothing. How then is B. to protect himself against being made liable a second time for the same thing, unless he is allowed to introduce evidence aliunde in explanation of the former record? Or take the very case of *Sitzenick v. Lucas*, supra, which is the nucleus of most of the authorities denying the admissibility of this kind of evidence. Suppose that the damages which the plaintiff claimed in the latter suit, had in point of fact, been litigated in the former, by way of defence, and allowed to him; if the doctrine which *Ld. Kenyon* is reported to have advanced, be correct, nothing could prevent the plaintiff from obliging the defendant to respond twice for the same injury. Or had the plaintiff, in the latter suit, neglected to avail himself of the matters upon which he predicated his right of recovery, as a defence in the former suit, in which case he would be barred, (see ante, note, 588 p. 830,) the defendant, according to the doctrine laid down by his lordship, must inevitably be precluded from availing himself of this defence, because he could not inquire whether the object of the first suit was to recover for the work done in varnishing the prints. It appears to us that such a principle, if adopted and carried out, would subvert some of the most salutary maxims of the law, and open a door to the most vexatious litigation, and the grossest injustice. "Every fact which exists on record must be proved by the record; but when the question is as to the real subject matter of a suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proved by other than record evidence." (Per Parker, C. J., *Parker v. Thompson*, 3 Pick. 429, 433, 4. See *Kilheffer v. Herr*, 17 Serg. & Rawle, 319, 226, per Houston, J.) Whether any matter has been tried between the same parties, and decided before, is a fact depending in part on parol evidence, and partly on the record. (*Cist v. Zeigler*, 16 Serg. & Rawle, 252, 255. *Crotzer v. Russell*, 9 id. 81, 83.) And such is the doctrine in England, no less than in this country. (See 2 Starkie's Ev. 200. 2 Ev. Poth. 347. *Seddon v. Tutop*, 6 Durn. & East, 607. *Martin v. Thornton*, 4 Esp. N. P. C. 180. *Lord Bagot v. Williams*, 3 Barn. & Cress. 239.)

But although you can explain, it is not competent to add to or contradict a record. (See ante, p. 316, et seq. of the text, and notes 550, 551, p. 799.) Hence, where the record of a former suit shows distinctly what matters were in issue and decided, pa-

rol evidence is inadmissible to establish that other matters, not within the issue, were likewise decided. This we deem a fair deduction from most of the cases above referred to, and will be found, moreover, directly sustained by *Manny v. Harris*, (2 John. Rep. 24.) There the point specifically put in issue in the former suit was, whether Harris had or had not tendered the monies due, to entitle himself to a deed for the land contracted to be sold; and the question was, whether the defendant in the latter suit could be permitted to prove that the demand claimed by the plaintiff, though not in issue, was taken into consideration and allowed to him. The court held that such evidence was inadmissible. And Spencer, J., who delivered the opinion, went expressly upon the ground, that by the record of the former suit, it appeared the issue did not warrant the giving of the plaintiff's demand in evidence; and hence evidence aliunde in the latter suit, to show that the jury in the former *did* decide upon it, ought not to be received. (id. 29, 30.) *Manny v. Harris* has been sometimes construed, as going the whole extent of denying the admissibility of parol evidence in aid of a former verdict and judgment, in all cases. We therefore find it, especially in the American reports, "cheek by jowl" with *Sintzenick v. Lucas*, supra, and quoted by judges and counsel, as sustaining exactly the same principle. A moment's attention will serve to show that this is an entire misapprehension. In *Sintzenick v. Lucas*, the matter sought to be affected by the former proceeding *was within the issue* joined, and might well have been there litigated and decided. In *Manny v. Harris*, on the contrary, the matter *was not in issue*, and could not have been decided. *Sintzenick v. Lucas*, therefore, decides that you shall not *explain* a record by parol evidence; *Manny v. Harris* merely says, that you shall not *add* to or *contradict* it. See further on this subject, post note 594, p. 847, 8.)

NOTE 591—p. 334.

See *Golightly v. Jellicoe*, 4 Durn. & East, 147, note (a), S. P.

But if the subject matter of the action were embraced by the terms of the submission, then the award would be a bar, even though such subject matter had not been inquired into by the arbitrators. This we deem consistent with what was said by Lord Mansfield in *Golightly v. Jellicoe*, supra, and by Buller, J. in *Ravee v. Farmer*, cited in the text. And accordingly, in *Smith v. Johnson*, (15 East, 213,) where the submission was of all manner of actions and causes of action, and the defendant claimed a deduction from the award for a charge which had not been brought forward before the arbitrators, Lord Ellenborough said, "Here is a reference of all matters in difference; and it appears that the subject, in respect of which the deduction is now claimed, was a matter in difference at the time, and within the scope of the reference: notwithstanding which, the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it, in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore, without deciding against the authority of *Golightly v. Jellicoe*, or the case cited from the civil law, I think that where all matters in difference are referred, the party, as to every matter included within the subject of such reference, ought to come forward with the whole of his case." And

per Baily, J. (id. 215 :) "The defendant, in order to entitle himself to claim this deduction, should have shown that it was not matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration." The court held the deduction not allowable. And it has been held in New-York, that an award upon a submission of *all demands*, is conclusive as to every thing constituting a demand upon the one side or the other, at the time of submission; and evidence to show that any particular demand was not inquired into before the arbitrators, nor passed upon by them, is inadmissible. (*Wheeler v. Van Houten*, 12 John. Rep. 311.) "It would be a very dangerous precedent," say the court, "to allow a party, on a submission so general, intended to settle every thing between the parties, to lie by, and submit only part of his demands, and then institute a suit for the part not brought before the arbitrators. The object of the submission was to avoid litigation; and neither party is at liberty to withhold a demand from the cognizance of the arbitrators, on such a submission, and then to sue for it." (id. 313; see also *De Long v. Stanton*, 9 id. 38.) A submission of *all demands* includes questions concerning real as well as personal property. (*Munro v. Alaire*, 2 Cain. Rep. 320, 327. *Sellick v. Adams*, 15 John. Rep. 197. *Marks v. Marriott*, 1 Ld. Raym. 114.) Where the defendant introduced an award, reciting that the parties had submitted "*certain disputes, controversies, charges and demands*," and it appeared that the agreement to submit was by parol; held, that as the award did not purport to cover *all demands*, it was only *prima facie* evidence that the subject matter of the present action was barred, and that parol evidence was admissible, on the part of the plaintiff, to show what claims were actually put before the arbitrator. (*Birbeck v. Burrows*, 2 Hall's Rep. N. Y. C. P. 51.) But where the subject matter of the action was clearly within the terms of the submission, the award, according to *Wheeler v. Van Houten*, *supra*, will be a bar; and evidence to show that by mistake the arbitrators omitted to allow for it, will not alter its effect, and is inadmissible: so with regard to evidence going to impeach an award for partiality or corruption. (*Newland v. Douglass*, 2 John. Rep. 62. *Barlow v. Todd*, 3 id. 367.) This must be understood, however, with reference to a court of law; for chancery may relieve in such cases, and for that purpose may inquire freely into the mistake, or as to the partiality and corruption charged. (id; and see 3 Atk. 644; 2 Wils. 148; 1 Salk. 73.) In New-Hampshire, a submission of all demands, and an award thereon, will only bar matters actually brought before the arbitrators; (*Whittemore v. Whittemore*, 2 New-Hamp. Rep. 26;) so also in Maine; (*Bixby v. Whitney*, 5 Greenl. Rep. 192;) and in Massachusetts; (*Smith v. Whiting*, 11 Mass. Rep. 445; *Webster v. Lee*, 5 id. 334; *Hodges v. Hodges*, 9 id. 320;) and it would seem that the same rule prevails in Kentucky; (*Engleman's ex'rs v. Engleman*, 1 Dana, 437;) and in Vermont, especially where the submission was by parol. (*Buck v. Buck*, 2 Verm. Rep. 417.) The court, however, said in this case that they were not prepared to open the door to go back of written submissions that are general and the awards general. (id. 421.) In all these cases, where the award is merely conclusive as to the matters actually laid before the arbitrators, it is of course proper to show, by parol or other competent evidence, that the particular demand sought to be barred was not laid before them.

NOTE 592—p. 334.

S. C., 5 Dowl. & Ryl. 87.

Where a plaintiff offers evidence in relation to a claim contained in one count of his declaration, which evidence is rejected by the judge, and the plaintiff, instead of striking out the count to which such evidence is applicable, suffers a general verdict to pass on the whole case, the judgment thereon will bar a new action for the claim so attempted to be established. (*Smith v. Whiting*, 11 Mass. Rep. 445.) But where a widow sued an executor of her former husband for money had and received, and on the trial, to prove one portion of her demand, gave in evidence the inventory and administration account of the defendant, charging himself with the very demand; but the defendant rebutted this evidence, by counter proof, that the monies claimed had never been received by him, and thus defeated a recovery for that portion of the alleged ground of action; held, that the judgment was not a bar to a subsequent suit, brought by the widow, after the money had been received by the executor. (*Wilson v. Hamilton*, 9 Serg. & Rawle, 424.) If, however, a claim is submitted to a jury, and they disallow it, or allow less than the plaintiff is entitled to recover, a verdict and judgment thereon are a conclusive bar to a second action for the same cause. (*Brockway v. Kinney*, 2 John. Rep. 210. *Phillips v. Berrick*, 16 id. 136. *Platner v. Best*, 11 id. 530. *Irwin v. Knox*, id. 365.) Should the plaintiff, in such case, not wish to hazard a verdict in the first suit, he ought to enter a *nolle prosequi* on the charge or claim, and thus withdraw it from the consideration of the jury. (*Brockway v. Kinney*, *supra*.)

This, however, can only be done in those cases where the plaintiff's demand is divisible; for where it consists of a claim indivisible in its nature, the defendant cannot be vexed by having it split up into separate causes of action; and a judgment in a suit for part of the claim is a bar to a subsequent action for the remainder. Thus, where several actions of trover were brought for the taking of several articles of goods at the same time and by one act, it was held, that a judgment for a part of the articles was a bar to any other action for the residue. (*Farrington et al. v. Payne*, 15 John. Rep. 432. *Bates v. Quattleborn*, 2 Nott & M'Cord, 205, S. P.) So where trover was brought for a horse, held that trespass for *taking* the same horse could not afterward be maintained; for though, in trespass, the plaintiff might have recovered damages, not only for the force and violence in taking the horse, yet, having elected to sue for the horse only, or its value, he is bound by his election, and shall not be permitted to carve two suits out of one cause of action. (*Hite v. Long*, 6 Rand. Rep. 457.) So of an entire contract for the payment of money; (*Willard v. Sperry*, 16 John. Rep. 121;) or for the sale of goods; (*Smith v. Jones*, 15 id. 229; *Phillips v. Berrick*, 16 id. 136.) And an account for goods sold and delivered, consisting of several distinct items, delivered on divers days, but all due, is an entire demand within the meaning of this principle, and a recovery for a part is a bar to any action for the residue. (*Gurnsey v. Carver*, 8 Wend. Rep. 492. *Bunell v. Pinto*, 2 Conn. Rep. 431; and see *Lane v. Cook*, 3 Day's Rep. 255.) And where a party brings an action for a *part* of an entire and indivisible demand, and obtains judgment in such action, he cannot subsequently avail himself of the *residue*, by way

of set-off, in an action against him by the opposite party. (*Miller v. Covert*, 1 Wend. Rep. 497.) Nor can a party, by assigning part of his claim to another, divide an entire cause of action, nor by any means sustain more than one suit on it; and if two suits be brought, a recovery in the first will bar the second. (*Ingraham v. Hall*, 11 Serg. & Rawle, 78.)

In Massachusetts, where the plaintiffs were owners of a close and a mill thereon, on the north side of a river, and their mill-dam was rightfully extended to land on the other side, which they did not own; and the defendants crossed the river below the plaintiff's land, and destroyed a part of the dam on the south side; having effected their object, they re-crossed the river at the same place, and went upon the plaintiff's close: held, that the destruction of the dam, and the entry upon the close, were distinct trespasses, so that a judgment in trespass *quare clausum fregit* for the latter would be no bar to a like action for the former. (*White v. Moseley et al.*, 8 Pick. Rep. 356.)

It is sometimes made a question, how far, and under what circumstances, a judgment in a former suit will bar a recovery for damages subsequently sustained from the same cause complained of in the first action. In *Fetter v. Beale*, (1 Salk. 11,) a man brought an action of assault and battery for beating his head upon the ground, and recovered. Afterwards, a piece of his skull came out, in consequence of the battery, and he sued again; but the former recovery was held to bar the second suit. Shower urged, in this case, that the subsequent damage was a new matter, which could not be given in evidence in the first suit, as it was not then known; and compared it to a nuisance, where every new dropping is a new act. But per Holt, C. J.: "Every new dropping is a new nuisance, (see *Shadwell v. Hutchinson*, 4 Carr. & Payne, 333.) but here is not a new battery; and in trespass, the grievousness or consequence of the battery is not the ground of action, but the measure of damages, which the jury must be supposed to have considered at the trial." (id.) So where the plaintiff sued for breach of covenant, in not delivering a good and sufficient New-Orleans boat, and was defeated; but afterwards brought an action of fraud, alleging deceit in the delivery in not disclosing certain latent defects; held, that both actions were substantially for the same cause, and though the plaintiff, since the action of covenant, had sustained further damages from the defendant's misconduct in respect to the delivery, yet such damages could constitute no new cause of action, and that therefore the whole was barred. (*Cutler v. Cox*, 2 Blackf. 178, 181.) And where a landlord had sued his tenant under the statute, and recovered double rent; held, that he could not bring case, afterwards, against the tenant, though he had lost the sale of the premises in consequence of such holding over. (*Crips v. Talavande*, 4 M'Cord's Rep. 20.) But if money is awarded to be paid at different times, *assumpsit* will lie on the award for each sum as it becomes due. (*Cooke v. Whorwood*, 3 Saund. Rep. 337. *Wilson v. Hamilton*, 9 Serg. & Rawle, 424, 429, S. P.) And it seems, that on a promise to indemnify, one action may be brought, and a recovery had for a breach or breaches; and then a subsequent action on the same promise, for another breach or breaches, happening after the first recovery. (*Hale v. Andrus*, 6 Cowen's Rep. 225.)

NOTE 593—p. 354.

A. brought an action of libel against B. for charging him with being a liar; to which B. plead a justification, alleging that the charge was true; and on the trial, to support his plea, B. offered in evidence the record of a former suit for slander, brought by him against A., to which the latter plead not guilty, and in which B. obtained a verdict and judgment: the object of this evidence was to show, it seems, the falsity of the words charged as slanderous in the first suit, and thus convict A. of having lied in that instance; it was inadmissible in many points of view, but the court, in pronouncing their opinion, put its rejection upon the ground, that it did not and could not establish what was designed to be made out by it: "If, indeed," say they, "the defendant in the former suit had put his defence on the truth of the charge, and had failed in the proof, it would have been his misfortune, and the matter having once passed in *rem judicatem*, he would have been precluded from contesting it when again coming in question incidentally in a second suit;" but, it is added, "his having refused to rest his defence on the truth of the words laid, is so far from being a conclusive acknowledgment that they were untrue, that it does not raise even a presumption that they were so, because it might, under all the circumstances, have been most eligible to trust to the plaintiff's inability to prove the speaking, or to avoid the risk of enhanced damages, from persisting in an unsupported accusation. A verdict is conclusive as to the fact found, and its operation would therefore be intolerably severe, if it were extended to any thing but what was directly and expressly passed upon;" (*Magaurin v. Patterson*, 6 Serg. & Rawle, 278, 280;) *aliter*, however, it appears as to the speaking of the words, for that fact was expressly passed upon. (*id.*) Further, see the next note and cases there cited; also ante, note 587, p. 826.

NOTE 594—p. 355.

The principal reason assigned for Lord Mansfield's decision in *Sir F. Evelyn v. Haynes*, cited in the text, is, "that no issue was taken in the first action upon any precise point." This doctrine has been followed by some American cases. In *Standish v. Parker*, (2 Pick. Rep. 20,) an action on the case was brought for obstructing a way, claimed by the plaintiff as appurtenant to his land; the general issue was pleaded by the defendant, and a verdict found for the plaintiff. Afterward the defendant petitioned for a new trial, which the court inclined to grant, provided the verdict and judgment in that suit could be made to conclude the petitioner in a new action for a continuance of the supposed injury. They, however, on examination, came to a different opinion, and held that nothing was finally determined by the verdict, save the damages for the interruption covered by the declaration; and that in a new suit, the petitioner might contest the respondent's right to the easement in question, with the same freedom as if no verdict had been rendered relating to the matter. "The principle adopted," says Parker, C. J., delivering the opinion of the court, "is, that in actions of trespass, or for torts generally, nothing is conclusively settled but the point or points put directly in issue. Thus, in trespass, upon not guilty pleaded, the title is not

concluded; though if the title is put in issue by plea of soil and freehold, the verdict will be conclusive in another action of trespass, for an injury done to the same land. So in actions on the case for interruption of lights and other easements, on the general issue, the title is not settled, though if the defendant pleads a title in bar, and issue is taken on it, the verdict shall settle that point for future actions." (S. P., see *Smith v. Sherwood*, 4 Conn. Rep. 276, per Hosmer, C. J.; *Church v. Leavenworth*, 4 Day's Rep. 274, 277, per Swift, J.; *id.* 281, per Baldwin, J.; *Richmond v. Hays*, 2 Penn. Rep. 492, 3, per Kirkpatrick, C. J.; *Cowles v. Harts*, 3 Conn. Rep. 516.) And in *Ryer v. Atwater*, (4 Day's Rep. 431.) Swift, J., says, "that when there are several distinct facts, which constitute the points contested between the parties, no authority can be found that will warrant the admission of a verdict, as evidence to prove one of the several facts put in issue. In the cases reported the verdict goes to the whole point, in issue, and not to a part of the facts." (*id.* 434.)

Thus much is perhaps true, that when a judgment is used in pleading as a *technical estoppel*, or is relied on by way of evidence as something *conclusive, per se*, between the parties, it must appear by the record of the prior suit, that the particular controversy so sought to be precluded, was there necessarily tried and determined. In other words, if, in such cases, the former record clearly shows that the judgment to which this effect is ascribed, could not have passed without deciding a particular matter, it will be considered as having settled that matter for all future actions; but otherwise not. Hence, a verdict and judgment for the defendant, on the general issue pleaded, in which the plaintiff claimed damages, consequent upon the defendant's act in wrongfully raising his mill-dam, will not estop the plaintiff from alleging the same act as the occasion of damages subsequently sustained. For the finding in the former action may have been on the ground that the plaintiff was not injured by the raising of the dam, or had released his cause of action, or had given the defendant permission to do the act complained of, &c. and did not necessarily determine the defendant's right to raise his dam and continue it in that state. (*Shafer v. Stonebraker*, 4 Gill & John. 345, 355, 6.) So in Maine, a verdict and judgment in favor of the tenant, upon the general issue in a writ of entry, is not conclusive evidence, *per se*, of title in him; for the statute (1826, ch. 344,) having declared that such plea shall not be taken as an admission of the tenant's seisin and possession, it may be that he prevailed because he was not proved in possession. (*Cutts v. King*, 5 Greenl. Rep. 482. See *Vaughan v. The Commonwealth*, 2 Virg. Cas. 273.) But a former verdict and judgment for the plaintiff, in replevin on the issue of no rent in arrear, is a bar to an action for use and occupation for the same rent, for which distress was made; and indeed to every action where the rent is again demanded. (*Cist v. Zeigler*, 16 Serg. & Rawle, 282.) These are principles upon which most of our American authorities seem to unite. (See *Spooner v. Davis*, 7 Pick. Rep. 147; *Melvin v. Whiting*, *id.* 79; *Cleaton v. Chambliss*, 6 Rand. 86; *Smith v. Sherwood*, 4 Conn. Rep. 276; *Ryer v. Atwater*, 4 Day's Rep. 433; *Green v. Thompson*, 5 Greenl. Rep. 224; *Maguarin v. Paterson*, 6 Serg. & Rawle, 278; *Burt v. Place*, 4 Wend. Rep. 591; *Kilheiffer v. Herr*, 16 Serg. & Rawle, 319; *Wood v. Jackson*, 8 Wend. Rep. 1, 36, 45; *Lawrence v. Hunt*, 10 *id.* 80, 82, 3, per Nelson, J. See also *Rex v. Knappstoft*, 4 Dowl. & Ryl. 469, S. P.; *Bradford v. Bradford*, 5 Conn. Rep. 127; *Betts v. Starr*, *id.* 550; *Dennison v. Hyde*, 6 *id.* 508; *Hopkins v. Lee*, 6 Wheat. Rep. 109.) But *Standish v.*

Parker, *supra*, and Sir F. Evelyn v. Haynes, have undeniably gone much further; indeed we fear, that should these adjudications be generally sanctioned, they will so restrict that salutary axiom of legal policy, "*nemo debet bis vexari pro eadem causa*," as to leave it little more than a mere speculative value. Let it be observed, that in both cases the facts essential to the plaintiffs' right, were charged in the respective declarations, and put in issue by the general plea of not guilty. The jury could not have found as they did in either case, without *necessarily deciding* that the facts thus alleged on one side and denied on the other, were true. The claim of right, therefore, on the part of the plaintiffs, had in every legitimate sense been distinctly put in issue and directly determined; all this appeared unequivocally and expressly from the record of the former suit; and to say that the judgment rendered therein should be inconclusive, because the issue was not upon a "*precise point*," appears to us to be forsaking the substance for a shadow. A better ground for Lord Mansfield's opinion "might, perhaps, be found in the suggestion that, although the finding of the jury did assert the right to exist in the plaintiff at the time of its violation, for which indemnity is recovered in the first suit; yet, that it does not irresistibly follow that its existence continued during the time of the injury complained of in the second." (See *per* Dorsey, J., *Shafer v. Stonebraker*, 4 Gill & John. 345, 357, 8.) Such appears to be the doctrine in Massachusetts, as settled since *Standish v. Parker*, *supra*, on the same parties coming before the court in a subsequent suit, for a continuance of the like obstruction. At the trial before Wilde, J., the former record was offered, but rejected, because the trial there was had on the general issue, and the right of way not put directly in issue by the pleadings. On motion for a new trial, the plaintiff's counsel contended that, as the plaintiffs in the former suit could not have recovered in that action without proving a right of way in them, the judgment was therefore sufficient to throw the burden on the other side, to show that this right had been divested or the obstruction removed. The defendant's counsel relied on *Standish v. Parker*, *supra*, without citing any other authority; and *per Curiam*,—"for the reason assigned by the plaintiffs' counsel, we think the record in the former action was admissible evidence, though not conclusive." (*Parker v. Standish*, 3 Pick. Rep. 298, 9.) Accordingly, a new trial was granted. If the court intended, as we believe they did, to adopt the proposition advanced by the plaintiffs' counsel, viz., that in order to avoid the effect of the former judgment, the defendant must show that the right there established had been divested, or the obstruction removed; then we are at liberty to suppose that they meant to be understood as holding also, that the former judgment was *conclusive* upon the existence of the right claimed at the time to which the judgment related, and *prima facie* evidence only of its continuance. And we have heard it intimated that Lord Mansfield's opinion in *Sir F. Evelyn v. Haynes*, should be construed in this way; but the statement of that case by Lord Ellenborough in 3 East, 365, will hardly admit of such a construction; there the former judgment is reported to have been held not conclusive upon the right of the plaintiff, *because* it could not have been used in pleading by way of estoppel; and it could not have been so used, *because* "no issue was taken in the first action upon any precise point." It is proper to infer, therefore, that if, instead of pleading not guilty in the first suit, the defendant had specifically put in issue the precise point of right claimed by the plaintiff, and that alone, the judgment would have been pleadable by way of estoppel, and hence conclusive. And yet the same thing

might still be said, viz., that it did not follow that such right continued to the time of the second obstruction of the water course. How does this case agree with the one of *Strutt v. Bovingdon*? (5 Esp. N. P. C. 56.) That was an action against B. and others, for diverting water from the plaintiff's mills. On the trial, the plaintiff gave in evidence a former action, brought many years before, by the same plaintiff against B., (under whom the defendants justified,) for similar injuries to those complained of in the latter suit, in which the plaintiff relied on the same right and recovered. We do not learn from the report that there was any thing like a "*precise point*" in issue, or in other words, an issue joined upon the specific question of right and that exclusively, appearing upon the record of the former judgment; and yet, notwithstanding the objection that the defendants were not the same in both suits, Lord Ellenborough said, "he should think himself bound to tell the jury to consider it as conclusive of the rights of the parties." So Mr. Starkie lays down the doctrine, that it is not necessary that the fact to be proved by the record, should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of that verdict; and he cites *Rex v. Pancras*, (Peake's Cas. 219,) where a verdict against a division of a parish for not repairing a road, was held afterward conclusive as to the obligation to repair, although the verdict also included another fact, viz., that the road was out of repair, (2 Starkie's Ev. 200,) "if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence that the whole parish is bound to repair, unless fraud can be shewn." (2 Saund. Rep. 159, a., n. (10).) See ante, note 587, p. 827, and cases there cited.

Widely different from *Sir F. Evelyn v. Haynes*, and *Standish v. Parker*, is the doctrine held in New-York. The courts there, have not even restricted the conclusiveness of former judgments to cases where the record showed that the point sought to be bound by it was necessarily determined; but have given to the principle a still broader range and a more efficient operation. Thus, in *Gardner v. Buckbee*, (3 Cowen's Rep. 120,) two notes had been given upon the sale of a vessel; one of the notes had been prosecuted in the marine court of the city of New-York, where the defendant pleaded the general issue, and gave notice of a total failure of consideration, because of fraud in the sale of the vessel, and on that ground succeeded in his defence. Afterward the second note was prosecuted, and on the trial the defendant offered in evidence the record of the former suit. The supreme court held that the record, with proof aliunde that fraud in the transaction was the ground upon which the verdict was founded, were conclusive against the plaintiff. Woodworth, J., who delivered the opinion, adopts the rule laid down by De Grey, Ch. J., in the *Dutchess of Kingston's* case, and then says: "I am not aware that it has been departed from by our courts. The general principle does not appear to be controverted by the counsel for the defendant in error; but it is urged that the judgment in the marine court does not affirm any particular fact in this issue, but is general and indefinite; and that from the language of the record, it cannot be inferred whether the two cases were founded on the same or a different state of facts. It is true the record merely proves the pleadings, and that judgment was rendered for the defendant. Without other proof it would not make out a defence. The record shows that it was competent on the trial to establish the fraud of the plaintiff. Whether fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrin-

sic the record. To do so is not inconsistent with the record, nor does it impugn its verity. The jury must have passed upon the fraud. It was directly in question. *Scott* testifies that the unseaworthiness was not disclosed at the time of the sale to the defendant. The inquiry then was solely directed to the question, was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between the parties on these points, and is an effectual bar to the action to recover the residue of the consideration money." (id. 126, 7.) So also in *Burt v. Sternbergh*, (4 Cowen's Rep. 559.) That was an action of trespass, *quare clausum fregit*, in which the defendant claimed title to the premises. At the circuit the plaintiff offered a record of a former suit for a trespass upon the same premises, in which the plaintiff had recovered; and accompanied it with parol evidence, to show that the defendant on that occasion set up the same title relied on by him in the latter suit. The judge decided that such record and evidence were conclusive as to the plaintiff's title, and the supreme court sustained the decision. It was there put upon the ground that the record, together with the evidence aliunde, showed that the former verdict must have turned on the point of title—the precise question which the defendant sought again to agitate. "The decision of the judge," say the court, "that the former recovery, and the evidence offered by the plaintiff, were conclusive evidence of the plaintiff's title, must be understood as having been made after the defendant had disclosed the defence and title on which he relied; and as determining nothing more than that, in relation to that title, the recovery and evidence were conclusive." But the defendant might have shown, if he could, that he had acquired title since the former trial, or any title other than that which had been passed upon in the former trial. (id. 563, 4.) These cases were succeeded by *Jackson v. Wood*, (3 Wend. Rep. 27,) where the same court, apparently without advertent to their previous decisions, held, that to make a record evidence to conclude any matter, it must appear from the record itself, that such matter was in issue, and that evidence aliunde, to show what came in question under it, was inadmissible. The leading authorities relied on by Marcy, J., who delivered the opinion, are *Sintzenick v. Lucas*, (1 Esp. N. P. C. 43,) *Manny v. Harris*, (2 John. Rep. 24,) *Smith v. Sherwood*, (4 Conn. Rep. 276,) *Ryer v. Atwater*, (4 Day's Rep. 433,) *Outram v. Morewood*, (3 East, 346,) most of which do measurably, and some of them expressly countenance the result at which he arrived. But afterward, the case coming before the court of errors, the judgment of the supreme court was unanimously reversed; (*Wood v. Jackson*, (8 Wend. Rep. 9;) thus restoring in effect the previous adjudications of *Gardner v. Buckbee*, and *Burt v. Sternbergh*, *supra*. The New-York doctrine, then, may be stated thus: that a verdict and judgment are conclusive upon any matter legitimately within the issue, and necessarily and directly found by the jury; and that where the record itself does not show that the matter was necessarily and directly found, evidence aliunde, consistent with such record, may be received to prove the fact. If the matter was not within the issue, and could not rightly have been litigated in the former action, parol evidence will not be allowed to show that it was passed upon; and so, even though the matter might properly have been controverted in the former suit, if it be not shewn that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded. (*Lawrence v. Hunt*, 10 Wend. Rep. 80.) As to the admissibility of parol evidence in aid of the effect of a record, see

ante, note 590, p. 837. See also, ante, note 558, p. 804, as to the difference between a former judgment when *pleaded*, and when used *as evidence*.

NOTE 595—p. 335.

In New-York, a former recovery cannot be given in evidence under the general issue in an action of trespass; e. g. an action of assault and battery. (Coles v. Carter, 6 Cowen's Rep. 691.) So in a special action on the case for fraud. (Brown v. Wilde, 12 John. Rep. 455.)

NOTE 596—p. 335.

See Bird v. Randall, 3 Burr. 1345, 1353; 1 Chitty's Pl. 472, 3; Gould's Pl. 330.

Whether in New-York, a former trial and judgment between the same parties can be given in evidence under the general issue, in an action of assumpsit, seems to be left in some doubt. It has been held, that in a justice's court, where at least as great latitude in pleading is allowed as in the higher courts, that the party must plead such judgment specially, or give notice of it. (Dexter v. Hazen, 10 John. Rep. 246. Fowler v. Wait, 10 id. 111. See Gardner v. Buckbee, 3 Cowen's Rep. 120. Cowles v. Carter, 6 id. 691.) In Pennsylvania, a former recovery may be given in evidence in assumpsit, under the general issue, and, it seems, is conclusive. (Kilheffer v. Herr, 17 Serg. & Rawle, 335. See Marsh v. Pier, 4 Rawle, 273, 287, 8.) Such is clearly the doctrine in the Supreme Court of the United States, (Young v. Black, 7 Cranch, 565, 567;) and in Vermont, (Squires v. Whiple, 2 Vermont Rep. 111, 115;) not so however in Ohio; there a former recovery must be pleaded, or notice given of it with the general issue, before it can be admitted. (Inman v. Jenkins, 3 Hamm. Rep. 271.)

NOTE 597—p. 335.

See Kent v. Kent, 2 Mass. Rep. 338. Richmond v. Hays, 2 Penn. Rep. 492

NOTE 598—p. 336.

In an action for mesne profits, the record of the ejectment suit is conclusive evidence of title in the plaintiff, from the time of the demise laid in the declaration. (Graves v. Joice, 5 Cowen's Rep. 261. Van Allen v. Rogers, 1 John. Cas. 281. Benson v. Matsdorf, 2 John. Rep. 369. Brown v. Abeel, 3 id. 481. Langendyck v. Burhans, 11 id. 461. Jackson v. Stone, 13 id. 447. Jackson v. Hills, 8 Cowen's R. 290. Dewey v. Osborne, 4 id. 329. Den v. M'Sham, 1 Green's Rep. 35.) If the plaintiff in the

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suit for mesne profits claims for occupation previous to the demise, the defendant may dispute his title at that time, but not after. (*Jackson v. Randall*, 11 John. Rep. 405. *West v. Hughes*, 1 Har. & John, 574.) Nor can he dispute the fact of his being in possession at the time of the commencement of the ejectment suit, (*Bailey v. Fairplay*, 6 Binn. Rep. 450,) or question the *extent* of the plaintiff's title, as by showing that the ejectment was for only a portion of the premises recovered; (*Graves v. Joice*, 5 Cowen's Rep. 261;) but he may show that the plaintiff received the rents and profits; for, in that case, he would be absolved from all liability for such rents and profits. (*West v. Hughes*, supra.)

There is no distinction in ejectment between a judgment by default and one obtained upon verdict, so far as its effect is concerned. In the one case, the right of the plaintiff is confessed, and in the other it is tried and determined. (*Baron v. Abeel*, 3 John. Rep. 481. *Aslin v. Parker*, cited in the text. *Goodtitle v. Tombs*, 3 Wils. 118. *Bradford v. Bradford*, 5 Conn. Rep. 127.) A recovery for mesne profits does not bar an action of trespass quare clausum fregit, for injuries done by the same defendant to the premises during the same period. (*Gill v. Cole*, 1 Har & John. 403.)

NOTE 599—p. 336.

"I think it may be fairly stated, as the result of the law on this subject," says Mr. Evans, (2 Ev. Poth. 359,) speaking with regard to verdicts in criminal cases, as evidence of the same facts in civil suits, "that there is no authority whatever, in favor of the admissibility of such evidence. The case of *Boyle v. Boyle*, (3 Mod. 164,) which is upon the face of it completely inconsistent with itself, and which is contained in a book of no reputation, can hardly claim the rank of an authority. It is said that a woman obtained a prohibition against a cause of jactitation, the man having been convicted of having married her, having a former wife living: thus, a judgment which implies the invalidity of a marriage, is made an affirmation of it. All the cases, in which a party having an interest in the subject of a criminal prosecution has been admitted as a witness, are in direct opposition to the principle, that the verdict on such a prosecution can be admitted as evidence in respect of the civil right." On this subject there seems to be little or no diversity of opinion among modern writers on the law of evidence. (See 2 Starke's Ev. 217; *Norris Peake*, 75 et seq.)

The following decision in New-York seems at variance with the generally received doctrine: In *Maybee v. Avery*, (18 John. Rep. 352,) an action of slander was brought for saying that the plaintiff was a *thief*, and stole the defendant's hens; and it was held, that a record of conviction of the plaintiff, before a court of special sessions, for stealing the defendant's hens, was admissible evidence, under a notice or plea of justification by the defendant, of the truth of the charge. The record of conviction, however, was not regarded as conclusive, but only *prima facie* evidence; and the party, it was said, might be allowed to disprove the fact of his guilt, and show the falsity of the testimony upon which the conviction was founded. And it was further held, that the conviction could not be received at all, if the defendant in the civil suit was a witness in the criminal prosecution. (See ante, note 574, p. 819.) *Spencer, J.*, delivering the

opinion of the court, remarks: "It is undoubtedly a rule, that to give a verdict and judgment thereon in evidence, it must be upon the same point and between the same parties or privies. The reason why it must be between the same parties, is, that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine witnesses; and generally the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict if against him, cannot avail himself of it. One of the exceptions to the rule is, that where the matter in dispute is a question of public right, in that case all persons standing in the same situation as the parties, are affected by it. It appears to me, that a verdict on an indictment forms another exception, and upon the same principle. The public is the party aggrieved, the prosecution is carried on through their functionaries, and any individual may, when necessary, avail himself of the conviction. The plaintiff cannot complain of this, for he had an opportunity to cross-examine witnesses, to adduce testimony, and to reverse the judgment if erroneous. (*Maybee v. Avery*, supra. See *Nelson v. Evans*, 1 Dev. Rep. 9. *The People v. Buckland*, 13 Wend. Rep. 592, 595.)

In Connecticut, verdicts in criminal prosecutions can never be given in evidence, in civil cases, to prove the facts upon which they were rendered, although the same question should arise. (*Swift's Ev.* 20.)

NOTE 600—p. 338.

S. P., *Kazer v. The State*, 5 Hamm. Rep. 280, 282; 2 Starkie's Ev. 217.

NOTE 601—p. 338.

An *express confession*, it is said, "carries with it so strong a presumption of guilt, that an entry on record, *quod cognovit indictamentum*, &c. in an indictment of trespass, estops the defendant to plead "not guilty" to an action brought afterwards against him for the same matter." (*Hawk. P. C.* 31, b. 2, § 2, 8th ed.) But an *implied confession*, which is, "where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, by yielding to the king's mercy, and desiring to submit to a small fine," is conceded to be different. In that case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se ingratiam, regis*, without putting him to a direct confession or plea, (which in such cases seems to be left to discretion,) the defendant will not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum*. (*id.* § 3; and see S. P., *Commonwealth v. Horton*, 9 Pick. Rep. 206.) Whether a record of conviction in a criminal case, upon either a direct or implied confession, can ever operate so as to estop the defendant from pleading not guilty in a civil case, quere. See the next note.

NOTE 602—p. 338.

In Roscoe on Ev., p. 102, it is said to have been ruled, by the then present Lord Chief Justice, (Abbot, we presume,) at nisi prius, that the record of conviction upon a plea of guilty, in an indictment for an assault, *is not evidence* in an action for damages for the same assault; and for this position the author cites vol. 2 of the text, p. 203. But all we understand Mr. Phillipps to say, at the page referred to, is, that the Lord Chief Justice has ruled that the record is not *conclusive evidence*. (See post, vol. 2 of the text, p. 203, and note (3).) Mr. Starkie also lays down the law to be, that the record of conviction, under such circumstances, *would be evidence like any other admission*. (2 Starkie's Ev. 218, note (e.) See Bradley v. Bradley, 2 Fairf. Rep. 367.)

NOTE 603—p. 338.

S. P., Stephens v. Jack, 3 Yerg. Rep. 403, 4; Kazer v. The State, 5 Hamm. Rep. 280. See also ante, p. 331, of the text, and Ward v. Green, 11 Conn. Rep. 455.

The principle upon which this doctrine rests is the one stated ante, note 582, p. 320: viz. that a judgment, though inter alia, is always evidence to prove itself, as a fact, and the legal consequences resulting from it. See likewise several cases illustrating its application, ante, note 583, p. 321, et seq. Upon the same principle, if B. has been acquitted upon an indictment, and brings an action against A. for a malicious prosecution, the record in the criminal suit will be conclusive as to the *fact of such acquittal*. (See post, vol. 2, ch. 18, and the notes; ante, note 582, p. 321.) And it has been held, in Massachusetts, that if the defendant in the criminal suit was convicted, the record of conviction would be conclusive evidence of probable cause, in an action for malicious prosecution. (Whitney v. Peckham, 15 Mass. Rep. 243. See this case and others in connection with it, cited ante, note 583, p. 322.) So in England, (Mellor v. Baddeley, 6 C. & P. 374.)

NOTE 604—p. 339.

See Mr. Evans' remarks upon Boyle v. Boyle, 2 Ev. Poth. 359, quoted ante, note 599, p. 850.

Admitting the decision to be law, it is scarcely inferrible from it, that the conviction would have been equally conclusive of civil rights in a temporal court. (2 Starkie's Ev. 219. Norris' Peake, 79. See also Gelston v. Hoyt, 3 Wheat. Rep. 317; The People v. Buckland, 13 Wend. Rep. 592, 596.)

In Maine, upon a libel by the wife for divorce *a vinculo*, on the ground of adultery, the record of the husband's conviction of that offence has been received as sufficient proof of the fact of marriage as well as of the adultery. (Anderson v. Anderson, 4 Greenl. Rep. 100. Randall v. Randall, id. 326. See Bradley v. Bradley, 2 Fairf. Rep. 367.)

NOTE 605—p. 339.

S. P., *Maybee v. Avery*, 18 John. Rep. 352, stated ante, note 599, p. 850.

NOTE 606—p. 340.

S. P., *Norris' Peake*, 78.

NOTE 607—p. 340.

See *England v. Bourke*, 3 Esp. N. P. Rep. 80. The position of Mr. Justice Buller seems not to have been generally sanctioned. (See *Gelston v. Hoyt*, 3 Wheat Rep. 317; *The People v. Buckland*, 13 Wend. Rep. 596.)

NOTE 608—p. 340.

This is upon the principle stated ante, note 603, p. 852.

NOTE 609—p. 340.

"It is a general rule of our law, that where any matter belongs to the jurisdiction of one court, so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it." (Per *Duncan, J.*, in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 429, citing the words of *Hargrave*, in his tracts, p. 452. *Blount v. Danach*, 4 Wash. C. C. Rep. 657, 659, 14 Serg. & Rawle, 184, note S. C. Per *Story, J.*, in *Cassels v. Vern.* 5 Mass. 334, 5; and see several instances, ante, note 586, p. 824, 5; and post notes 344, 5, and 620, for its direct application to courts of probate. And it is evidence even against strangers. (4 Wash. C. C. Rep. 659, ut supra. 14 Serg. & Rawle, 186, 7, note S. C.)

In *trespass quare clausum fregit*, the determination of the court of sessions, locating the line of two towns, was held conclusive between the parties; and fixed the town and county in which the locus in quo should be adjudged to lie. This was under a statute giving the power to the sessions. (*Gorrill v. Whittier*, 3 N. H. Rep. 265.) The decision was without notice to the opposing town; yet held valid and binding. (id. 269, and see the cases there cited.) And see the great case of *Maingay v. Gahan*, (1 Irish T. R. 1 to 80, *passim*.) for much learning on this head; also *Simras v. Slacum*, stated post note 610; and *Ammidon v. Smith*, in same note.

The same rule extends even with greater latitude and force to the decisions of ex-

clusive jurisdictions. (4 Rawle, 111, 112, per Huston, J.) Thus, part of a debt being attached in the defendants hands by process from a justice's court, he was held protected against a second recovery for so much. (Tubb v. Madding, 1 Alab. Rep. 129; and see Stagall v. Wyche, 5 Yerg. 83, and Cox v. White, 2 Mill. Lou. Rep. 422.) And judgments on foreign attachment shall conclude all persons who intervene and take defence as well as the garnishee, unless there be fraud in the latter by which the intervener is deprived of his defence. In such case, though he be a party, he may show the fraud. (Coates v. Roberts, 4 Rawle, 100, 111, 112.) The irregularities of a former judgment on foreign attachment cannot be inquired into in a subsequent action by another creditor, plaintiff, against the same garnishee, to recover the property. (Cox v. White, 2 Mill. Lou. Rep. 422.) A decree of the county court in behalf of a turnpike company under a statute, against a town, declaring it to be the duty of the town to repair two certain bridges on the company's road, and ordering repairs accordingly, was held conclusive on the town, on all subsequent similar applications to compel repairs. (Canaan v. The Greenwoods turnpike company, 1 Conn. Rep. 1, 7.) The sentence of a surrogate as to a will of the personality, is conclusive on all the world as being in the nature of a proceeding *in rem*, to which any one may make himself a party. (Bogardus v. Clark, 4 Paige, 623.)

NOTE 610—p. 341.

This proposition must always be qualified with the fact, that the person seeking to impeach the former judgment or sentence, was neither party nor privy to it. If he stand in either of these relations, he shall not be heard to allege fraud, even in the mode of proceeding by which he is condemned; of course he shall not in the foundation and merits. (Peck v. Woodbridge, 3 Day, 30; post 346, of the text.) Farmor's case, cited by our author, was itself a covinous fine with proclamations between the tenant and another, in fraud of the reversioner, and the numerous illustrations contained in the report will be found of a similar character. The same remark is applicable to all the cases cited in The Duchess of Kingston's case, (11 St. Tr. 261.) If the fraud be against the party, it can be corrected in that court alone where the proceeding is pending. (3 Doug. 313, note, and the cases there cited.) In a word, the proposition stated by our author, is no more than what we see every day illustrated in the trial of judgments recovered or confessed to defraud creditors. While the party shall not be heard, third persons are liberally received. (Townsend v. Kerns, 2 Watts, 180, 183.) *In a late case, a judgment was obtained by a prior attaching creditor against his debtor; a junior attaching creditor coming in and defending in his debtor's name, under a statute which conferred this right, the defence failed; yet, in a subsequent action against the attaching officer, the junior creditor was allowed to prove that the first recovery was in part fraudulent; whereupon the whole was vacated in his favor. (Fairfield v. Baldwin, 12 Pick. 388, 392, 4.) So, where a widow and executrix, confessed a judgment in favor of her son, to enable him to sell his father's land, and thus avoid a voluntary settlement made by his father in favor of his daughter, under pretence that the father was indebted, at that time, to the son; in ejectment by the trustee under the settlement, he was allowed to impeach the judgment as being in fraud of

the settlement. (Hall v. Hamlin, 2 Watts, 354.) Judgments, and other proceedings in courts of justice, come within the general proposition: "That third persons may always show fraud and collusion in acts by which their rights are to be affected;" though otherwise as to the parties; for *nemo allegans suam turpitudinem audiendus est*. (Per Sergeant, J., in Townsend v. Kerns, 2 Watts, 183.) For the purpose of seeing the mode in which these and the like colorable, covinous or fraudulent acts may be assailed, and what shall be deemed covinous, &c.; as also, what may be received as proof, the student would do well to read the whole of Fermor's case and the Duchess of Kingston's case, cited above, in connection with the great case of D. Twyne, which follows Fermor's in 3 Rep. 80. The invalidity of a divorce, obtained ex parte, on false suggestion, was shown on the above principles by Thompson, C. J., in Borden v. Fitch, 15 Jolin. Rep. 145, 6.)

Many cases concede the general proposition in the language of the text, that fraud vitiates a judgment. But the student should always take this with the qualifications mentioned. It is said, post 346, of the text, that the party is tied up, notwithstanding the fraud; and the same doctrine is recognised by Sergeant, J., ut supra. We have said that the same rule extends to the privy. This will be seen by the case of Osborne v. Moss, (7 John. Rep. 161.) There the intestate had confessed a judgment to defraud creditors, under which his good were sold, and although his administrators seized the goods for the benefit of the creditors, yet he could not hold them; and the fraudulent purchaser recovered against him in trover. He came in as a privy to his intestate, and could no more impeach the judgment than the intestate himself.

We also find the same general proposition, that a judgment may be impeached for fraud, advanced or conceded in respect to foreign judgments, sentences, &c. (See post, note 623, and the remarks of Collett, D. J., *passim*, in Silver Lake Bank v. Harding, 5 Ham. 547, 8; 11 Mass. Rep. 266.) It would seem, that in respect to these, the cases call for about the same qualification as if they were domestic. The right to impeach is generally confined to third persons, who are strangers. (*id.*, and see post 353, 4, of the text, and note 656.) An exception seems to prevail in Louisiana, under their code of practice, by which a party may impeach a former judgment against him by showing that it was obtained in fraud of the rules of the court. (Paxton v. Cobb, 2 Mill. Lou. Rep. 137.) He may also nullify the former judgment directly by an action. (*id.* 139.)

But while third persons may impeach, they shall also be protected by these fraudulent judgments, where they act under them bona fide. "The judgments of a court, of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and therefore all acts performed under them are valid as far as respects third persons. A sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser; nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such judgments are valid acts; all the legal consequences which follow a judgment, are, with respect to third persons, precisely the same, in respect to one obtained by fraud, as if it had been fairly obtained. (Per Marshall, C. J., in Simms v. Slacum, 3 Cranch, 306, 7.) Even the party may sometimes be protected; as if he fraudulently obtain judgment in his favor in consequence of which he goes at large, the sheriff cannot therefore re-take him; (per Marshall, C. J., in Simms v. Slacum, 3 Cranch, 306,

7;) and held, therefore, that an insolvent discharge of the body by two Virginia justices, obtained by the debtor's fraud, whereupon, he was discharged from prison, should yet protect him and his surety in the prison-bonds-bond, from an action for the escape, (Simms v. Slacum, 3 Cranch, 300;) and, it seems, an injunction, though obtained by fraud would in Virginia have the same effect. (Per Marshall, C. J., in Simms v. Slacum, 3 Cranch, 307.) "The judgment," [in the insolvent proceeding] "may not shield the debtor from an original claim; but it is believed that no case can be adduced, where an act which is the legal consequence of a judgment, has, in itself, created a new responsibility, with respect to the party himself; much less with respect to third persons, who do not even participate in the fraud." (Per Marshall, C. J., in Simms v. Slacum, 3 Cranch, 307, 8.) The learned C. J. infers, therefore, that the departure from the prison-bonds would not even subject the party *on his bond for the limits*, though it might not discharge him from a claim for the original debt. Quere, as to the party. Paterson, J., agreed that the sheriff would be protected, but dissented as to the principal in the bond, and the surety, who "stands on the same floor as the principal;" (Simms v. Slacum, 3 Cranch, 309, 10;) and the contrary would seem to be at war with a part of the doctrine in the *Duchess of Kingston's* case, where it was agreed that even a collusive divorce would not shield the party from a conviction of bigamy. The opinion of the court, in *Simms v. Slacum*, resulted in a reversal of the judgment. On remanding the cause for further proceedings, it appeared that Wise, the prison-bonds surety of Simms, was one of the justices who granted his discharge; being, at the same time, a fraudulent trustee of Simms' property. Hence, on the cause coming again before the court, the discharge was held void; probably on the ground of a want of jurisdiction, the justice being interested; for, in a subsequent case of a like fraudulent discharge, in the state of Rhode-Island, the court not being interested, it was held good as a protection both to the party and surety in the prison-bonds-bond. This, too, was by the S. C. of the U. States, Marshall, C. J., delivering the opinion of the court, and now carrying his obiter dicta as to the party in *Simms v. Slacum*, into the form of a direct adjudication. (*Ammidon v. Smith*, 1 Wheat. 447, 460; *Smith v. Quinton*, Brayt. 200, S. P., and see *Bean v. Smith*, 2 Mason, 252.)

NOTE 611—p. 341.

This power of spiritual courts, as such, to decide directly on the legality of marriage, if it exist at all in the courts of the United States, is probably confined to very few courts of that character. In New-York, the power is exclusively exercised by the court of chancery, on questions of divorce. (2 R. S. 141, 2 et seq.) The suit *causa jactitationis matrimonii*, and the suit for restitution of conjugal rights, are unknown to our law; and a suit to compel the celebration of a marriage pursuant to a previous contract, seems to be obsolete. We have no courts properly ecclesiastical. To these alone the three latter classes of causes pertained; and we have not heard of any attempt to compel the specific execution of a marriage contract in the court of chancery.

But we shall see hereafter, that divorces on divers grounds and by various courts of the United States, not ecclesiastical, form a very common subject of sentence. In such cases, their conclusiveness when jurisdiction appears, is the same as that with which

the like ecclesiastical sentences are invested in England, whose cases on this head are continually appealed to by our courts. The general result of the English adjudications is briefly given by our author; but the student or practitioner, desirous of a more minute illustration, will find his time well rewarded by perusing Mr. Hargrave's collection of cases in his tracts. (Harg. Law Tracts, 452 to 456.)

NOTE 612—p. 342.

This trial by *certificate*, as it is called by the English law, is probably unknown to any of our courts. In New-York, it is expressly abolished by statute. (2 R. S. 409, 10, § 4.)

NOTE 613—p. 343.

See post, note 620.

A will was offered for probate, and rejected on hearing witnesses. Held conclusive as a bar against any future presentation and probate in the same court. And this too, in a state where the probate court took cognizance of wills, both of real and personal estate. (Case of Wells' will, 5 Litt. 274.) So, as to personalty, of a decree revoking probate of a will, after proof in common form, on the ground of insanity. (Brown v. Gibbon, 1 Nott & McCord, 326.) The question as to the effect of a decree disallowing a will proposed for probate was deliberately considered in Laughton v. Atkins, (1 Pick. 535, 541, et seq.) and the court came to the conclusion, that, after it had once been proposed in the probate court and rejected by a decree, it could not afterwards be used for any purpose whatever; but was reduced to a mere nullity. It is also material to observe, that the decree set up was one against the heir, who had no notice except the public one by advertisement in a newspaper. (See id. 547.) A like doctrine had before been held, in Reid v. Borland, 14 Mass Rep. 208.

In Pennsylvania, a will of *lands* may be given in evidence on proof of its execution, notwithstanding a verdict and judgment on an issue of *devisavit vel non* from the register's court, against the validity of the will. (Smith v. Bonsall, 5 Rawle, 80.) Further, see post, note 620, p. 862, et seq.

NOTE 614—p. 343.

See post, note 620.

Where a probate court has power to grant letters of commitment or guardianship for lunatics, such letters are conclusive evidence of insanity against all persons dealing with the lunatic. (Leonard v. Leonard, 14 Pick. 280. See Middleborough v. Rochester, 12 Mass. Rep. 363.)

As to the qualification of the rule mentioned in the text, it applies universally to judgments, decrees and sentences, of all courts. They are only evidence of what was directly in issue, and not of matters *incidentally* contested before the court which pronounced them, nor of matters merely inferrible from them by argument. (See ante, note 587, p. 826, and the cases there cited; also, the rule laid down in the *Duchess of Kingston's* case, ante, p. 333 and 340, of the text.) The case of *Hibsham v. Dulcaban*, (4 Watts, 183,) furnishes a valuable illustration of this doctrine. There, the defendants having pleaded a release to the plaintiff's declaration for a legacy, and the plaintiff having replied *per fraudem*, the defendants rejoined that the release was exhibited by them in the orphan's court, and allowed by that court as a decisive bar to exceptions taken by the plaintiff to their administration account; and the question raised by the demurrer was, whether the validity of the release had passed *in rem judicatem*. *Held*, that the decree of the orphan's court was incompetent to affect the plaintiff in his common law action. The question of fraud came before the court incidentally; the validity of the release was drawn into contest incidentally; and the point being thus incidentally decided, could no more prejudice his rights in another court, than could the decision of a surrogate or register prejudice the title of an unsuccessful claimant of administration to a decedent.

NOTE 615—p. 344.

They are not *prima facie* evidence of death, even in favor of the person who sues as administrator in the cause. (*Moons v. De Bernales*, 1 Russ. 300, 306, 7.) The direct contrary, however, was held at law where the defendant omitted to plead in abatement. The letters were there held conclusive evidence of the death. (*Newman v. Jenkins*, 10 Pick. Rep. 515.) The letters of administration in this case were granted on an absence of the alleged intestate, [he not being heard from,] of only three years on a sea voyage, without other proof of his death, direct or circumstantial. (*id.*)

NOTE 616—p. 344.

2 R. S. of New-York, 61, § 29. See post, note 617. Also, *Sholly v. Diller*, 2 Rawle, 177, 8. Also, per Daggett, J., in *Avery v. Chappel*, 6 Conn. Rep. 276; case of *Wells' will*, 5 Litt. 273; and especially per Mills, J., at p. 276.

A grant of administration to the decedent's husband has been held conclusive evidence that she had the power to make the will, though a *feme covert*. (*Cassels v. Vernon*, 5 Mason, 332, 334, 5; and see *Picquet v. Swan*, 4 Mason, 443, 461, 2.) And the recital in letters of administration, with the will annexed, that R. was executor, by implication is conclusive of that fact. (*Roth v. Earl of Enniskillen*, 1 Huds. & Bro. 187.) The probate cannot be collaterally resisted by shewing that the will is a forgery; and that the testator made another testament, and appointed another executor. (*Moore v. Janner's adm'r.* 5 Monroe, 42, 45.) An original bill in chancery, alleging that the probate of a will of personalty is void, cannot be sustained. The error in ad-

mitting such void will to probate, can only be corrected on appeal. (*Tarver v. Tarver*, 9 Pet. 174.) So of a will of real estate, where the court of probate had the power of admitting such will to proof, (*id.*) and see post, note 620, S. P. in several cases.

But a distinction should be made between the abstract validity of the will, and any point upon its construction and effect; for on the latter, the parties claiming have a right to be heard, and cannot be foreclosed in any matter wherein they have not been heard as parties. Thus, where the plaintiffs claimed as legatees, against the curator of the heir at law; he, (the curator) pleaded *res judicata*, viz., that in a suit between him and the executor the whole subject of the legacy was decreed to the heirs at law by the probate court, which set aside so much of the will as bequeathed to the legatees. The latter insisted they were not to be affected by such a decree because not parties. The court by Porter, J. said, the plea of *res judicata* could not be sustained under such circumstances. "The law says, in a case of contestation, the executor may interfere to sustain the validity of the will. But his right to interfere in a contestation cannot be extended to make him the representative of the conflicting interests which the will has created." The point contested had been whether the plaintiffs were qualified to take as legatees. It was insisted that they were not, because they were children of the testator by a colored concubine. (*Valsain v. Cloutier*, 3 Mill. Lou. Rep. 170, 175, 6.)

NOTE 617—p. 344.

2 R. S. of N. York, 80, § 56.

And an executor was protected in all his acts as such, *pendente lite*, on a will ultimately set aside; and had all his commissions and other allowances. (*Bradford v. Boudinot*, 3 Wash. C. C. Rep. 122.) So donees and purchasers under him shall be protected, (*Benson v. Rice*, 2 Nott & M'Cord, 577, 8, and authorities there cited;) and payments made to him are valid. (*Moore v. Tanner's adm'r.* 5 Monroe, 48.) So the administrator himself acquiring title in the goods under letters afterwards repealed by reason of a will found, shall be protected in his possession, nor can the question of his due administration of such goods be tried in trover against him at the suit of the executor; (*Foster v. Brown*, 1 Bail. Rep. 221, 223, 4;) and this, though the administration were fraudulently obtained, as by suppressing a will. (*id.*)

NOTE 618—p. 344.

The language of Lord Kenyon in *Rex v. Inh. of Netherseal*, (4 T. R. 258,) is, "We cannot receive any other evidence of there being a will in this case, than such as would be sufficient in all other cases, where titles are derived under a will; and nothing but the probate or letters of administration with the will annexed, are legal evidence of the will, in all cases of personality." This language was repeated and recognized by the S. C. of the United States in *Armstrong v. Lear*, (12 Wheat. 175, 6.) It was adopted as authority for denying the right here to sue for a legacy under a foreign will, an administrator appointed here, but who had not caused probate of the will to be made.

(See post, note 619.) The same doctrine is recognized in *Tarver v. Tarver*, 9 Pet. 174. But in the latter case the complainants set up the will as true; and made it the foundation of their title, by alleging that a condition contained in it had failed, whereby the property came to them. The answer admitted the will, but insisted on the want of any condition. In such case, the complainants could not call on the defendants for proof of the will by the production of a probate, (*id.* 179;) it is obvious that the probate could not be said to be in issue; for the will was agreed by the pleadings: ante, note 331, p. 444, et seq.

NOTE 619—p. 344.

Where, in trover, the plaintiff claimed as administratrix, the title to a slave converted after the intestate's death, and made profert of the letters in declaring; though the defendant pleaded the general issue, this was held no admission of the letters, as it would have been had she sued in her representative character, according to the rule, ante, note 331, p. 447. She, therefore, not being able to maintain her action, by proof of her actual possession against the defendant as a wrong doer, but the letters making a part of her title; held, that their existence was denied by the general issue, and they must be proved. (*Browning v. Huff*, 2 Bail. 174, 177.) The plaintiff in trover, the vendee of an executor, not being able to show the probate, though he proved the will, and no exclusive possession in him appearing, was non-suited. (*Pinney v. Pinney*, 2 Mann. & Ryl. 436; and see note (a) to that case, p. 437; 8 Barn. & Cress. 335, S. C.) But the title of three executors, named in the will, was held proved by a probate and letters to one of them: and they may, in such case, all sue as executors; (*Walters v. Pfeil*, 1 Mood. & Malk. 362, 3;) or the one who made probate may sue alone, at his election, and maintain his action, without proving that the others renounced. (*Davies v. Williams*, 1 Sim. 5.) Quere, see 1 Mood. & Malk. 363, per Lord Tenterden, C. J., reading from Selw. N. P. So, although there be an administrator appointed *cum testamento annexo*, here, yet the legatee cannot recover of him, till he first cause a regular probate of the will here; and this, though it be operative as a will in a foreign country, where it was executed. (*Armstrong v. Lear*, 12 Wheat. 169, 175, 6.) We shall see, post, note 621, that a title may as well be made under a foreign, as a domestic probate; and this probate being a judicial proceeding, may, as between the states, be proved by the regular certificate under the constitution and laws of the United States. (Act of Cong. of 1790. *Balfour v. Chew*, 5 Mart. Lou. Rep. N. S. 517. *Johnson v. Rannels*, 6 Mart. Lou. Rep. N. S. 621. *Thomas v. Tanner*, 6 Monroe, 53, 4.) Being so proved it will avail, without the formal proof of the statute which gives the foreign probate court its jurisdiction. A probate certified by the clerk, and presiding justice of the county court, of Jefferson county, Virginia, in due form as required by the U. S. law, was received by the supreme court of Pennsylvania. On objection, that the statute authority of the county court should also have been proved by a certified copy, the court agreed, that the laws of Virginia were to be proved as the laws of a foreign country; but that the acts of its courts might undoubtedly be resorted to for their exposition. To the act of the county court, in holding jurisdiction of the subject of probate, the maxim *omnia presumuntur rite esse acta*, is as applicable as it is to judicial proceedings in

our own state. (*Ripple v. Ripple*, 1 Rawle, 386. *Thomas v. Tanner*, 6 Monroe, 53, 4.) These decisions go far towards placing the mode of proof of a judgment of an inferior court in a neighboring state, on the complete footing of a domestic judgment of the same character. (See ante, note 298, p. 305, for several decisions on this point; also post, note 656.) It is exactly the presumption allowed and advocated by Chancellor Kent, in favor of a domestic probate. (*Westcott v. Cady*, 5 John. Ch. Rep. 334, §43.) The state of Pennsylvania, however, has a statute that the letters of administration granted by a neighboring state, shall be received as authority to sue, the same as if they were domestic. (*McCullough v. Young*, 1 Binn. 63, 4.) Yet it is not perceived that *Ripple v. Ripple* rested on this. The proof was there received as part of a title under the *lex loci*; not as giving a right to sue in a representative character. The statute was not referred to; and, for aught we know, has been repealed. The decision would seem plainly to rest on the general law; and if sustainable, is a most valuable step towards shortening and simplifying this kind of foreign evidence. The conclusive effect of probates in neighboring states and foreign countries, both as to real and personal property, was very fully examined and illustrated in *Robertson v. Barbour*, (6 Monroe, 527 to 529.) The result is that full faith and credit shall be given, and all local forms of notice, &c. shall be sanctioned; and the whole supported by a presumption that it conforms to the local law.

NOTE 620—p. 344.

This authority concerning wills and administration, is, in the state of New-York, committed to the surrogates of the several counties. (2 R. S. 56, et seq.) Various other powers in respect to the administration of decedents' estates personal, and for deficiency of these their real estate, are also conferred by these statutes upon the same officers. (2 R. S. 100, et seq.) They are also endowed with certain powers in respect to the assignment of dower, (id. 488, et seq.) and some other matters. Their determinations, on these heads, so far as their effect in evidence has been considered, have been placed by the courts on the same footing with those of the English ecclesiastical courts as given by our author. (*Jackson ex dem. Miller v. Hixon*, 17 John. Rep. 123. *Jackson ex dem. Clarke v. Randall*, 5 Cowen's Rep. 168. *Jackson ex dem. Jenkins v. Robinson*, 4 Wend. 436.) And see *Jackson ex dem. Sitzer v. Waltermire*, 5 Cowen's Rep. 299, and 7 id. 353, S. C.; also, *Dubois v. Dubois*, 6 Cowen's Rep. 494. In New-York, too, the same officers receive proof of devises, and order them to be registered; but the statutes will allow this to operate as presumptive evidence only. (2 R. S. 57, § 7, &c.; id. 58, § 15.) Such is also the law of Pennsylvania. (*Coates v. Hughes*, 3 Binn. 498. *Logan v. Watts*, 5 Serg. & Rawle, 212. See per Tilghman, J., in *Spangler v. Rambler*, 4 Serg. & Rawle, 193. *Walmsley v. Read*, 1 Yeates, 87. *Smith v. Bonsall*, 5 Rawle, 80. *Downing's estate*, 5 Watt's Rep. 80.) Powers somewhat similar appear to reside in the courts of probate of Connecticut, Massachusetts and Rhode-Island, where the law accords a conclusive effect to their decrees as evidence, both in the realty and personally. (*Bush v. Sheldon*, 1 Day, 170. *Judson v. Lake*, 3 Day, 318. *Laughton v. Atkins*, 1 Pick. 535. *Spencer v. Spencer*, 1 Gall. 622. *Brown v. Lanman*, 1 Conn. Rep. 467.) In *Bush v. Sheldon*, supra, a

sale of land by order of the judge of probate, for defect of personal estate, was held unimpeachable by the heir, in an action of ejectment, because he was a party in the court of probate. (*Jackson ex dem. Jenkins v. Robinson*, *supra*, S. P.) *Judson v. Lake*, and *Spencer v. Spencer*, held the decree of the court of probate, establishing a will, conclusive not only in respect to the personality, but also the realty, on the ground that the powers of that court were, by statute, the same as to both. So in Massachusetts, (*Dublin v. Chadbourn*, 16 Mass. Rep. 433,) North Carolina, (*Stanley v. Kean*, Tayl. 93, said to be *prima facie* evidence,) Kentucky, (case of Wells' will, 5 Litt. 273,) Indiana, (said in *Robertson v. Barbour*, 6 Monroe, 527, 8,) and Alabama, (semb. *Tarver v. Tarver*, 9 Pet. 174.) See *Nicholls v. Hodges*, 1 Pet. 562, as to the powers of the orphan's court in Maryland.

Independent of the above statute modifications, the powers of the court of the surrogate, judge of probate, the orphan's court, ordinary, or of whatever name, coming in the place of the English ecclesiastical court, (and such a court exists in every state,) are the same with those of the English ordinary in respect to the wills and estates of testators and intestates; and their decrees are to be received as conclusive evidence under the limitations prescribed by our author. It has accordingly been held in South Carolina, that the decree of the ordinary against a will, founded, too, on the finding of a jury that the testator was insane, shall not be received as evidence against a devisee under the same will; for the powers of the ordinary respect the personality only. (*Crossland's ex'rs. v. Murdock*, 4 M'Cord, 217.) The same thing was held of a like decree in the appellate court, (com. pleas) for they, of course, as an appellate court, were tied down to the same narrow line of jurisdiction; (*id.*) This point was lately very fully examined by the learned vice-chancellor of the 1st circuit, (N. Y.) On a review of the English authorities, he shows that a decree of chancery, (on appeal from the surrogate,) annulling the testament for insanity, is not even admissible between the same parties on the same point, (insanity,) as to a devise in the same will. (*Bogardus v. Clarke*, 1 Edw. Ch. Rep. 266 to 270.) He also proves that a verdict, decree, &c. against the devise (for insanity,) would be equally inadmissible as affecting the personality. The authorities cited by him as directly bearing on these points, are *Montgomery v. Clarke*, 2 Atk. 378; *Clark v. Dew*, 1 Russ. & M. 103; and per *Yelverton, B.* in *Hume v. Burton*, 1 Ridgw. Irish P. C. 277. This decision was fully sustained by the learned chancellor on appeal, (4 Paige, 623, S. C.) on the views taken by vice-chancellor M'Coun. The chancellor adds *Maxwell v. Mountague*, cited Lord Hardwick, in 3 Atk. 546. The same distinctions were directly adjudged by Washington and Pennington, Js. in *Harrison v. Rowan*, 3 Wash. C. C. Rep. 580, 582, 3, and by the supreme court of New-Jersey, in *Den v. Ayres*, 1 Green, 153; and see *Darby's lessee v. Maycr*, 10 Wheat. 465, 469, and the cases cited 1 Pick. 241. But in Kentucky, where the power of such courts extends to land, the rejection of a will was held conclusive against any further hearing even in the same court, both as to realty and personality. (Case of Wells' will, 5 Litt. 273.) These courts have the incidental power of revoking letters of administration improvidently issued. (*Raborg's adm'x. v. Hammond*, 2 Harr. & Gill, 42. *Brown v. Gibson*, 1 Nott & M'Cord, 326.)

Such courts are, in this country of course, creatures of the statute, or of special constitutional enactment. The general adoption of the common law would not bring them in upon us, for want of a hierarchy furnishing the appropriate officers and ma-

chinery for the action of an ecclesiastical forum. Their powers are defined in the same way; and hence they are treated as special limited and inferior jurisdictions, in pleading whose decrees, a concurrence of circumstances must be set forth, indicating that they have acted within the scope of their specific powers; and the same principle will of course call for all that strictness of proof necessary to give them jurisdiction, the nature of which will be considered more at large in our subsequent notes. (14 John. Rep. 430. *Dakin v. Hudson*, 6 Cowen's Rep. 221. *Smith v. Rice*, 11 Mass. Rep. 507, 512, &c. *Hunt v. Hapgood*, 4 Mass. Rep. 117. *Ex parte Pleasants*, Whart. Dig. ed. of 1829, p. 160, pl. 205. *Palmer v. Palmer*, 1 Mill. Lou. Rep. 99, 100.) Thus, in setting forth a surrogate's decree for distribution, you must plead that the same surrogate granted the letters of administration; for such surrogate could alone make the decree. (*Dakin v. Hudson*, 6 Cowen's Rep. 221.) In proving a surrogate's or other probate sale of real estate, you must show a petition and account; but having done this, or otherwise shown jurisdiction, however erroneous the proceedings may have been, they are conclusive till annulled on appeal, and cannot be impeached collaterally. (*Jackson ex dem. Jenkins v. Robinson*, 4 Wend. 436. *Jackson ex dem. M'Fail v. Crawfords*, 12 Wend. 533. Per Kent, C., in *Morsers v. White*, 6 John. Ch. Rep. 381, 2, 385, 6. *Brown v. Lanman*, 1 Conn. Rep. 467. *Bush v. Shelden*, 1 Day, 170, cited also, *supra*. *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 422, 429. *Selin v. Snyder*, 7 Serg. & Rawle, 166. Per *Jackson, J.*, in *Scott v. Hancock*, 13 Mass. Rep. 166; and in *Smith v. Rice*, 11 Mass. Rep. 512. *Thompson v. Tolmie*, 2 Pet. 157. *Perkins v. Fairfield*, 11 Mass. Rep. 227. President of the orphan's court of Dauphin co. for the use of *Groff v. Groff*, 14 Serg. & Rawle, 181, 184. *Allen's lessee v. Lyons*, 2 Wash. C. C. Rep. 475. *Kennedy v. Wachsmuth*, 12 Serg. & Rawle, 171. See matter of *Hemiup*, 2 Paige, 320. *McCombs v. Dunbar*, 1 Mill. Lou. Rep. 18, 21. *Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715. *Richer v. Fitzsimmons*, 4 Watts' Rep. 251. *Ford v. Walsworth*, 15 Wend. 449.) And it seems that a recital of the presentation of the account in the surrogate's order of sale is not sufficient. The fact of its having been presented must be shown affirmatively. (*Ford v. Walsworth*, 15 Wend. 449.)

Such proceedings are *in rem*, against the estate, not *in personam*; and they bind all those claiming under the testator or intestate; and even divest the lien of a judgment; (*M'Pherson v. Cunliff*, 11 Serg. & Rawle, 422, 429, 430, 4 Dall. 119;) and as such they are binding on the land sold like the condemnation of a court of exchequer or admiralty on goods. (11 Serg. & Rawle, 430.) In support of these sales by probate courts, irregularities are to be overlooked; purchasers should not be affected by the unskillfulness or negligence of the proper officers. The regularity of their sales is to be presumed, especially after a lapse of years; (11 Serg. & Rawle, 432; *Messinger v. Kintner*, 4 Binn. 105; *Snyder's lessee v. Snyder*, 6 Binn. 496; *Perkins v. Fairfield*, 11 Mass. Rep. 227;) and the record saying the party appeared, or asserting other matter pertinent, has been held to conclude. (*Selin v. Snyder*, 7 Serg. & Rawle, 166. 11 id. 436, S. P.) Such decree is like one in chancery on which a sale is had, or a judgment at law and a sheriff's sale. The purchaser shall not be bound to look to the matters previous to the decree or judgment, except to jurisdiction and parties, though the sale may be avoided, if that be unfair: (*Selin v. Snyder*, *supra*. Per *Duncan, J.*, in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 433, 4.) In this last case, p. 437, Dun-

can, J., applies to such a proceeding the strong general language of Trumbull, J., in *Canaan v. Greenwoods*, T. P. Co. (1 Conn. Rep. 7.) "A judgment, decree, sentence or order, passed by a court of competent jurisdiction, which transfers, creates or changes a title, or any interest in estate real or personal, or which settles and determines a contested right, or which fixes a duty on one of the parties litigant, is not only final as to the parties themselves, and all claiming by or under them, but furnishes conclusive evidence to all mankind, that the right, interest or duty belongs to the party to whom the court adjudged it. It is admissible in favor of any person who may be interested to prove the existence of such right or duty as a fact." Some former decisions and dicta especially at nisi prius in Pennsylvania, were favorable to a collateral inquiry into the merits of probate proceedings and orders of sale. These are considered in the above case of *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 434 to 439; and they are brought back to the rule above stated by Trumbull, J. The judgment of confirmation on a probate, will not conclude, however, in respect to the character of the purchaser, as whether he purchased in his own right, or in trust; for where he was named as purchaser simply, in partition, of which the Pennsylvania orphan's court hath jurisdiction in certain cases, yet the purchase being in truth for himself and others by agreement, this was let in even against one who claimed under the nominal purchaser, not *bona fide*. (*Bavington v. Clarke*, 2 Penn. Rep. 115, 123, 4.)

The sentence of a court of probate ordering the execution of a will, is *prima facie* evidence that it was duly proved, not to say conclusive. (*Donaldson v. Winter*, 1 Mill. Lou. Rep. 137, 144.) And whenever the above, or other probate sales or transactions are drawn in question, the appointment of the executor or administrator by the court of probate cannot be questioned for error, irregularity and the like; as if the court has granted administration to the wrong person. This and the like defects can be set right by appeal only. (*M'Combs v. Dunbar*, 1 Mill. Lou. Rep. 18, 21.) And this is so in general, and for any other purpose, or on any ground of error; as where in an action by an administrator against the defendant, the latter objected, "that all the heirs being present in the state, and represented the defendant being one of them, an administrator could not be appointed; 2d, that all the property of the succession having been legally disposed of, there was no object upon which to administer; 3d, that the appointment of the plaintiff as administrator, if ever made (but which was denied,) issued irregularly and *ex parte*." The judge *a quo*, on the production of letters of administration, held these conclusive, and refused evidence to impeach the act of the court of probate on any of the above grounds. His decision was affirmed on appeal. (*Rils v. Questi*, 2 Mill. Lou. Rep. 249;) and see ante, note 616, p. 858. While the order of a court of probate directing the execution of a will, is unreversed, no other court can declare the will void, or collaterally examine the correctness of the order or judgment. (*Lewis' heirs v. His ex'rs*, 5 Mill. Lou. Rep. 387, 393, 4.)

In debt on a surrogate's decree for the payment of a legacy, held that the decree was itself evidence of a will and that the defendant was executor. (*Dubois v. Dubois*, 6 Cowen, 494.)

A decree settling an account is conclusive. (*Saxton v. Chamberlain*, 6 Pick. 422. *Jenison v. Hapgood*, 7 id. 1. *Potter v. Webb*, 2 Greenl. 257. *Field v. Hitchcock*, 14 Pick. 405. *Downing's estate*, 5 Watts' Rep. 90. *Wimmer's appeal*, 1 Whart. Rep. 96.) It cannot, therefore, be impeached in an action on the probate bond; (*Goodrich*

v. Thompson, 4 Day, 215;) nor by a bill filed in equity to compel an account. (Jenison v. Hapgood, 7 Pick. 1. Blount v. Darrach, cor. Washington, J., U. S. C. C. 14 Serg. & Rawle, 184, note; 4 Wash. C. C. Rep. 657, S. C. The same case is also mentioned in id. 722, note; and see Barton v. Morris, 1 Green. 18.) The revised statutes of New-York, (2 R. S. 94, § 65,) expressly declare such settlement conclusive for most purposes, on all who are cited either actually, or by the regular newspaper advertisement; and this effect is also given by those statutes to the proceedings of the surrogate on account, in the general settlement and winding up of the concerns of the estate. (2 R. S. 91, et seq. to id. 94.) So of an order, on accounting, that execution issue from a court of law. (2 R. S. 116, § 21.) And see Dubois v. Dubois, 6 Cowen, 494. But in this, as in all cases, where the effect of the settlement stands independent of any statute, there should be notice. Where the defendant presented his account to the parish judge, by whom it was accepted and homologated, without calling in the heirs or any persons of adverse interests, the court said the proceeding was not of such a character as, on a subsequent suit to compel an account, enabled the defendant to plead *res judicata*. To warrant this there must be a defendant and plaintiff; and an issue either expressly joined, or implied by law, (Marchand v. Gracie, 2 Mill. Lou. Rep. 147, 8;) and the courts are peculiarly strict in cases of constructive appearance for infants. In one case, where the court appointed a *curator ad hoc*, for an infant who appeared and contested the account, the whole was declared null, on a collateral contest touching the sale of property by the executor, though his representative had accounted for it on an investigation adverse to the very curator of the infant who now claimed the property. The reason was, that the infant could appear by tutor only and not by curator. (Psyche v. Paradol, 6 Lou. Rep. by Curry, 366, 377, 8; and see Bernard v. Vigneau, 1 Mart. Lou. Rep. N. S. 1, 9.) Though, if minors be duly represented, they are bound by these and the like proceedings and judgments of courts, as if they were of full age. (Groun v. Abat's ex'rs. 7 Lou. Rep. [Curry,] 17.) The accounting is of course impeachable in equity for fraud; as where the administrator secretly suppressed the receipt of a sum of money from abroad; and the account was closed without this being credited. (Pratt v. Northam, 5 Mason, 95, 103.) And this, though the statute declared the decree on accounting to be final and conclusive. (id.) In Wright v. Wright, (2 M'Cord's Ch. Rep. 185, 197,) the account settled in the court of the ordinary, seems to have been opened and examined in chancery, without advertent to the point that any thing was concluded by the proceeding below. Such settlements are holden *prima facie* evidence in Kentucky, (Vance, adm'r. v. Vance's distributees, 5 Monroe, 521, 2; Kellar's ex'rs. v. Beelor, id. 576, 7) but if made after bill filed in chancery, they are no evidence. (Kellar's ex'rs. v. Beelor, 5 Monroe, 576, 7.) They are only *prima facie* evidence in Maryland. (Scott v. Dorsey's ex'rs. 1 Harr. & John. 227, 231. Spedden v. The State, 3 Harr. & John. 251.) In this last case, the contrary was much and ably insisted on by counsel; (id. 254, 259.) The argument on the other side went on the *ex parte* character of the proceeding. (id. 266.) The State v. Massey, and Selby v. Gunby, in the general court, had before denied the conclusiveness of such settlements; (id. 276, 7, note.) The amount of the Maryland doctrine on these cases is said by Earle, J. to be, that such settlements are right *prima facie* only; and are not conclusively binding on persons not parties to them, and who have not had an opportunity

of appealing from them. (Haslett's adm'r. v. Glenn, 7 Harr. & John. 23. Gist's adm'r. v. Cockey, 7 Harr. & John. 134, 139.) This notion was recognized in Owens v. Collinson, 3 Gill & John. 25, 39; and held there, that the onus probandi rests on him who seeks to impeach the settlement. It was also held, that a bona fide payment or retainer, under the direction of the orphan's court, was conclusive of the justness of the debt paid or retained; otherwise, where the party had no notice, or it appeared on the face of the vouchers passed by the court that the claim was not a just one. (Owens v. Collinson, 3 Gill & John. 25.) They are not evidence at all of over-payments beyond the assets. But as to payments, within the amount of assets, they are prima facie evidence to shew the situation of the personal estate, in all controversies between the personal-representatives of the deceased, and distributees or legatees, and in actions by creditors against the heirs or devisees of the deceased, and to warrant a sale of the real estate by decree in chancery. (Gist's adm'r. v. Cockey, 7 Harr. & John. 134, 139.) And per Dorse, J. in Owens v. Collinson, 3 Gill & John. 39, "the claims of an administrator in this case, in common with all other claims against the deceased, being accredited to him in the settlement of his account with the orphan's courts, such accounts must be regarded by us as the acts of a court of competent jurisdiction, whose proceedings being wholly *ex parte*, are not conclusive, but rest on the principle that *omnia rite acta fuisse presumuntur, donec probitur in contrarium*." See also Scott v. Burch's adm'r. 6 Harr. & John. 67. In South Carolina, a receipt of payment, obtained by an administrator before the decree of accounting, was disallowed in an action on his bond, upon the usual ground that all matters of defence were merged in the suit for an account. A decree for an account is there held to be conclusive, where proper notice has been given, of all matters of account arising previous to the date of the decree. (Chambers v. Patton, 1 Bail. Rep. 130. Simkins v. Cobb, 2 id. 60.) And in the first case, Nott, J. said that *ex parte* settlements before the ordinary were conclusive in a court of law, though not in equity. See a note, post, where we speak generally of a former suit barring all claim on a matter of defence in a prior suit. Also ante, note 588, p. 830 to 834. In Neville v. Robinson, (1 Bail. Rep. 361,) it was denied generally, that an accounting before the ordinary should conclude, even on a plea of plene administravit. The report of the case is a mere note; and does not even distinguish whether there was notice of the accounting given to the party sought to be concluded or not. And see Harrington v. Cole, 3 McCord, 509. The effect of these decrees of the ordinary was afterwards much considered, in Simkins v. Cobb, (2 Bail. 60.) The action was debt on an administration bond against the sureties. The decree of the ordinary was in favor of the distributees for the whole balance claimed, on a citation and default of the principal, the surety not being a party, and the ordinary having no right to call him in as a party. The court, (by O'Neill, J.) regretted the want of such power. In this case the administrator was guardian of the distributees, and had charged himself in his accounts as guardian with all the assets, thus discharging the sureties. The decree was made in 1829, on the administrator's last return, which was in 1823. The court regretted, also, that exclusive jurisdiction of suits on these bonds had not been given to courts of equity. Yet even there, except in extraordinary cases, the sureties could not be made parties to the account. In this case there was a good defence which the sureties might have set up. A court of law had no original authority to investigate these accounts. Hence it must be done before the ordinary, or in a court of equity;

and the letter of the surety bond made his accounting or being required to account, an essential prerequisite to a suit on the bond. For these purposes the decree has been regarded as conclusive, but not beyond, for the security has a right to look into the decree, to see that he is charged according to the form and effect of his undertaking. If the security were discharged, he could not be touched by a subsequent decree against the administrator, based upon an act of his, subsequent to the discharge. It was doubted whether the decree concluded any thing except the fact of being required to account, and the different items, so as to relieve a court of law from looking to the propriety of their allowance or disallowance. To this point the court review the cases of *Syles v. Caldwell*, 3 M'Cord's Rep. 225, 6; *Ordinary v. Robinson*, 1 Bail. 25, 27; *Harrington v. Cole*, 3 M'Cord, 511; and show, that the decree must have the same effect both at law and in equity. They conclude, that it shall bind only as to the propriety of the receipts and expenditures, and cannot determine whether the balance has been properly paid away. It concludes only to the time of the last return of accounts; for on the returns alone can it act. In that view the defence interposed in the principal case was sustained; the payment of assets to the guardian being without the operation of the decree. (See 2 Bail. Rep. 61 to 65.)

It will at once occur to the learned reader, that the above was the question how far a decree against the principal shall effect the surety, in respect to which the civil and common law have come to such opposite conclusions as we noticed, ante, note 569, p. 816. The decision, probably owing to the special clause in the bond, follows the civil law; and see *Shelton ads. Cureton*, 3 M'Cord, 412, S. P. The same point was held in *Lucas v. Curry's ex'rs.* (2 Bail. 403, 406,) in an action between the sureties for contribution. And in this case it was said, that the decree shall be conclusive against the administrator. (id. 405, 6.) In a suit against sureties, the decree against the administrator, made by the ordinary, cannot be impeached for error or irregularity. (*Lyles v. Brown*, 1 Harp. Rep. 31.) See *Lyles v. Caldwell*, 3 M'Cord's Rep. 225.

The decisions in Pennsylvania, as to the conclusive character of these decrees on settling an account, place them as far above impeachment as they do the adjudications of any other court. (See *McFadden v. Geddis*, 17 Serg. & Rawle, 336. *App v. Driesback*, 2 Rawle, 237. *Riegel v. Rothrock*, 5 id. 266. *Wimmer's appeal*, 1 Whart. Rep. 96.) And where the account of an executor had been settled in the orphan's court, and an action was subsequently brought against him for a legacy, held that he could not show that the balance against him on such accounting was composed of bonds not due at the time of the settlement, and which could not afterwards be collected. (*Thompson v. M'Gaw*, 2 Watts' Rep. 161.) And when a final administration account has been confirmed, the remedy for omissions or mistakes is by a petition for a review in the orphan's court, and not a citation to the administrators to settle a new account. (*Downing's estate*, 5 Watts' Rep. 90.) In Massachusetts, if an item be omitted in settling the account, (as if the administrator omit to charge himself with interest,) it may afterwards be recovered; and so if the administrator open it, by applying to have his account on which the decree was made, corrected, (*Saxton v. Chamberlain*, 6 Pick. 422, *Field v. Hitchcock*, 14 Pick. 405;) an administration account may be partially settled by a decree; and there is no power in the probate court to make the decree final, so as to protect the executor from accounting in respect to other matters of account afterwards accruing. (*Field v. Hitchcock*, 14 Pick. 405.)

You may in these cases, as in all others, adduce evidence to disprove jurisdiction. (*Elliot v. Peirsol*, 1 Pet. 328, 9; and see matter of *Hemiup*, 3 Paige, 310. *Jackson v. Jeffries*, 1 Marsh. Rep. 88, 9.) As, that the deceased died, while resident in a foreign state, the surrogate, not then having the power; (*Weston v. Weston*, 14 John. Rep. 428; and see *ex parte Barker*, 2 Leigh, 719, stated post, note 621, and several like cases there;) so, that the letters were of administration *durante absentia* of an executor; (*Ford v. Travis*, cited 8 Cranch, 14, 26. *Griffith v. Frazier*, 8 Cranch, 9, 25;) or, that they are of the estate of a living man. (Per Marshall, C. J. in *S. C.*, 8 Cranch, 24; per Owsley, J. in *Moore v. Tanner's adm.* 5 Mon. 46.) So if there be no jurisdiction of the party, as for want of notice, if that be required; or where the party is not regularly in court, as required by statute. (*Messinger v. Kintner*, 4 Binn. 97; *Smith v. Rice*, 11 Mass. Rep. 507, 513. *Proctor v. Newhall*, 17 Mass. Rep. 81, 91, and see matter of *Hemiup*, 2 Paige, 320, 3. *id.* 310. *Hallett v. Hare*, 5 Paige, 316, 17.) Nor are such decrees conclusive where they go beyond the statute power of the court; as where land held in dower was on the death of the tenant distributed to one, in preference to another of the next of kin or heirs. (*Hunt v. Hapgood*, 4 Mass. Rep. 117. *Sumner v. Parker*, 7 Mass. Rep. 79, 83.) So, where the land sold lay in a foreign state. (*Wilkinson v. Leland*, 2 Pet. 627, 655.) If an attorney for a non-resident, or guardian for an infant, be necessary and not appointed, the sale of land is void as to him. (*Messinger v. Kintner*, 4 Binn. 97. *Smith v. Rice*, 11 Mass. Rep. 507, 513.) So if there was no petition to sell. (*Messinger v. Kintner*, 4 Binn. 97.) And it was once, at N. P., held void, because no administration account was settled. (Per Tilghman, C. J. 4 Binn. 104, citing *Larrimer's lessee v. Irwin*, M. S.) But this notion was repudiated as resting on a mere irregularity, in *M'Pherson v. Cunliff*, *ut supra*. See also post, note 622.

In *Thompson v. Tolmie*, (2 Pet. 165,) Ch. J. Thompson said, that if a court expressly find and assert by their record a fact necessary to give jurisdiction, it is by no means clear that the fact can be contradicted collaterally. And see *Raborg v. Hammond*, 2 Har. & Gill, 42, 50; also stated post, note 622. See post, note 637.

In addition to jurisdiction and parties, it behoves the conveyancer to look and see that the final conveyance under a surrogate's decree of sale, is executed in proper form and on the requisite authority. A statute of New-York, of April 8, 1813, formerly required that an indifferent person, to be designated by the surrogate, should join in the conveyance. (1 R. L. of 1813, 451, § 24.) Another, April 12, 1819, that the bargain of sale should be confirmed by the surrogate previous to a deed. (Sess. 42, p. 215, § 3. The above § 24 is repealed by the latter statute, § 4; and see 2 R. S. 105, § 30, 31.) These formula must be adhered to or the deed is void at law. A statute provision allows the omission of the third person, &c. to be summarily corrected in chancery, after that court shall have been satisfied of the fairness of the sale. (Sess. 42, p. 214, § 1; and see 2 R. S. 110, 111, § 61 to 65.) But several conveyances have recently been declared null at law, (at the Washington circuit,) for lack of judicial confirmation; one, in *Rea v. M'Eachron*, (13 Wend. 465,) and another in *Albro v. Waller*, tried at the same place, Nov. 1835, (M. S.) In the latter case, the circuit judge stayed the suit with a view to move the supreme court for time to perfect the proceedings in due form before the surrogate. The motion was denied, but with a further stay; whereupon a bill was filed by the purchaser in the vice-chancery of the fourth circuit: a temporary injunction was granted; but it yet remains to see whether equity has power to perfect such a

sale. The broadest amending statute (2 R. S. 110, 11, § 61 to 65,) does not, in terms, cover this defect. The supreme court, however, appear to take the contrary for granted in *Rea v. M'Eachron*, (Sutherland, J.) at p. 472. The statute seems to cover only two cases; the non-joinder of a discreet person under the old law, and the non-recital of the confirming order; not the non-existence of such order. It cannot be extended to other cases by construction. (*Matter of Hemiup*, 2 Paige, 316, 320; 3 Paige, 305, S. C.)

Independent of statute regulation, these judicial sales under an order, if regular in time and circumstance, pass the title, without any return or order of confirmation; or, if that be necessary, the court may yet allow a return; an order of sale carries a power to convey, by implication. The sale, however, must be regular as to time. Being short of the time allowed by statute, the sheriff mistaking calendar for lunar months, it was held void. (*Williamson v. Farrow*, South Car. Law Journ. 184, 189, 190.)

So far as the acts of the probate court are concerned, chancery and other tribunals have always struggled to maintain the proceedings in favor of bona fide purchasers. The importance of doing so was ably and eloquently vindicated by Duncan, J. in *M'Pherson v. Cunliff*, (11 Serg. & Rawle, 431, 2;) and by Yates, J. in *Snyder's lessee v. Snyder*, (6 Binn. 496.) But we are not aware that an omission of substantial forms by the parties has yet been relieved against. Whether it may not come under the equitable head of relief against the defective execution of powers, or by compelling the specific execution of contracts, remains to be seen. Such sales have been set aside in equity, on the ground of fraud; e. g. where it was presumable, from the purchase being by a trustee; (*Reynolds v. Scarborough*, Car. Law Journ. 106;) and it was held in one case, that this might be done even after the orphan's court had made an order of confirmation; but the heirs who made the objection were not parties. A case of fraud in defeasance of the order of confirmation, was allowed to be shown in an action of ejectment. (*Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 721.)

In *Kennedy v. Wachsmuth*, (12 Serg. & Rawle, 171,) it was held that the orphan's court might amend the proceedings even after sale. It was done, in this case, by adding in the book, a registry of the affirmation of one of the administrators, made in fact, but by a clerical mistake omitted in the record.

With regard to form, it will be seen hereafter, that every court, however humble in power, must in general keep a register of its sentence, judgment, and other proceedings in the cause or matter upon which it is called judicially to act; and, although this need not be drawn up at the time, such registry is an essential characteristic, without which it cannot be received in evidence. In form, however, it has been holden that technical formality and legal precision need not be preserved, if they are significant in common understanding and parlance. Thus, in a suit in the orphan's court by a distributee against an administratrix and her husband, for a distributive share, instead of a decretal declaration that the sum was due from the administratrix and her husband, and declaring out of what fund it should be made, the decree was that so much was due by the estate. In a suit upon the administration bond, there was a replication to a plea of performance, setting forth a decree of the ordinary ascertaining a sum to be due by the defendants, the administratrix and her husband; the rejoinder denied the existence of such decree, whereupon issued was joined. On trial, the decree, which recited that the ordinary (on due citation and hearing,) had proceeded to settle the estate, and ascertained a sum to be due from the estate to Hannah Clif-

ton, (the distributee,) was objected to as incomplete, uncertain and insufficient, inasmuch as it did not even declare the sum to be due by the defendants; much less that they should pay it. The record was, however, held properly admissible. On motion for entering a non-suit at bar, on appeal, the court (by Johnson, J.) remark, that "In the absence of any statutory or other regulation, each department of the judiciary must be left to adopt and pursue its own formula in its proceedings; because neither of them has the power to prescribe these matters for the others. With respect to matters of substance, there are certain requisites, however, which equally apply to every jurisdiction, and without which legal proceedings would be useless and unnecessary. In addition to the ordinary circumstances of time and place, they should, for the most obvious reasons, exhibit the parties, the subject matter in dispute, and the result. These facts being ascertained, the legal consequences follow of course, whatever may be the phraseology used; and where forms are not prescribed, it is the most that can be expected from the subordinate tribunals, where for the most part, the proceedings are conducted by the parties themselves, and before judges unused to and uninformed in the technicalities and subtleties of pleading." (*Ordinary v. M'Clure*, 1 Bail. Rep. 7, 8, 9.) In South Carolina, the ordinary who holds the orphan's court, has no power to do any act beyond the mere settlement of the accounts. He cannot order payment, nor enforce it. (id. 9.) The decree was holden to be conclusive. (id.)

The proceedings in the probate courts, whether they are considered as in a court of concurrent or exclusive jurisdiction, where they are conducted fraudulently and collusively between the personal representative and the purchaser or others, stand on the same footing as the English or American proceedings in divorce cases, or the English jactitation in the *Duchess of Kingston's* case; being impeachable by the parties injured, who are not actual parties to the suit, either by bill in chancery, in ejectment, or otherwise in a collateral way. (*Reynold v. Scarborough*, Car. Law Journ. 106; *Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 720, 1, both cited supra.) For this rule as to cases of divorce in America, see post, note 623; also post, note 652. In Massachusetts, held, that the settlement of an administrator's accounts, though the statute declared it conclusive, was yet examinable in equity for fraud. (*Pratt v. Northam*, 5 Mason, 95, 103, 4.) And this was said of fraud in withholding an account of assets; though it would be otherwise, if the court had participated in the fraud, which was not pretended. (id. 106, 7.)

NOTE 621—p. 344.

It seems by what fell from Parsons, Ch. J. in *Goodwin v. Jones*, (3 Mass. Rep. 514, 517, 518,) and the reasoning of the supreme court of errors in Connecticut, in *Riley v. Riley*, (3 Day, 74, 88, 9,) that this notion of local jurisdiction in the grant of letters testamentary or of administration, is the foundation of our refusing to notice them when emanating from the courts of a foreign country, or of a neighboring state of the union. Such, whatever may be the ground, seems to be the well settled rule in all the common law countries where the question has been raised. As a consequence, a personal representative deriving his powers in that way, will not be recognized as a party beyond the territorial jurisdiction of the court whence he has derived his powers. (Per

Kent, Ch. in *Morrell v. Dickey*, 1 John. Ch. Rep. 156; Story *Confl. of Laws*, 422; *Williams v. Storrs*, 6 John. Ch. Rep. 353, 357; *Tourton v. Flower*, 3 P. Wms. 369; *Bac. Ab. executors, &c. (E)* pl. 3; 2 *Roll. Ab. executor, (G)* 1; *Atkins v. Smith*, 2 *Atk.* 63; *Lee v. Bank of England*, 8 *Ves.* 44; 11 *Vin. executors (F)* 3, and *(G)* 15; *Shaw v. Staughton*, 3 *Keb.* 163, case 36; *Fenwick v. Sears' adm'rs.* 1 *Cranch*, 253, 259, 282; *Per Kent, Ch. in Doolittle v. Lewis*, 7 John. Ch. Rep. 47; *Dixon's ex'rs. v. Ramsay's ex'rs.* 3 *Cranch*, 319; *Per Marshall, C. J. in Doe, lessee of Lewis, v. M'Farland*, 9 *Cranch*, 152; *Goodwin v. Jones*, 3 *Mass. Rep.* 514; *Riley v. Riley*, 3 *Day*, 74; *Champlin v. Tilley*, 3 *Day*, 303; *Langdon v. Potter*, 11 *Mass. Rep.* 313; *Borden v. Borden*, 5 *Mass. Rep.* 67; *Campbell v. Tousey*, 7 *Cowen's Rep.* 64; *Kerr v. Moon's devisees*, 9 *Wheat.* 565, 571; *Johnson v. Rannels*, 6 *Mart. Lou. Rep. N. S.* 622, 3; *Mothland v. Wireman*, 3 *Penn. Rep.* 185, 187, &c.; *Græme v. Harris*, 1 *Dall.* 456; *Anonymous*, 1 *Hayw.* 355, and a learned note there by the reporter; *Picquet v. Swan*, 3 *Mason*, 469, 472, 3; *Per Porter, J. in Le Cesne v. Cottin*, 2 *Mart. Lou. Rep. N. S.* 495; *Brodie, adm'r. v. Bickley*, 2 *Rawle*, 431; *Campbell v. Sheldon*, 13 *Pick. Rep.* 8; *Sabin v. Gilman*, 1 *N. H. Rep.* 193; *Perkins v. Williams*, 2 *Root*, 462; *Stearns v. Burnham*, 5 *Greenl. Rep.* 261; *Thompson v. Wilson*, 2 *N. Hamp. Rep.* 291; *Bulls' adm'r. v. Price*, *Cam. & Norw.* 68; *Per Owsley, J. in Moore v. Tanner's adm'r.* 5 *Monroe*, 46, 7; *Glenn v. Smith*, 2 *Gill & John.* 493; *M'Cormick v. Sullivant*, 10 *Wheat.* 192; *Stanton v. Holmes*, 4 *Day*, 87, 96; *Dodge's adm'r. v. Wetmore*, *Brayt.* 92, 3; *Lee v. Havens*, *Brayt.* 93; *Dangerfield's ex'x. v. Thurston's heirs*, 8 *Mart. Lou. Rep. N. S.* 232; *Fearing v. Executors of Ball*, 6 *Lou. Rep. by Curry*, 685, 690; *Naylor v. Moody*, 2 *Blackf.* 247; *Leake v. Gilchrist*, 1 *Dev.* 73; *Curle v. Moor*, 1 *Dana*, 445; and see *Biddle v. Wilkins*, 1 *Pet.* 686; *Dawes v. Boylston*, 9 *Mass. Rep.* 337; *Cutter v. Davenport*, 1 *Pick.* 81, 85; *Burnley's adm'r. v. Duke*, 1 *Rand.* 108; *Jackson v. Jeffries*, 1 *Marsh.* 88, 9; *Armstrong v. Lear*, 12 *Wheat.* 175, 6; *Kraft v. Wickey*, 4 *Gill & John.* 332; *Hunter v. Bryson*, 5 *Gill & John.* 493; *Johnson v. Avery*, 2 *Fairf. Rep.* 100.) He cannot be received to sue jointly with the domestic administrator. (*Dickinson v. M'Craw*, 4 *Rand.* 158.) Certain cases, perhaps put this more correctly on the *lex fori*. Thus *per Marshall, C. J.* "All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country." (*Dixon's ex'rs. v. Ramsay's ex'rs.* 3 *Cranch*, 324; and see *per Story, J. in Picquet v. Swan*, 3 *Mason*, 474.) There is a learned note in 1 *Hayw.* 355, collecting the English cases upon this head, which in the result agree with ours, though like ours, they will be there seen to differ in the principle on which they go.

But this notion of disregarding foreign probate must be taken with many qualifications; and not as going to deny validity to the general rights and acts of the foreign executor or administrator arising under the *lex loci*; (*per Story, J. in Trecothick v. Austin*, 4 *Mason*, 35; See *selectmen of Boston v. Boylston*, 2 *Mass. Rep.* 384; *Campbell v. Tousey*, 7 *Cowen's Rep.* 64, 67;) and it is only when he comes abroad to sue or be sued, or act as *such*, that he is treated as destitute of power; (see *per Marshall, C. J. ut supra, in Dixon's ex'rs. v. Ramsay's ex'rs.*) Thus, his title is complete under his foreign letters; and he may sue here in his own name, (in his foreign right as per-

sonal representative,) in trover; (per Story, J. in *Trecothick v. Austin*, 4 Mason, 16, 32; Story's Conf. of Laws, 431.) Voluntary payments to and receipts by him are valid. (Per Story, J. in *Trecothick v. Austin*, 4 Mason, 83; *Atkins v. Smith*, 2 Atk. 63. Per Kent, Ch. in *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 49. Per Jackson, J. in *Stevens v. Gaylord*, 11 Mass. Rep. 264; Story's Conf. of Laws, 431, and note 2.) And the foreign executor of a foreign mortgagee of land, in the state of New-York, may foreclose under a power in the mortgage, by advertisement under the statute. (*Doolittle v. Lewis*, 7 Johns. Ch. Rep. 45; see *Cutter v. Davenport*, 1 Pick. 81.) He takes under the power, not under the letters of probate. So, a foreign executor may sue in his own name for land devised to him, for he takes under the devise; and the letters serve merely to aid in designating the person. (*Doe, lessee of Lewis, v. M'Farland*, 9 Cranch, 151.) So a recovery by a foreign administrator, is a bar to an action here, by a domestic administrator, for the same demand. (Per Jackson, J. in *Stevens v. Gaylord*, 11 Mass. Rep. 265. *Shaw v. Staughton*, 3 Keb. 163, case 36, S. P.) And the appointment of the debtor an executor in a foreign state, will be recognized as extinguishing the debt. (*Stevens v. Gaylord*, 11 Mass. Rep. 256.) The assent of a foreign executor to a specific legacy there, would entitle the legatee to sue in trover for the subject of a bequest every where. So of a vendee who buys of him. (Per Story, J. in *Trecothick v. Austin*, 4 Mason, 35. *Slack v. Walcott*, 3 Mason, 508, 518.) And this is true of any one, even the executor himself, who sues in his own right, though that right be derived under a foreign will. It is so, in the numerous class of cases wherein the executor may sue without presenting himself in his representative character. This proposition was very fully considered and illustrated in the case so often cited above of *Trecothick v. Austin*. (4 Mason, 16.) A slave may be reclaimed and demanded here, by the foreign administrator of the deceased foreign owner, without taking letters here. (*Commonwealth v. Griffith*, 2 Pick. 11, 18.) And a foreign probate was received to sustain a title in a legatee who was defendant. (*Johnson v. Rannels*, 6 Mart. Lou. Rep. N. S. 621.) A domestic administrator may, by attorney, receive the effects abroad and shall account therefor at home. (*Atkins v. Smith*, 2 Atk. 63.) Most of the above doctrines were fully recognized in *Leake v. Gilchrist*, (2 Dev. 73,) wherein it was held, that a foreign administrator might assign a bond against an obligor resident in his own state; and that the assignee might sue upon it in his own name in North Carolina, wherein bonds are negotiable like bills of exchange. A foreign administrator holding his intestate's negotiable note endorsed in blank, may sue on it in Maine, in his own name. (*Barrett v. Barrett*, 8 Greenl. 353.) So in New-York, if it be payable to bearer. (*Robinson v. Crandall*, 9 Wend. 425. Story's Conf. of Laws, 433.)

When we accord these broad effects to a foreign administration, as such, perhaps it should be confined to a case where that is the principal appointment, which is always where the testator or intestate resided, the whole of whose personal effects, wherever situate, are distributable according to the *lex domicilii*. (See *infra*.) Accordingly, where the domicil and death were in England, and *bona notabilia* both there and in Ireland, payment and discharge of a bond, which had always been in England, to the Irish administrator, was held no bar to a suit on the same bond in England. (*Daniel v. Luker*, 3 Dy. 305, a. case 58.) A greater operation may possibly be given by the United States constitution and laws, even to the ancillary appointment, as between the

several states, (see *infra*;) though so far as the American courts in general have acted on this and the like questions, we have hardly yet arrived at any distinction in favor of state administrations as contrasted with those which are totally alien. As the power of the administrator in a neighboring state is at present understood, it would probably be confined in its action to what should be esteemed *bona notabilia* in the jurisdiction of the neighboring court, and would not extend to *bona notabilia* elsewhere. Such seems to have been the more obvious principle of *Daniel v. Luker*, *supra*. Such is the distinction recognized in *Leake v. Gilchrist*, (2 Dev. 79;) and such, as we shall see, is the rule as declared in New-Hampshire, Vermont and Maine, if it be not even more unfriendly to the action of the foreign executor. It was accordingly denied that a foreign executor could endorse a note of his testator, and thereby entitle the endorsee to sue in his own name in the domestic state, a citizen there who signed the note. (*Thomson v. Wilson*, 2 N. H. R. 291. *Stearns v. Burnham*, 5 Greenl. 261. *Lee v. Havens*, 1 Brayt. 93.) The court say, in the first case, that choses in action, due by citizens of New-Hampshire, are *bona notabilia* there, of which the foreign probate court had no jurisdiction. The same remarks are made in *Lee v. Havens*. Following out this ground of local jurisdiction, the supreme court of Vermont directly held, that even a voluntary payment to, and discharge by an administrator appointed in New-York, the state of the intestate's domicile, was a nullity; and should not protect the defendant against an action in Vermont, brought by the administrator appointed there. (*Vaughan v. Barret*, 5 Verm. Rep. 333.) The debt was, of course, *bona notabilia* of Vermont. A probate or letters of a neighboring state, will not protect the foreign executor or administrator against trover by the domestic executor or administrator. Even payments by the former will not be allowed, *as such*; though, if proper, they may be recouped in damages in such action of trover. (*Glenn v. Smith*, 2 Gill & John. 493, 513, and see *Campbell v. Tousey*, 7 Cowen's Rep. 64, and *Riley v. Riley*, 3 Day, 74; *Campbell v. Sheldon*, 13 Pick. Rep. 8, 22.) The administration makes such foreign executor or administrator, a domestic executor *de son tort*, and if sued as such, he is entitled to the proper allowances, and will be chargeable accordingly for payments, distributions and assets, so far as they have been administered or come to his hands. (*Glenn v. Smith*, 2 Gill & John. 493, 513. *Campbell v. Tousey*, 7 Cowen's Rep. 64. *Mothland v. Wireman*, 3 Pennsylv. Rep. 188, 9. *Riley v. Riley*, 3 Day, 74.) And this, even though the goods were received in the foreign state and brought from there. (*Campbell v. Tousey*, 7 Cowen's Rep. 64.) This extent of the principle, however, is seriously doubted by Mr. Justice Story; (*Story's Confli. of Laws*, 425, et seq.) and he refers to the following cases as indicating a different doctrine, viz. *Selectmen of Boston v. Boylston*, 2 Mass. Rep. 334; *Goodwin v. Jones*, 3 id. 514; *Davis v. Estey*, 8 Pick. Rep. 475; *Dawes v. Head*, 3 id. 128; *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 45, 47. See also, *Currie v. Bircham*, 1 Dowl. & Ryl. 35. If an administrator have taken letters here, and receive the goods abroad under ancillary letters there, he shall account for them here as regular administrator. (*Pratt v. Northam*, 5 Mason, 95.)

For the presumptions in favor of these foreign probates, and that they shall be intended to be according to law, see *ante*, note 619, p. 860, 1.

As to what shall constitute domicil, and the evidence on this head, see 2 Kent's Com. 430, &c. note, and *Leake v. Gilchrist*, 2 Dev. 78, &c.

In Pennsylvania, they once had a statute giving the same right to administrators of neighboring states to sue there, as domestic administrators have. (*M'Cullough v. Young*, 1 Binn. 63, 4; 4 Dall. 292, S. C. See *Willing v. Perot*, 5 Rawle, 264. *Brodie v. Bickley*, 2 Rawle, 431.) In *Bryan v. M'Gee*, (2 Wash. C. C. Rep. 337,) it was held, that a New-Jersey administrator was accountable in the U. S. district court of Pennsylvania. This might have depended on the peculiar law of the forum. Washington, J. says, he may be made to account any where. This general proposition would seem to be confined to the United States court; for the cases in the state courts, above cited, go without distinction that a foreign administrator can neither sue nor be sued as such; though he may, as executor de son tort. (*Campbell v. Tousey*, 7 Cowen's Rep. 64. *Riley v. Riley*, 3 Day, 74. *Borden v. Borden*, 5 Mass. Rep. 67.) Yet it might have been on the notion prevalent in Pennsylvania, where we perceive that suits against foreign administrators are upheld on principle, as proper in all the states. (*Evans v. Tatem*, 9 Serg. & Rawle, 252, 258, 9.) See also *Mothland v. Wireman*, 3 Pennsylv. Rep. 188, 9; *Swearingen v. Pendleton's ex'r*, 4 Serg. & Rawle, 389; but in this last case, the defendant had taken letters both in Virginia and Pennsylvania. He was holden to account, however, for property which he got under his foreign letters. The notion was formerly the same in Connecticut as now in Pennsylvania, (*Nicole v. Mumford*, Kirb. 270;) though we have seen it overruled as to that state by several cases, cited *supra*, p. 870, 1.

There is, we confess, a good deal of difficulty in distinguishing why a judicial act or sentence, which vests a complete legal title in the executor or administrator at home, should not be available to give him a complete remedy, as well as title abroad. The law of the testator or intestate's domicil, where these letters are generally granted in the first instance, govern the title and distribution of all his personal estate, wherever situate. (See the authorities to this point, 2 Kent's Comm. 428, &c.; 1 Hayw. 357, note; and 4 Cowen's Rep. 517, et seq. note, and the authorities there cited. Per Nelson, J. in *Schultz v. Pulver*, 11 Wend. 363, and the authorities there cited. And see *Selectmen of Boston v. Boylston*, 2 Mass. Rep. 384, 393.) But this case, at the page last cited, seems to go somewhat upon the statute of Massachusetts, limiting the powers of the administrator appointed there on the estate of a foreigner. The foreign appointment is merely ancillary to that of the testator or intestate's domicil, and all must be administered according to the *lex domicilii*. (*Stevens v. Gaylord*, 11 Mass. Rep. 256, 263, 4.) Accordingly, administration in Massachusetts, of the estate of an intestate domicilled in England, shall not subject the administrator to account here for effects collected by him under his English letters. (*Selectmen of Boston v. Boylston*, 2 Mass. Rep. 384, and see *Richards v. Dutch*, 8 Mass. Rep. 506.) A difficulty, in the execution of this rule, grows out of the claims of home creditors, which has perplexed the courts of different countries, and resulted in considerable diversity of opinion. (Per Nelson, J. in *Schultz v. Pulver*, 11 Wend. 363, 4. See the cases, 2 Kent's Comm. 431, and *id.* 430, 1, as to what facts constitute domicil.) As among the neighboring states of this country, however, one would suppose it an easy transition, especially under the U. States law, declaring that the effect of a sentence in one state shall be the same in all others, fully to recognize these judicial appointments throughout the union, in all their domestic ef-

facts and consequences. We have seen that they are judicial acts, and proveable as such, (ante, note 619, p. 860, 1.) within the constitution and law of the union; and see *Carter's heirs v. Cutting*, 8 Cranch, 251, 2. Yet, in the face of that law, we deny them the general effect which it expressly confers on all judicial acts proveable under it; an effect, too, which is so plausibly derivable from the principles of the *lex loci*, that the courts of Connecticut once, and Pennsylvania still later, have yielded the conclusion in that view.

In making the above remarks, we had not discovered that the point had ever been thought of in any of the numerous cases decided against the general effect of these neighboring probates. North Carolina has, however, departed from the above two early cases, cited from 1 Hayw. 355, and Cam. & Norw. 68, decided 1799 and 1800; and on a suit being brought upon a probate of South Carolina, the court say, (without noticing either of the two former cases,) "We are of opinion that the probate and letters testamentary issued in South Carolina are sufficient to enable the plaintiff to sue here. The constitution of the United States and the act of Congress made to carry it into effect, direct us to give 'full faith and credit to the records, public acts and judicial proceedings of other states. A probate is a judicial act of a court, having competent jurisdiction; and, while it remains unrepealed, completely authenticates the right of the executor.'" (*Stevens' ex'rs. v. Smart's ex'rs.* 1 N. Car. Law Rep. 471.) Kentucky has a statute letting in probates and letters of other states as authority to sue, &c. (*Huling v. Fort's adm'r.* 2 Litt. 193; 4. *Thomas v. White*, 3 id. 177, 182, 3. *Moore v. Tanner's adm'r.* 5 Monroe, 47.) But this is holden not to interfere with the power of the state to grant domestic letters upon the estate of the same decedent. (*Henderson's adm'rs. v. Clarke*, 4 Litt. 277. *Moore v. Tanner's adm'r.* 5 Monroe, 47, 8, 9.) And when granted, they shall take precedence of foreign letters, and supersede them. (*Moore v. Tanner's adm'r.* 5 Monroe, 49.) Tennessee, also, has a similar statute. (*Smith v. Smith*, 7 Yerg. Rep. 26.)

Clearly, however, a probate of one state cannot be received, as such, to affect the title to land in another. This stands on the *lex loci*. (*McCormick v. Sullivant*, 10 Wheat. 192, 202, and the cases there cited. *Robertson v. Barbour*, 6 Monroe, 526, 527, 528.)

NOTE 622—p. 344.

See ante, note 620, p. 869, for divers cases of want of jurisdiction. *Griffith v. Frazier*, and *Ford v. Travis*, there cited, seem to conflict with the dictum in 1 Lev. 236, (for it is but a dictum,) cited by our author, that you may not show another person to be an executor; see per Thompson, J. in *Biddle v. Wilkins*, 1 Peters, S. C. Rep. 691, 692.

In Massachusetts, a grant of administration more than 20 years after the death, is void, the statute forbidding this; and the grant was allowed to be questioned collaterally, by plea of *ne unques* administrator. (*Wales v. Willard*, 2 Mass. Rep. 120.) So, of letters granted by the court of Suffolk, when the domicile of the intestate was in Middlesex. (*Holyoke v. Haskins*, 5 Pick. 20, 25. *Cutts v. Haskins*, 9 Mass. Rep. 543.) The statute confines the grant to the county of his domicile; and see *Collins v. Turner*,

2 Tayl. 105; 3 N. Car. Law Rep. 105, S. G. and ex parte Barker, stated *infra*. Though the judge of probate is forbidden by statute to act as attorney for the estate pending before him, yet his doing so will not take away jurisdiction; otherwise, (with-in another statute,) if he be interested, as if he be a creditor of the estate. (Cottle's case, 5 Pick. Rep. 483.)

These lines of inquiry into jurisdiction are very nice. A statute of Maryland confined jurisdiction of the estates of intestates, to the orphan's court of the county where the intestate died, and directed the court to inquire and adjudicate upon the time and place of death. The court having granted letters of administration, it was held, that the letters, involving a decision on such point of jurisdiction, were conclusive, and could not be questioned collaterally; that the orphan's court alone could apply a remedy, by direct repeal; and, till that was done, they remained in full force. (Raborg v. Hammond, 2 Har. & Gill, 42, 50.) And the court put this opinion on the well known general ground recognized by their own cases, (Barney's lessee v. Patterson, 6 Har. & John. 182, and Taylor v. Phelps, 1 Har. & Gill, 492,) as well as others, viz. that the judgment of a court of competent jurisdiction, when coming incidentally in question, or offered as evidence of title in any other court, shall conclude on the points decided, and cannot be questioned for error or mistake. This case of Raborg v. Hammond, has an important bearing on the great general question of judicial inviolability in our inferior magistrates, and, pushed to its full extent, would seem to interfere with some of the cases cited ante, note 620, p. 868, not to say with several other cases allowing collateral attacks on jurisdiction; for the point on which jurisdiction rests must in general be inquired of by the court. It is always, perhaps, necessarily involved in, and is, therefore, in the eye of the law, passed upon by the award of probate or letters. (And see per Thompson, J. in Thompson v. Tolmie, 2 Pet. 165, stated ante, 620, 868.) The courts of Pennsylvania and South Carolina have gone quite as far in respect to jurisdiction over the person. Where the record of the orphan's court asserts, that the party appeared, or had notice, it is held, that this cannot be contradicted in a collateral proceeding. (Selin v. Snyder, 7 Serg. & Rawle, 166. 11 id. 436. Lyles, ordinary, v. Robinson, 1 Bail. Rep. 25, 27.)

We considered ante, note 620, p. 863, the more proper place to exhibit those cases, where jurisdiction in the probate court has been questioned as to letters of probate or administration which were afterwards introduced as inducement to the proof of probate sales. They have, perhaps, been oftener questioned in this shape than any other. The objection is, of course, common to any proceedings based upon letters which are void, for that reason. Thus, where the hustings court of Richmond, (Virginia,) granted letters on the estate of a citizen of Canada, there not being *bona notabilia* in Richmond; and where the county court of *Henrico* granted letters as of a foreign citizen, when he was, in fact, a domestic citizen and a resident of Cabell county; in each instance the grant was holden void, and that without any repeal or revocation, administration might be committed by the proper court to another: in the first case, in a county where there were *bona notabilia*, and in the latter, where the deceased resided, these facts being essential to give jurisdiction. (Ex parte Barker, 2 Leigh, 719, and the case of Robinson's estate there cited; and see Weston v. Weston, 14 John. Rep. 423, stated ante, note 620, and several like cases, *supra*, in this note.) At any rate, it seems clearly unnecessary to shew the circumstances, by substantive proof, which give juris-

diction in the first instance; that shall be intended from the letters, or a certified copy, and the onus lies on the other side. (*Owings v. Beall*, 1 Litt. Rep. 257, 259.) When, however, the jurisdiction comes in question, all matters *in pais* to sustain and repel it, as that there were or were not *bona notabilia*, and the like, may be proved by parol, though the local goods be omitted in the inventory. (*Harrington v. Brown*, 5 Pick. 519, 521.)

In Kentucky, there being no evidence to show where the testator's property was, at the time of his decease, the court held, that as between letters granted there, and letters granted in another state, it should be presumed that the domestic court had the rightful jurisdiction. (*Tanner v. Allison*, 3 Dana's Rep. 422.)

NOTE 623—p. 346.

The right of strangers to attack sentences of divorce on the ground of fraud, often becomes important in causes depending upon marriage questions. The courts of the United States, proceeding upon different grounds, and affording different degrees of facility in obtaining such sentences, it has become common to go from one state to another, whose easy practice is often perverted by false suggestion and apparent default, even without notice to the adverse party. Both parties residing within the state, its courts have jurisdiction, though the marriage took place in another. (*Barber v. Root*, 10 Mass. Rep. 260. *Harteau v. Harteau*, 14 Pick. 183, 185, 6. *Harding v. Alden*, 9 Greenl. Rep. 140.) The English rule is otherwise. (2 Kent's Comm. 110. *Tovey v. Lindsay*, 1 Dow, 117; and see per Platt, J. in *Pawling v. Bird's ex'rs*, 13 John. Rep. 208, and the cases there cited, and 9 Greenl. 148, 9. For the law of Scotland, see 2 Kent's Comm. 110, 111, et seq.) Even where jurisdiction is obtained over the subject matter, a false suggestion and ex parte proceeding, or fraud upon the law in any way, it is said, will vitiate the decree. (Per Thompson, Ch. J. in *Borden v. Fitch*, 15 John. Rep. 145. Per Weston, J. in *Harding v. Alden*, 9 Greenl. 140, 150, 151. *Jackson v. Jackson*, 1 John. Rep. 424.)

The Duchess of Kingston's case, so often cited in the text, was where the husband and wife both joined in the collusive suit; and it is evident, from much of the reasoning in that case, that even had the decree been for a divorce *a vinculo*, it would not have protected the Duchess against the conviction of bigamy in her second marriage. The same thing would doubtless follow from one of our collusive foreign divorces.

The more common ground of rejecting these foreign sentences, lies in the want of jurisdiction; the circumstances to constitute which want, have been laid down with great caution. Sewall, J. speaking of Vermont, says, "the laws which authorize the supreme court of that state to proceed in suits for divorce, instituted in favor of persons resident for a time, but having no settled domicile within the state, against persons resident and domiciled in other states, who are not, and never have been, amenable to the sovereignty of the state of Vermont,—upon allegations of offences not pretended to have been committed within the territory of the state, or contrary to the peace, morals, or economy of the society there, or in violation of any contract subsisting, or which has ever been recognized there; in short, where no jurisdiction of the parties or of the sub-

ject matter can be suggested or supposed, are not to be justified by any principles of comity, which have been known to prevail in the intercourse of civilized states." (Barber v. Root, 10 Mass. Rep. 265, 266.) Accordingly, in a subsequent case, where the husband removed to Vermont, for the purpose of obtaining the divorce, for a cause not known to the laws of Massachusetts, the wife not appearing ever to have been within the jurisdiction of Vermont, the sentence was held void, and the husband charged at the suit of the plaintiffs in an action for necessities furnished to his wife. (Hanover v. Turner, 14 Mass. Rep. 227.) The court put their decision on the ground that the husband's temporary absence, (which was a little over a year,) was for the purpose of evading the laws of Massachusetts. In a like case, and on a similar ground, the supreme court of New-York refused to enforce a Vermont decree for alimony. (Jackson v. Jackson, 1 John. Rep. 424.) It is remarkable, that in this case both parties appeared, and were heard by counsel; and yet the husband was allowed to impeach the decree. On this point in the cause, the supreme court went on a doctrine which for a while prevailed there, that the judgment of a neighboring state is but a foreign judgment, and mere prima facie evidence. So far, the case is now not law, as we shall see in a subsequent note. And see Sanford v. Sanford, 5 Day, 353, 358. The doctrine of Jackson v. Jackson was recognized in Pawling v. Bird's ex'rs. 13 John. Rep. 208, 209, though Platt, J. doubts whether it would apply to a marriage which was, in fact, solemnized in the divorcing state. (id.) But see Bradshaw v. Heath, 13 Wend. 407. By a subsequent case, the question of jurisdiction is put on the more simple ground, that the defendant never was in Vermont, nor in any manner personally notified or apprized, and did not in any manner appear. (Borden v. Fitch, 15 John. Rep. 141.) And the case concedes that, had there been due notice, appearance, or other substantial ground of jurisdiction, the sentence would be conclusive, if the case were clear of fraud, upon the rights of others. The case was, however, one of plain fraud, and even if the wife had colluded with the husband, we have seen that, by analogy to the reasoning in the Duchess of Kingston's case, the decree could not affect the plaintiff. (id. 145.)

It is enough to conclude the defendant, that he appear in person, or by attorney. (Sanford v. Sanford, 5 Day, 353.) Though the marriage took place and the adultery were committed in a foreign state, yet a divorce *a vinculo* may be granted. (Harding v. Alden, 9 Greenl. 140.) And personal notice to the defendant, though he reside in another state, is valid, and shall bind him, though he do not appear; but, it is not said that the service of notice was upon him while he was in the foreign state. (id. 140, 141, 148.) However, in this case, the learned court supposing a want of notice, consider that the wife and the marital rights to be affected, being within the jurisdiction of the court, the suit for divorce was in nature of a proceeding *in rem*, and the decree valid as to the thing, (the wife and her marital duties, and the husband's claims upon her,) though void *in personam*; and that, in this view, her right to marry again, and so acquire dower, which she now sought to recover on the death of her second husband, was complete, however impotent the decree might have been as one for alimony, when brought to bear in a foreign suit against the foreign husband in person. (id. 150, 1.) See post, note 637, in which the general distinction between proceedings *in rem*, and *in personam*, is considered with a view to the manner of notice in order to acquire jurisdiction. The same case holds, that the divorcing power is not prohibited by the

constitution of the United States which forbids all state laws tending to impair the obligation of contracts, (id. 150,) and it recognizes these decrees of one state as binding in another, within the same constitution, and the cases of *Mills v. Duryee*, (7 Cranch, 481,) and *Hampton v. McConnel*, (3 Wheat. 234,) subject to the qualification that there must be jurisdiction. (9 Greenl. 149.) But it is reluctant to concede, in the broad language of *Hall v. Williams*, (6 Pick. 232,) that, "if such a judgment be rendered, in a state against, a man not within that state, nor bound by its laws, nor amenable to its jurisdiction, and that judgment should be produced in any other state against the defendant, it would be entitled to no credit." (9 Greenl. 149, 150.) Regarding this, as we before observed, in the light of a proceeding *in rem*, *Weston, J.* remarks, "if we refuse to give full faith and credit to the decree of the supreme judicial court of Rhode Island, because the party had his domicile in another state, and was not within their jurisdiction, we refuse to accord to the decrees of that court, the efficacy we claim for our own, when liable to the same objection." (id. 148.) He denies the consequence, that such a divorce is not valid within the constitution and law of the United States, because it happens to be for a cause not recognized by the state called upon to enforce it. (id. 149.) "The decree was rendered by the highest judicial tribunal in that state, (Rhode Island.) As it belongs to that tribunal to declare authoritatively and definitely, what the law of the state is, we are bound to infer that by that law, the bonds of matrimony previously existing between the libellant and her husband, were thereby dissolved; and that such is the effect of the decree within the state of Rhode Island." (id. 148.) He hence feels himself bound by the United States statute, to give the same effect to the sentence in Maine, as it would have by law or usage in Rhode Island.

The state of Indiana supports the decrees for divorce, made against foreign residents, on a statute notice by advertisement. (*Tolen v. Tolen*, 2 Blackf. 407.)

The effect of divorces in a neighboring state on a marriage in S. Carolina, where this contract is indissoluble by any domestic tribunal, is considered by a learned writer in the *South Car. Law Journ.* 377. The writer seems disposed to nullify such divorces. He puts it too much on the general doctrine, *de conflictu legum*, overlooking the constitution and law of the U. States. This view had not then, 1831, been sustained by any of the courts of that state.

A similar question to that in *Harding v. Alden*, of dower claimed in virtue of a second marriage, was recently decided in the sup. court of New-York. The notion of its being a proceeding *in rem*, was denied. It went upon the simple ground of the foreign residence of, and want of personal notice to the husband, which, as his appearance in court was not proved aliunde, nor expressed by the record, were holden good grounds for impugning the sentence. (*Bradshaw v. Heath*, 13 Wend. 406, 416, 417.) In this case, the marriage, divorce, offence, and general residence of both parties, were in Connecticut. The husband, (the defendant in the divorce suit,) was apparently absent at the time, just over the line between that state and New-York, whose court was not disposed to make any of those presumptions, in favor of the decree, which run through *Harding v. Alden*.

The residence of the husband is not the residence of the wife, for the purpose of giving jurisdiction over her person, though such be the legal notion in respect to the general question of settlement and domicile. (Per *Putnam, J.* in *Hanover v. Tur-*

ner, 14 Mass. Rep. 231. The contrary was suggested by Bristed, arg. 15 John. Rep. 131.)

A sentence of divorce *a vinculo*, properly obtained, is received as conclusive to divest the rights of all persons claiming in consequence of the marriage. Thus, the right of a husband's creditor, who had extended lands held by the husband, *jure uxoris*, were held to have ceased as a consequence of such a divorce. (*Barber v. Root*, 10 Mass. Rep. 260.)

These decrees, though domestic, like all others, domestic or foreign, are impeachable collaterally, for want of jurisdiction. Thus, a statute conferring the power to divorce *a vinculo*, the court not only decreed such a divorce, but also alimony: Holden void, in an action of debt for the alimony, for the right to decree that, is not incident to the power of divorce. (*Davol v. Davol*, 13 Mass. Rep. 234.)

Further on this subject, see post, note 633.

NOTE 624—p. 347.

"The whole world, it is said, are parties in a prize cause, and therefore the whole world is bound by the decision. The reason on which this *dictum* stands, will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary*, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause, so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law or equity; and no reason is discerned why the sentence of a court of admiralty, under the same circumstances, should not be re-examinable in a court of admiralty. This reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo as enemy's property, is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral. It is not at variance with that decision, because the question of prize is one of which courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them." (Per Marshall, Ch. J. *the Mary*, 9 Cranch, 126, 144.)

The doctrine that, by the monition, every one who could have asserted a right to or in the property libelled, is to be regarded as a party to the suit, and consequently, that all claims which might have been interposed and settled in such suit are barred by the judgment or sentence, has been acted upon in Louisiana. (*Bauduc's Syndics v. Nicholson*, 4 Miller's Lou. Rep. 81, 85, 86.) "The settled principles of law," says Porter, J. delivering the opinion of the court in this case, "give to the judgment *in rem*, the authority of the thing judged, against all parties to it; that is, against all the world who had a claim to assert on the property." (id. p. 86.) The rule has been laid down in similar terms in Kentucky. (*Thomas v. Southard*, 2 Dana's Rep. 475, 482.) See further, *Mankin v. Chandler*, 2 Brockenb. Rep. 123; per Marshall, C. J., S. P.

Where a slave was libelled and condemned by the name of *Jack Robinson*, instead of that of *Taliver*, by which he was always called, the court of appeals in Virginia held, that the owner could not be presumed to have had notice that his interest was involved in the suit, so as to enable him to assert his right, and, therefore, was not bound by it. (*Hooe v. Pierce*, 1 Wash. Rep. 212.)

NOTE 625—p. 347.

These sentences, like judgments of a court of common law, are always conclusive as to their own existence, and the legal consequences resulting from them. (See ante, note 582, p. 820.) One of those consequences is, that the title of the original owner to the property upon which they operate is completely extinguished, and transferred to the captors or their sovereign. (*The Star*, 3 Wheat. Rep. 78, 86. *Stewart v. Warner*, 1 Day's Rep. 142. *Jenkins v. Putnam*, 1 Bay's Rep. 8. *Cherriot v. Foussat*, 3 Binn. Rep. 220. *Williams v. Armroyd*, 7 Cranch, 423, 432. *Armroyd v. Williams*, 2 Wash. C. C. Rep. 508. *Hooe v. Pierce*, 1 Wash. Rep. 212. *Wheelwright v. Depeyster*, 1 Johns. Rep. 471. *Vanderheuevel v. The United Ins. Co.* 2 Johns. Cas. 451. *Ocean Ins. Co. v. Francis*, 2 Wend. Rep. 64. *Swift's Ev.* 16. *Fowler v. Savage*, 3 Conn. Rep. 96, per Chapman, J. *Rose v. Himely*, 4 Cranch, 241. See also, ante, note 583, p. 823. *Story's Confli. of Laws*, 495.)

NOTE 626—p. 348.

The doctrine on this subject, in England, has been carried quite as far, to say the least of it, as is consistent with sound policy. Sentences of foreign admiralty courts have been upheld and regarded as conclusive there, even while they were denounced as arbitrary—unjust,—proceeding "upon worse than Algerine principles,"—"professing to follow the law, but in reality making it a stalking horse for an act of piracy." (See per Kenyon, C. J., *Geyer v. Aguilar*, 7 T. R. 691, 692.)

Some of the more modern cases speak in terms of regret, that the course of adjudication had been so liberal and unguarded. In *Fisher v. Ogle*, (1 Camp. Rep. 418,) the action was on a policy of insurance upon the *Juno*, represented as an American ship, which had been condemned in a French court of vice-admiralty at Martinique. The

sentence was in these words:—"That it resulted evidently from the papers on board, that the expedition of the said ship Juno, her cargo, and the operations of her captain on the coast of Africa, were for account of the brothers Geddes, merchants of London, who had, to mask the English property of this outfit, borrowed the American flag and passport of the said ship Juno, and taken for their agent and partner, in the expedition, captain Fisher, furnished with a certificate of citizen of the United States." It then went on to condemn the vessel and cargo, as "good and valid prize," without stating any specific ground of condemnation. Lord Ellenborough said, "we show sufficient respect for French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not American; and it is not to be considered evidence of what it does not specifically affirm." A verdict was found for the plaintiff, and on motion for a new trial his lordship further said,—"I must look to the adjudicative part of the sentence, and there I find nothing stated as to the ship or her cargo not being American. Have you any case in which it was held that the judges must fish for a meaning when a sentence of this kind is produced to them? Here the foreign court seems not to have formed any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity, that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded." The other judges were of the same opinion, and the sentence was accordingly held not conclusive. (*id.* 420.) In another case, (*Donaldson v. Thompson*, 1 Camp. Rep. 429, 432,) Lord Ellenborough said, "I am by no means disposed to extend the comity which has been shewn to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favor rests upon an authority in *Show*, (*Hughes v. Cornelius*, 2 Show. 232,) which does not fully support it; and the practice of receiving them often leads to the greatest injustice."

The English doctrine, however, after having been much controverted in this country, has, to a certain extent, received the deliberate sanction of many of our courts. In the supreme court of the United States, in Massachusetts, Connecticut, South Carolina, and Louisiana, the sentence of a foreign court of admiralty condemning property for a breach of blockade, or as enemy's property, is conclusive evidence, as between the insured and underwriter, of the facts upon which it is founded. (*Croudson v. Leonard*, 4 Cranch's Rep. 434. S. C. 1 Hall's Amer. Law Journal, 148. *Baxter v. The Marine Ins. Co.* 6 Mass. Rep. 277. S. C. 7 *id.* 275. *Brown v. The Union Ins. Co.* 4 Day's Rep. 179. *Stewart v. Warner*, 1 *id.* 142. *Swift's Ev.* 15, 16. *Starkie v. Woodward*, 1 Nott & M'Cord, 329, note. *Groning v. Union Ins. Co.* *id.* 537. *Drayton ads. Wells*, *id.* 409. *Campbell v. Williamson*, 2 Bay's Rep. 237. *Cucullu v. Louisiana Ins. Co.* 5 Martin's Lou. Rep. N. S. 464. *Blanque v. Peytavin*, 4 *id.* 458. *Zeno v. The Louisiana Ins. Co.* 2 Miller's Lou. Rep. 593.

So also in Maryland, formerly; (*Gray v. Swan*, 1 Har. & Johns. 142;) but now by statute such sentence has been reduced to the character of mere prima facie evidence. (*The Maryland Ins. Co. and Phoenix Fire Ins. Co. v. Bathurst*, 5 Gill & Johns. Rep. 159.)

And in Pennsylvania, the same doctrine prevailed for a time as in England; (*Dempsey v. Ins. Co. of Pennsylvania*, 1 Binney's Rep. 299, note; see *Brown v. Ins. Co. of Pennsylvania*, 4 Yeates' Rep. 119;) but the legislature there, likewise, have provided, that no sentence of a foreign prize court, shall be conclusive of any facts, save the actings and doings of the court. (See 2 Starkie's Ev. 239, note 1.)

In New-York, the rule is now well established, that although the sentence of condemnation by a foreign court of admiralty, is conclusive to change the property, yet it is only *prima facie* evidence of the facts upon which it purports to be founded; and in a collateral action, such evidence may be rebutted by showing that no such facts existed. (*Vanderheuvell v. The United Ins. Co.* 2 Johns. Cas. 451. S. C. 2 Caines' Cas. in Err. 217. *New-York Firemen Ins. Co. v. De Wolf*, 2 Cowen's Rep. 56. *Ocean Ins. Co. v. Francis*, 2 Wend. Rep. 64. *Radcliffe v. United Ins. Co.* 9 Johns. Rep. 277. *Johnston v. Ludlow*, 2 Johns. Cas. 481. *Laing v. United Ins. Co.* id. 487.)

The doctrine in Virginia is the same as in New-York. (*Bourke v. Granberry*, 1 Gilmer's Rep. 16.)

NOTE 627—p. 348.

The sentence of a foreign court of admiralty is conclusive only as to what is positively affirmed in it, and not of that which can merely be gathered from it by inference. (*Fisher v. Ogle*, 1 Camp. Rep. 418, stated in the next preceding note. See also, *Horneyer v. Lushington*, 3 id. 88, 89. *Roscoe on Ev.* 103. *Dalgleish v. Hodgson*, 7 Bing. Rep. 495, S. P.)

And the court must look to the judicative part of it; for it will not be evidence of what is merely stated in the consideration part. (*Christie v. Secretan*, 8 T. R. 192. 2 Ev. Poth. 355. See *Maryland and Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. 159. *Robinson et al. v. Jones*, 8 Mass. Rep. 536.)

Like the judgment of a court of common law, it is, in general, conclusive as to its own correctness and the facts necessary to uphold it; (see ante, note 587, p. 826; note 588, p. 830;) but not as to facts without which it may have been rightly pronounced. (*Maley v. Shattuck*, 3 Cranch, 458, 488.)

NOTE 628—p. 348.

S. C. 3 Doug. Rep. 345.

The contrary has been expressly held in South Carolina; (see *Bailey v. South Car. Ins. Co.* 1 Nott & M'Cord, 544, note (b), cited in the next note;) and Nott, J. after reviewing the English cases, came to the conclusion that the weight of authority in England, was against the doctrine contained in *Salouci v. Woodmas*, cited in the text. (id. 546.) In New-York, also, the court of errors have held, that a condemnation as "lawful prize," afforded *no judicial inference* of the vessel being enemy's property, as there may be other just causes of condemnation. (*Goix v. Low*, 2 Johns. Cas. 480.) And the reporter in a note to this case, says—"From the cases of *Pollard v. Bell*, (8 Term Rep. 444,) *Bird v. Appleton*, (id. 562,) and *Fisher v. Ogle*, (1 Camp. 418,) it seems

now to be the opinion of the English courts, that where the sentence of the foreign court of admiralty condemns merely as "good and lawful prize," without adverting to the question whether it is neutral or enemy's property, such sentence is not conclusive." (id. 480, note (a).)

NOTE 629—p. 349.

See *Dalglish v. Hodgson*, 7 Bing. Rep. 495.

In Pennsylvania, where the question was whether certain property was *American*, conformably to a warranty in a policy of insurance, held, that inasmuch as the libel stated contradictory causes of condemnation, and the decree was general, so that the precise grounds of it could not be ascertained, evidence was admissible on the part of the plaintiff, to show that the property was *American*: and it distinctly appearing from the proof that such was the character of the property, Shippen, J. said—"We cannot presume that the judge of a foreign court has perjured himself, by declaring that property to be *French*, which we know to be *American*; and of course we must assume the position, that his decree proceeded upon the other allegations in the libel," viz. those which conceded the property to be *American*. (*Vassee v. Ball*, 2 Dall. Rep. 270, 275. S. C. 2 Yeates' Rep. 178. See *Croussilart v. Ball*, 3 id. 375.)

And in South Carolina, where the libel alleged one ground of condemnation, and the sentence another, held, that it was such a case of ambiguity, as to afford ground for opening the decree and suffering the parties to go into evidence on both sides. (*Blacklock v. Stewart*, 2 Bay's Rep. 363. See *S. P. Williamson v. Tunno*, id. 388.)

The same doctrine was held in Maryland, where the decree was ambiguous, so that the precise grounds of it could not be gathered from it. (*Gray v. Swan*, 1 Har. & Johns. 142.)

In Massachusetts, where the sentence, after alleging a rescue from the possession of a belligerent captor, proceeded to declare, that for that cause, or otherwise, the vessel was condemned, held, that the assured might disprove the alleged rescue, and that the sentence was no more than mere *prima facie* evidence. (*Robinson v. Jones*, 8 Mass. Rep. 536.) Not so, however, where the sentence, after stating one sufficient cause of condemnation, proceeded to condemn the vessel for that cause, adding, and for other sufficient causes. In this case, the sentence was held conclusive against the insured as to the ground specifically set forth. (*Baxter v. The New England Mar. Ins. Co.* 6 Mass. Rep. 277. See S. C. 7 id. 275.)

In New-York, we have already seen that the sentence of a foreign admiralty court, is conclusive to change the property, but is only *prima facie* evidence to affect a warranty or representation in a policy of insurance: (see ante, note 626, p. 883.) And where the libel alleged various and inconsistent causes of condemnation, and the sentence pronounced the vessel as forfeited "for a breach of some or one of the laws relating to trade and navigation;" Spencer, senator, regarded it as equivalent to saying that the condemnation was for some cause or other, and consequently proved nothing as between the insured and underwriter. (*The Ocean Ins. Co. v. Francis*, 2 Wend. Rep. 64, 74; and see per Walworth, Ch. id. 69, 70.)

If the court acted, as in this last case, under a municipal law, and the condemnation was for a breach of such law, the sentence would be no evidence as to a warranty against illicit trade, unless the law alleged to have been broken be proved. The sentence itself furnishes no evidence of the existence of such law. (*id*; and see *S. C.* under title *Francis v. Ocean Ins. Co.* 6 *Cowen's Rep.* 404, in supreme court.)

NOTE 630—p. 349.

S. P. 1 *Starkie's Ev.* 247, 248, 5 *Amer. ed.*

Where a policy of insurance of a vessel contained a warranty of American property, held, that a condemnation by a British court, proceeding upon the ground that such vessel *persisted in an intention to enter a blockaded port*, did not falsify the warranty; merely *persisting in an intention to enter*, unaccompanied by any other fact, not being sufficient to forfeit the strictly neutral character of the vessel or authorize her condemnation. Otherwise, however, it seems, if the condemnation had proceeded upon the ground of *an attempt to enter, after knowledge of the blockade*. (*Fitzsimmons v. Newport Ins. Co.* 4 *Cranch*, 185. *Williamson v. Tunno*, 2 *Bay's Rep.* 398.)

NOTE 631—p. 349.

Roscoe on Ev. 104; 2 *Ev. Poth.* 355.

If the ground of the sentence is set forth, and it appear that the condemnation was not for a breach of the law of nations, it will not be considered as conclusive or binding as to the question of neutrality, upon the courts of other countries. (*Ocean Ins. Co. v. Francis*, 2 *Wend. Rep.* 64, 69, per the chancellor. See *S. P. Campbell v. Williamson*, 2 *Bay's Rep.* 239.)

Where a vessel was condemned for resisting, by force, an attempt to search her, contrary to an ordinance of the country of the captors, held, that as such resistance was no violation of the law of nations, the condemnation was not conclusive evidence on the question of neutrality. (*Salucci v. Johnson*, 4 *Doug. Rep.* 224; and see *id.* p. 232, 233, note (k).)

Other exceptions to the conclusiveness of foreign admiralty sentences, depend upon some peculiar stipulation between the assured and underwriter. Thus, where the foreign sentence relates to property warranted American, and the policy contains a proviso, that if the fact be called in question, it shall be sufficient for the assured to prove it in any court of the United States, the sentence is only *prima facie* evidence to falsify the warranty in such cases. (*The Maryland Ins. Co. v. Wood*, 6 *Cranch*, 29. *Culbreath v. Gracy*, 1 *Wash. C. C. Rep.* 219. *S. C.* 1 *Binn. Rep.* 296, note. *Calhoun v. The Ins. Co. of Penn.* 1 *Binn. Rep.* 293.)

A foreign admiralty sentence has been holden inconclusive, where it did not appear that any libel had been filed, any monition issued, or any hearing had; and the court strongly intimate that it was not even admissible. (*Sawyer v. The Maine Fire Ins. Co.* 12 *Mass. Rep.* 291. See also, *Obicini v. Bligh*, 8 *Bing. Rep.* 331.)

NOTE 632—p. 349.

Every foreign admiralty sentence must depend for its operation, upon the jurisdiction of the court pronouncing it. And all the cases agree, that where the doctrine as to the conclusiveness of these sentences prevails, it must be understood with the above qualification. If jurisdiction be wanting, all is wanting, and the whole proceeding will be regarded as utterly null and void. Nor is there any question, that upon both principle and authority, the court, before whom such sentence is sought to be used, has the right of examining freely into the matter, and deciding whether the foreign tribunal which pronounced the sentence had jurisdiction or not. (See *Rose v. Himely*, 4 Cranch, 241, 263, et seq. *Story's Confli. of Laws*, 492, et seq. *Cherriot v. Foussat*, 3 Binn. Rep. 220. *The Ocean Ins. Co. v. Francis*, 2 Wend. Rep. 64. S. C. 6 Cowen's Rep. 404. *Hudson v. Guestier*, 4 Cranch, 293. 4 Cowen's Rep. 523, 524; note. 2 Ev. Poth. 355. *La Nereyda*, 8 Wheat. Rep. 108, 168. *Thomas v. Southard*, 2 Dana's Rep. 475, 482, 483.)

1st, Jurisdiction may depend, upon the state of the *res*, on which the sentence was designed to operate. Thus, if by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that such condemnation would change the property. (*Rose v. Himely*, supra, per Marshall, C. J. *Story's Confli. of Laws*, 494.) So, if the possession of the *res*, should be actually lost by the captor, as by recapture, escape, or voluntary discharge, the prize courts of the captor would thereby lose jurisdiction. (1 Kent's Comm. 359, 2 ed. *Hudson v. Guestier*, 4 Cranch, 293. *Jenkins v. Putnam*, 1 Bay's Rep. 8. 10.) But the possession of the captor in a neutral port, the port of an ally, or of a nation under the control of the sovereign of the captor, is the possession of such sovereign, and the *res*, though remaining there, are within the jurisdiction of the courts of the captor. (1 Kent's Comm. 358, 359. id. 104. *Hudson v. Guestier*, supra. *Williams v. Armroyd*, 7 Cranch, 432. *The Henrick and Maria*, 4 Rob. Adm. Rep. 43. 6 id. 138, note. *Cherriot v. Foussat*, 3 Binn. Rep. 220. *Page v. Lennox*, 15 John. Rep. 172. *Sheaff v. 70 hogsheads*, Bee's Adm. Rep. 163. But see *Wheelwright v. Depeyster*, 1 John. Rep. 471.)

2d. The jurisdiction of a foreign admiralty court, may depend upon its national character. Thus, the prize court of an ally of the captor has no right to condemn, (1 Kent's Comm. 103, 2d ed.;) and *a fortiori*, the court of a neutral cannot.

3d. The jurisdiction may, also, depend upon the place where the court sits. Thus, the prize court of the captor cannot act in a neutral territory, and if it do so, its proceedings will be deemed unauthorized and void. (*Glass v. The sloop Betsey*, 3 Dall. Rep. 6. 1 Kent's Comm. 103, 2d ed. and the cases there cited. See also, the cases cited in the text.) But the prize court of the captor may sit in the territory of an ally. (1 Kent's Comm. 103, 2d ed.)

4th. Jurisdiction may also depend upon the manner in which the court is constituted. Thus, where a condemnation was pronounced by a pretended court of admiralty at Galveztown, constituted by commodore Aury, under the alleged authority of the Mexican republic, the supreme court of the United States said, that "it did not recognize the existence of any court of admiralty, sitting at Galveztown, with authority to adju-

dicate on captures; nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state, at war with Spain; so that the court could not consider as legal, any acts done under the flag and commission of such republic or state. (*The Nueva Anna and Liebre*, 6 Wheat. Rep. 193.) "I admit," says Washington, J. in *Snell v. Fausatt*, (1 Wash. C. C. Rep. 271, 274,) "that, where we find a condemnation by a foreign court, of the origin of which we are not informed, we ought to presume it a legitimate tribunal. But, when the source of its authority and constitution is stated, we ought to examine it, and if it be contrary to the usual mode of constituting courts, it shifts the burthen of proof upon the party who would support the condemnation; particularly, as it is more easy to prove the legitimacy of the court, than to disprove it. We know that the appointment of courts is, in all civilized countries, by the sovereign power. This, however, may be lodged by the sovereign, in a subordinate civil officer; nay, in a military commander, if the sovereign so chooses. But this latter mode is so unusual, that when we hear of a court being constituted by a military commander; and particularly, where it is not clear that he was, at the time, commander in chief; it destroys the presumption of its legality, so as to require the party who would support the condemnation, to show that the court was instituted by lawful authority. (S. C. 3 Binn. Rep. 239, note.)

"But even where the authority of the court has clearly emanated from the sovereign power of the nation, it is going too far to say, that its jurisdiction cannot be questioned. All nations are on an equality. If any one, then, should undertake to erect a jurisdiction in manifest violation of justice, general convenience, and long established principles, is this to be submitted to? Suppose a belligerent should direct its officers to hold a prize court within the dominions of a neutral, without that neutral's consent; can it be doubted, whether the jurisdiction of such a court may be called in question? But, it is answered, that it is the business of the government, and not of courts of justice, to seek redress in case of these irregular acts of sovereigns. This answer does not appear satisfactory. Governments may certainly interfere with great propriety. But what are the courts to do, when the subject is brought before them in the course of the administration of justice? They cannot refuse to decide, and have no rule to govern their decisions, but the law of nations." (*Cherriot v. Foussat*, 3 Binn. Rep. 220, 251.)

It may be well to add, before concluding our notes upon foreign admiralty sentences, that an appeal from a sentence, prevents it from having the force of *res judicata*, and consequently, while such appeal remains undetermined, the sentence will prove nothing. (*Zino v. The Louisiana Ins. Co.* 6 Martin's Lou. Rep. 62, N. S.) So, if the sentence or decree shall have been reversed, it is no evidence of the cause of condemnation. (*Dorr v. The Union Ins. Co.* 8 Mass. Rep. 494. *Cleveland v. The Union Ins. Co.* id. 308, 320.)

There is no distinction between a sentence of condemnation and a sentence of acquittal, as it respects the principle of *res adjudicata*. The latter is just as conclusive that the alleged cause of condemnation did not exist, as the former is that it did. (*Gelston v. Hoyt*, 13 John. Rep. 561. See S. C. 3 Wheat. Rep. 246. *The Bennett*, 1 Dodson's Rep. 175, 180. *Story's Conf. of Laws*, 503.)

NOTE 633—p. 350.

As to foreign sentences, confirming marriages or granting divorces, if fairly obtained, and pronounced by competent tribunals in regard to persons within the jurisdiction, there is great reason to hold, says Mr. Justice Story, that they ought to have universal conclusiveness. (Story's Conf. of Laws, 497.) The case cited in the text, was where the validity of a marriage in France was asserted to have been established by the sentence of a court in France, having proper jurisdiction; and Lord Hardwicke is reported to have said—"It is conclusive, whether in a foreign court or not, from the law of nations in such cases; otherwise, the rights of mankind would be very precarious." As early as the reign of Charles II, Lord Chancellor Nottingham maintained, in the House of Lords, that a foreign decree of divorce, in the case of a foreign marriage, was conclusive, and could not be opened, or the merits re-examined. For, "it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form of those countries wherein they were given. For, what right hath one kingdom to reverse the judgment of another? And what confusion would follow in christendom, if they should serve us so abroad, and give no credit to our sentences." He referred to *Wier's case*, (5 Jac.) wherein a judgment in debt having been rendered in Holland, against an Englishman, he fled from execution to England, and the judgment being certified, the defendant was imprisoned in the admiralty for the debt, and the K. B. upon *habeas corpus* held the imprisonment lawful, and that "it was by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and the one to execute the judgments of the other." (Note to *Kennedy v. Cassilis*, 2 Swanst. Rep. 342, 344, et seq. 1 Rol. Abr. 530, pl. 12. 2 Kent's Comm. 119. Story's Conf. of Laws, 497, 498.)

On the other hand, Lord Stowell, in a case before him, in which the validity of a foreign sentence of divorce was set up, by way of bar to proceedings in the English ecclesiastical courts, between the same parties, observed—"Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and, undoubtedly, a sentence of separation, in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding in other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband, is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England. Had there been a sentence against the wife for adultery in Brabant, it might have prevented her from proceeding with any effect here; but no

such sentence any where appears. (*Sinclair v. Sinclair*, 1 Hagg. Consist. Rep. 297. See also, *Scrimshire v. Scrimshire*, 2 id. 397, 410. Story's Conf. of Laws, 498, 499.)

Indeed, it may be stated as the general result of the English cases, that the courts there are not disposed to regard any foreign sentence, dissolving an English marriage, as valid. For the authorities in support of this position, and the reasoning by which it is sustained, the reader is referred to Story's Conf. of Laws, 186, et seq.; id. 499; *Lolly's case*, 1 Russ. & Ryan's Cas. 236; *Tovey v. Lindsay*, 1 Dow's Rep. 117; *M'Carty v. De Caix*, 3 Hagg. Eccles. Rep. 642, note; 2 Kent's Comm. 116, 117, 2d ed.

It is otherwise, however, in Scotland. (Story's Conf. of Laws, 178, et seq. id. 499.)

In this country, we find but few decisions directly pertinent to the subject under consideration. The Massachusetts and New-York courts furnish us with some cases, from which it appears, that so far as our law has been declared, it does not differ much from that of Scotland. In the former state, where a marriage celebrated in Massachusetts had been dissolved in Vermont, upon a suit by the husband for a divorce, for the cause of extreme cruelty of his wife, (a cause inadmissible by the laws of Massachusetts to dissolve a marriage,) it appearing that the parties had not, at the time, any permanent domicile in Vermont, but that the husband had gone there for the purpose of obtaining a divorce, the divorce was held a mere nullity on the ground that there was no real change of domicile. "If," said the court, "we were to give effect to this decree, we should permit another state to govern our citizens in direct contravention of our own statutes; and this can be required by no rule of comity." (*Inhabitants of Hanover v. Turner*, 14 Mass. Rep. 227, 231. See also, *Barber v. Root*, 10 id. 265, 266.) In another case, the question was brought before the court whether a Massachusetts marriage could be dissolved by a decree of divorce made in Vermont, both parties being at the time *bona fide* domiciled in the latter state, and the cause of divorce being such as would authorize a divorce *a vinculo* in Massachusetts. The court decided in the affirmative, holding that the law of the actual domicile must regulate the right. The reasoning of the court was substantially this: regulations on the subject of marriage and divorce are rather parts of the criminal than the civil code; and apply not so much to the contract between the individuals as to the personal relations resulting from it, and the relative duties of the parties, their conduct and standing in the society of which they are members; and these are regulated with a view principally to the public order and economy, the promotion of good morals, and the happiness of community. The *lex loci*, therefore, by which the conduct of married persons is to be regulated, and their relative duties are to be determined, and by which the relation itself is to be, in certain cases, annulled, must always be referred to the place where it subsists for the time, and not to the one where it was entered into. (*Barber v. Root*, supra.) For other cases, remotely bearing on this subject in Massachusetts, see *Hopkins v. Hopkins*, 3 Mass. Rep. 158; *Carter v. Carter*, 6 id. 268; *Richardson v. Richardson*, 2 id. 153; *Harteau v. Harteau*, 14 Pick. Rep. 181.

The New-York doctrine coincides in effect with that of Massachusetts. Accordingly, where a marriage celebrated in the former state, was dissolved by a Vermont decree, made on the application of the wife, for a cause not recognized by the laws of New-York, the husband still remaining domiciled in New-York, the supreme court

refused to carry the decree into effect as it regarded alimony notwithstanding the husband appeared in the cause, upon the ground that there being no *bona fide* change of domicile of the parties, it was an attempt fraudulently to evade the operation of the laws of New-York. (*Jackson v. Jackson*, 1 Johns. Rep. 424.) The court, however, abstained from any opinion as to the effect of the divorce so obtained. In a subsequent case, where the marriage took place in Connecticut, and the husband afterward went to Vermont and obtained a divorce against his wife, who never resided there and never appeared in the suit, held, that the decree of divorce was invalid, being *in fraudem legis* of the state where the parties were married and had their domicile. It was further held, that the courts of Vermont could not possess a proper jurisdiction of the case, both parties not being within the state, and the wife not having had personal notice of the suit. (*Borden v. Fitch*, 15 Johns. Rep. 121.) What would be the effect of a marriage in Connecticut, a subsequent *bona fide* change of domicile to New-York, and then a divorce in the former state, both parties appearing in the suit, remains undecided. (*Pawling v. Bird's ex'rs*, 13 Johns. Rep. 192. See *Bradshaw v. Heath*, 13 Wend. 407.) This subject in respect to divorces, as among the neighboring states, is more fully considered, ante, note 623.

NOTE 634—p. 350.

So, Huberus lays down the rule, that it is unlawful for the magistrates of another commonwealth to prosecute, or suffer to be prosecuted, a second time, one who has been absolved or pardoned, although without a sufficient reason; provided, however, that no evident danger or inconvenience result from giving effect to the foreign proceedings, to the government where the second prosecution is instituted: (2 Huberus, B. 1 Tit. 3, p. 26.) In order to illustrate the qualification to this rule, a case is put of a defendant acquitted in Transylvania for a murder committed in Friezeland, it distinctly appearing that the acquittal was obtained to elude the jurisdiction of the government where the crime was perpetrated. If the illustration given, therefore, is to be understood as defining the extent to which the rule is to be qualified, it would appear that a foreign acquittal should be regarded as conclusive, except where the proceedings were without jurisdiction, or where they were instituted in fraud of the rightful sovereignty, or with a view of evading justice. And such we apprehend to be the true doctrine. (See *Car. Law Journ.* 453; 3 *Dall. Rep.* 372, note.) The same rule, it is said, is applicable to civil cases. (id.)

NOTE 635—p. 350.

The conviction of an infamous crime in a foreign country, has been deemed, in Maryland, to render the person convicted incompetent as a witness there, provided it be shown that the offence would disqualify at common law, or by some statute of the country where the conviction occurred. (*State v. Ridgley*, 2 Har. & M'Hen. 120. *Clarke's lessee v. Hall*, id. 378. *Cole's lessee v. Cole*, 1 Har. & Johns. 572.)

Not so, however, in North Carolina, or in Massachusetts; and in the latter, even a conviction in a neighboring state has been held not to render a witness incompetent. (*Commonwealth v. Green*, 17 Mass. Rep. 515.) But such conviction has been received to affect the witness' credibility. (*State v. Candler*, 9 Hawks' Rep. 393. *Commonwealth v. Knapp*, 9 Pick. Rep. 496, 511, 512. See ante, note 521, p. 745; note 58, p. 64. Also, post, note 637.)

NOTE 636—p. 353.

Mr. Starkie, (1 Starkie's Ev. 228, 6th Amer. ed.) on a very thorough and perspicuous review of the cases prior to the publication of his treatise, states the better opinion to be, that when an action is brought on a foreign judgment in the courts of England, such judgment is conclusive. The opposite notion, he says, rests chiefly upon the cases of *Walker v. Witter*, (cited in the text, ante, 351,) *Sinclair v. Frazer*, (id. 350,) and a dictum of Eyre, Ch. J. in giving judgment in *Phillips v. Hunter*, (id. 352.) He proceeds to remark—"It is to be observed, in the first place, that these authorities are all, with a view to this question, extra-judicial. In *Walker v. Witter*, and *Sinclair v. Frazer*, the only question necessary to be determined was, whether on proof of a foreign judgment in his favor, the plaintiff was entitled to recover against the defendant, without entering into the original consideration on which the judgment was founded; and the question how far such evidence was controvertible, did not arise; and the case of *Phillips v. Hunter* was decided against the opinion of Eyre, Ch. J. by the three other judges. Secondly, the position in *Walker v. Witter*, and the observation of Buller, J. in support of it in a subsequent case, (*Galbraith v. Neville*, cited ante, 351, of the text,) proceed upon the supposition that no judgments are conclusive, except those of record in this country; and that the judgment of a foreign court could not be entitled to greater credit than the judgment of a court not of record in this country." Several authorities are then noticed, going to establish that the decision of a competent tribunal is conclusive, whether it be a court of record or not. Thus, the judgment of commissioners in a court of conscience, (*Moses v. Macfarlan*, Burr. Rep. 1005;) the decision of commissioners authorized by statute to settle accounts between certain officers and agents of the army, (*Moody v. Thurston*, Strange's Rep. 481;) the allowance of a debt by the commissioners of bankrupts, (1 Doug. Rep. 407;) a condemnation by commissioners of excise, (1 Hargr. Law Tracts, 446; see *Henshaw v. Pleasance*, 2 Bl. Rep. 1174;) the judgments of ecclesiastical courts, and admiralty courts, (*Da Costa v. Villa Real*, Strange's Rep. 961; see ante, 346, et seq. of the text and notes;) the decision of private arbitrators, (*Doe v. Rosser*, 3 East. 15; 16 East. 208.) "These are instances," observes the learned author, "in which the adjudication, though not of record, is final. (See also, ante, note 586, p. 824.) A matter is not less *res adjudicata*, because it is not of record; that is, because it is not preserved and authenticated in a particular manner; and when it has been established as a legal judgment by a court of competent jurisdiction, it seems to be equally entitled to consideration. The principle on which the conclusive quality of judgments, decrees,

or sentences depends, applies just as much to foreign judgments attempted to be enforced here as to any other. Judgments of inferior courts in this country do not differ, in that respect, from recorded judgments; and if the mere circumstance of their being foreign made any difference, the objection would equally apply to all foreign judgments, and consequently the sentences of foreign courts of admiralty would not be, as they are, conclusive here. The principle upon which a judgment is admissible at all is, that the point has already been decided in a suit between the parties or their privies, by a competent authority which renders future litigation useless and vexatious. If this principle extends to foreign as well as domestic judgments, as it plainly does, why is it to be less operative in the former than in the latter case? If it does not embrace foreign judgments, how can they be evidence at all? By admitting that such judgments are evidence at all, the application of the principle is conceded. Why, then, is its operation to be limited as if the foreign tribunal had heard nothing more than *ex parte* statements and proof? Lord C. J. Eyre lays stress on the circumstance, that the judgment is voluntarily submitted by the party, who claims the benefit of it, to the jurisdiction of the court, (see ante, 352, of the text;) but so it is in every case where a party claims the benefit of such a judgment, for no one is compelled to avail himself of a judgment; and it can make no difference whether he attempts to enforce it as plaintiff, or as a matter of defence; for it could scarcely be contended, that a judgment was merely *prima facie* evidence for a plaintiff who endeavored to recover the debt, but that it was conclusive in his favor when he used it by way of set off. In the case of *Galbraith v. Neville*, Lord Kenyon expressed strong doubts as to the doctrine advanced in *Walker v. Witter*; and it appears that, ultimately, (5 East, 475, n. (b).) the court refused a new trial, being of opinion that the judgment was, at all events, *prima facie* evidence of the debt, without entering into the question how far it was impeachable." (1 Starkie's Ev. 228 to 231, 6th Amer. ed.) The case of *Tarleton v. Tarlton*, (4 Maule & Sel. 20, cited in the text, post, p. 359, 360,) is then briefly noticed, and the whole is concluded by a reference to *Burrows v. Jemino*, (Strange's Rep. 733, cited ante, 350, of the text.) as most direct to show that foreign judgments are not to be regarded as mere *prima facie* evidence, but that they are conclusive. (1 Starkie's Ev. 231, 232, 6th Amer. ed.)

As sustaining the doctrine above advanced, we add the following: In a somewhat recent case before the vice chancellor, the question was, whether, where a judgment has been recovered in a foreign country, and an action brought upon it in the common pleas of England, chancery would entertain a bill, filed by the defendant, for a discovery and commission to examine witnesses abroad, with a view to an investigation of the merits of the foreign judgment in the suit so commenced. The leading authorities were fully examined, and the vice chancellor, on demurrer, decided against the bill, holding the true doctrine to be, that foreign judgments were conclusive evidence, and not re-examinable. He regarded the ancient decisions as distinctly maintaining this view, (see note to *Kennedy v. Cassilis*, 2 Swanst. Rep. 342, 344, et seq. per Lord Nottingham, cited ante, note 633,) and after referring to Lord Kenyon's opinion in *Galbraith v. Neville*, and that of Lord Ellenborough in *Tarleton v. Tarlton*, he observed, "The old authors and the opinions of Lords Ellenborough and Kenyon, greatly overweigh the proposition to be extracted from the judgment of Lord Mansfield, (in *Walker v. Witter*,) and the expression of opinion by Mr. Justice Buller, (in *Galbraith*

v. Neville.) If I were to allow this bill to stand, I should be, in effect, saying that the judgment obtained in Antigua, may be overruled by the court of common pleas." (Martin v. Nicolls, 3 Simons' Rep. 458. S. C. 5 Cond. Eng. Ch. Rep. 198. See also, the same doctrine; Gresley's Eq. Ev. 339.)

"There is much reason to contend," says Mr. Story, in his commentaries upon the conflict of laws, "that the present inclination of the English courts of common law is to sustain the conclusiveness of such judgments. It is very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed; the merits, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the evidence they may now appear otherwise. Suppose a case purely sounding in damages, as an action for an assault, for slander, for conversion of property, for a malicious prosecution, for criminal conversation; is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In case of covenant, or debt, or breach of contract, are all the circumstances to be re-examined anew? And if they are, by which laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex æquo et bono*? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, showing the judgment to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial." (Story's Conf. of Laws, 506, 507. See Guinness v. Carroll, 1 Barn. & Adol. 459. Becquet v. M'Carthy, 2 id. 951. Also, 8 Brown's Parl. Cas. 264.)

The conclusiveness of foreign judgments, is also strongly maintained by Vattel. "It is the province of every sovereign," says that distinguished writer, "to exercise justice in all places under his obedience, to take cognizance of the crimes committed, and the differences that arise in the country. Other nations ought to respect this right. And as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such, as soon as a cause in which foreigners find themselves interested has been decided in form, the sovereign of the defendants cannot hear their complaints. To undertake to examine the justness of a definitive sentence, is to attack the jurisdiction of him who has passed it." Hence he deduces the general rule, that in consequence of this right of jurisdiction, the decision made by the judge of the place, within the extent of his authority, ought to be respected, and to be in force even in foreign countries. (Vattel, B. 2, ch. 7, § 84. See Story's Conf. of Laws, 491, 492.)

The rule, however, if it prevail, must doubtless be understood with the proviso that the judgment is final and conclusive where it was rendered. (See Roscoe on Ev. 107; Plummer v. Woodburn, 4 Barnw. & Cress. 637; S. C. 7 Dowl. & Ryl. 37. See also, note (a) to Novelli v. Rossi, 2 Barn. & Adol. 757.)

And even where such is the case, if sought to be directly used by way of discharge,

or as the foundation of an action, the courts in England still hold it open in some respects to re-examination and impeachment. Thus, where a French court by a decree discharged the parties from the obligation of a contract made in England, specifically alleging as a reason for the decision, that which plainly showed that they had entirely misunderstood the law which ought to have governed; held, that the decree was no bar to an action on the contract in the English courts. (*Novelli v. Rossi*, 2 Barn. & Adol. 757. *Story's Conf. of Laws*, 224, 225.) So, where assumpsit was brought on a judgment of the admiralty court of Scotland, which gave interest on an English contract, contrary, as was at first supposed, to the English law, held, that the plaintiff could not recover such interest; and the jury were directed to find their verdict for the principal alone, with liberty to the plaintiff to move for the addition of the interest; such motion was afterward made and granted, but expressly on the ground that interest was allowable by the English law. (*Arnott v. Redfern*, 2 Carr. & Payne, 88.) So, it seems, if the judgment was rendered contrary to the law of the country under which the court derived its jurisdiction, it will be regarded as void. (*Story's Conf. of Laws*, 507. *Becquet v. McCarthy*, 2 Barnw. & Adol. 951.) But, to render it void on this ground, the defect must be clearly and unequivocally established. (*id.*) So, it seems, a foreign judgment may be examined, and impeached, on the ground that the judgment was unfairly or fraudulently obtained. (2 *Starkie's Ev.* 214; *Story's Conf. of Laws*, 507.)

The American authorities, although professing to follow the course of English adjudication on this subject, maintain a doctrine diametrically opposite to them, as the latter are now understood. According to the former, a foreign judgment, when produced as the foundation of an action in the courts of this country, is never more than mere *prima facie* evidence, and the defendant may impeach it by showing that it was irregularly obtained, or indeed upon almost any ground which would have constituted a defence to the original suit. (See *Barney v. Patterson's lessee*, 6 Har. & Johns. Rep. 182, 202, 203; *Taylor v. Phelps*, 1 Harr. & Gill, 492; *Croudson v. Leonard*, 4 Cranch's Rep. 442; *Bissell v. Briggs*, 9 Mass. Rep. 462; *Bartlett v. Knight*, 1 id. 401; *Smith v. Lewis*, 3 Johns. Rep. 157, 168, 169, per Kent, C. J.; *Taylor v. Bryden*, 8 id. 173; *Hubbell v. Coudrey*, 5 id. 132; *Smith v. Williams*, 2 Cain. Cas. in Err. 110, 118, 119; *Hitchcock v. Aicken*, 1 Cain. Rep. 460; *Betts v. Death*, Addison's Rep. 265; *Stoddard v. Allen*, N. Chip. Rep. 44; *Curtis v. Gibbs*, 1 Penning. Rep. 429; *Buttrick v. Allen*, 8 Mass. Rep. 273; *Waddams v. Burnham*, 1 Tyl. Rep. 233, 237; *Hall v. Williams*, 6 Pick. Rep. 232, 236; *Gulick v. Loder*, 1 Green Rep. 68, 70; *Warren v. Flagg*, 2 Pick. Rep. 448, 450; *Robinson v. Prescott*, 4 N. Hamp. Rep. 450; *Benton v. Burgot*, 10 Serg. & Rawle, 240; *Winchester v. Evans*, Cooke's Rep. 420; *Hoxie v. Wright*, 2 Verm. Rep. 267; *St. Albans v. Bush*, 4 id. 58.)

In Vermont, it has been said that, if the defendant in an action on a foreign judgment produces evidence to raise a presumption that the plaintiff's original claim was groundless, this will put the plaintiff to prove his demand *de novo*, and the trial would then be had as though no judgment had been previously rendered. (Per Chipman, C. J., *King v. Gilder*, 1 D. Chip. Rep. 59, 61, 62.)

But in New-York, where an action was brought upon a foreign judgment (or the judgment of a neighboring state, which the court treated as foreign,) Kent, C. J. delivering the opinion, said—"To try over again, as of course, every matter of fact

which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent." And he much doubted whether the rule could ever operate to this extent. (*Taylor v. Bryden*, 8 John. Rep. 173, 177. See also, *S. P. Hitchcock v. Aicken*, 1 Cain. Rep. 460, 461, per Thompson, J. See *Winchester v. Evans*, 1 Cooke's Rep. 421.)

In Ohio, the supreme court have laid down the doctrine in the true spirit of the old and recent English cases. There an action was brought on a justice's judgment of a neighboring state, and Collet, J. delivering the opinion, said—"This judgment, although not within the act of congress, is within the provision of the constitution. It is a judicial proceeding, to which full faith and credit is to be given. A state or nation is bound, and has the exclusive right to administer justice within its territories to parties there contending. When the parties have had an opportunity of being heard, and a definitive decree has been pronounced, a regard to this right and duty of every state and nation, and to justice, requires that the justice of the sentence should not be re-examined by the tribunals of another state or nation, unless it is shown that the sentence was obtained by fraud. (*Vat. B. 2*, chap. 7, sect. 84.) The courts in England had not uniformly regarded this principle of the law of nations; therefore it was, it is probable, that this was introduced into our constitution." (*Silver Lake Bank v. Harding*, 5 Hamm. Rep. 545, 547.) It is further said, that whether the court rendering the judgment is a court of record or not, if it had jurisdiction, its decision is conclusive, and, until it is reversed, the parties cannot again litigate the same matter, unless there was fraud in obtaining it. (*id.* See also, *Poorman v. Crane*, 1 Wright's Rep. 347; *Goodrich v. Jenkins*, *id.* 348; *Silver Lake Bank v. Hardin*, *id.* 430; *Kuhn v. Miller*, *id.* 127.)

And all the American cases agree, that where a foreign judgment comes *incidentally* in question, it is conclusive. (*Barney v. Patterson's lessee*, 6 Har. & Johns. Rep. 182, 202, 203. *Smith v. Lewis*, 3 Johns. Rep. 168, 169, per Kent, C. J. *James v. Allen*, 1 Dall. Rep. 188. Note to *Andrews v. Herriot*, 4 Cowen's Rep. 520, 521. 3 Dall. Rep. 372, note.) As where it is used as the foundation of a title derived under it, (*Barney v. Patterson's lessee*, 6 Har. & Johns. Rep. 182, 202, 203; *Grant v. McLachlin*, 34; see *Thompson v. Tolmie*, 2 Peter's Rep. 157;) or to show that the subject matter of the action has once passed *in rem judicatam*, (*Smith v. Lewis*, 3 Johns. Rep. 157, 168, 169;) or introduced by a guarantor, as a defence, in order to show that his principal was not liable, (*semble*, *Griswold v. Pitcairn*, 2 Conn. Rep. 85, 92;) or is relied upon by the garnishee in a foreign attachment, for the purpose of protecting himself against the claims of his original creditors, (*Taylor v. Phelps*, 1 Harr. & Gill, 492; see also, *Holmes v. Remsen*, 4 Johns. Ch. Rep. 460; *S. C.* 20 Johns. Rep. 229; *Embree v. Hanna*, 5 John. Rep. 101; *Bissell v. Briggs*, 9 Mass. Rep. 462, 468; *Flower v. Parker*, 3 Mason's Rep. 247, 251; *Wheeler v. Raymond*, 8 Cowen's Rep. 311; *Perkins v. Parker*, 1 Mass. Rep. 117; note to *Andrews v. Herriot*, 4 Cowen's Rep. 521; *Scott v. Coleman*, 5 Litt. Rep. 349, 350; *Moore v. Spackman*, 12 Serg. & Rawle, 287; see ante, note 609;) or by the underwriter, in a policy of insurance, to show a breach of warranty on the part of the insured, in an action upon the policy, (*Croudson v. Leonard*, 4 Cranch's Rep. 434, 441, 442; see ante, note 626, as to the states in which this doctrine has been recognized;) or by a

party to justify himself for acts done in virtue of it, (*Bissell v. Briggs*, 9 Mass. Rep. 462. *Rapelje v. Emery*, 2 Dall. Rep. 231. S. C. id. 51. *Hoxie v. Wright*, 2 Verm. Rep. 269.) But all the cases agree, that a judgment, rendered without jurisdiction, is void, and to be treated as a nullity, whether it comes in question directly or collaterally. (See *Elliot v. Piersoll*, 1 Peters' Rep. 328, 340; *Fisher v. Harnden*, 1 Paine's Rep. 55; *Holmes v. Boughton*, 10 Wend. Rep. 75; *Walker v. Maxwell*, 1 Mass. Rep. 103; *Collet v. Keith*, 2 East. 261; *Thompson v. Tolmie*, 2 id. 157; see the next note, and the cases there cited.)

A judgment of the supreme or a circuit court of the United States, when offered in evidence in a state court, is not to be treated in regard to its effect as a foreign, but as a domestic judgment. (See *Barney v. Patterson's lessee*, 6 Har. & Johns. Rep. 182, 202, 203; *St. Albans v. Bush*, 4 Verm. Rep. 58; *Rochelle's heirs v. Bowers*, 9 Lou. Rep. (Curry,) 528; see also, *Pepoon v. Jenkins*, 2 Johns. Cas. 119; *Reed v. Ross*, 1 Baldw. Rep. 36.)

By the constitution of the United States, it is declared, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings, of every other state." And congress is authorized by general laws to prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof. (Constitution of the U. S. art. 4.) In pursuance of this authority, congress, by act of May 26th, 1790, ch. 11, (2 L. U. States, 102,) after providing for the mode of proof, has declared, that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." By the second section of a supplementary statute, passed March 27th, 1804, the provisions of the act of 1790 are extended to the records and judicial proceedings of the respective territories of the United States, and the countries subject to the jurisdiction of the United States. (3 L. U. States, 621.)

With respect to the interpretation of the above mentioned clause of the constitution, there has been some diversity of opinion, particularly as to the words in the latter branch of the section, "and the effect thereof." Some judges have thought that the word "thereof," had reference to the proof or authentication, so as to read "and to prescribe the effect of such proof, or authentication." Others have thought that it referred to the antecedent words, "acts, records and proceedings," so as to read, "and to prescribe the effect of such acts, records, and proceedings." (See *Bissell v. Briggs*, 9 Mass. Rep. 462, 467; *Winchester v. Evans*, Cooke's Rep. 420; *Hitchcock v. Aciken*, 1 Cain. Rep. 460; *Green v. Sarmiento*, 1 Peters' C. C. Rep. 74; *Field v. Gibbs*, id. 155; *Commonwealth v. Green*, 17 Mass. Rep. 515, 543, 544.) "Those who were of opinion that the preceding section of the clause made judgments in one state conclusive in all others, naturally adopted the former opinion; for otherwise, the power to declare the effect would be either wholly senseless, or congress would possess the power to repeal, or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only *prima facie* evidence, as naturally embraced the other opinion; and supposed, that until congress should by law declare what the effect of such judgment should be, they remained only *prima facie* evidence." (3 Story's Comm. on the Const. 181, 182.)

The former seems the interpretation generally adopted. But it is not, practically,

of much importance which construction prevails; since each admits the competency of congress to declare the effect of judgments when duly authenticated; which has been done as we have before noticed. It may be stated, as a principle now uniformly received and sanctioned throughout the United States, that the judgment of one of the state courts, is of the same dignity in every other state, as in the one where it was pronounced; and hence, if, in the courts of the state where the judgment was pronounced, it is conclusive in its operation as evidence, or otherwise, it must be equally so, and to the same extent, in all the courts throughout the union. (*Mills v. Duryee*, 7 Cranch, 481. *Clark's ex'rs v. Carrington*, 7 id. 308. *Hampton v. Mc'Connell*, 3 Wheat. Rep. 234. *Mayhew v. Thatcher*, 6 id. 129. *Hoxie v. Wright*, 2 Vermont Rep. 263. *Buford v. Buford*, 4 Munf. Rep. 241. *Borden v. Fitch*, 15 Johns. Rep. 121. *Andrews v. Montgomery*, 19 id. 162. *Field v. Gibbs*, 1 Peters' C. C. Rep. 155. *Commonwealth v. Green*, 14 Mass. Rep. 515. *Gibbons v. Livingston*, 1 Halst. Rep. 236, 275. *Newell v. Newton*, 10 Pick. Rep. 470, 472. *Hall v. Williams*, 6 Pick. Rep. 232. *Spencer v. Brockway*, 1 Hamm. Rep. 259. *Benton v. Burgot*, 10 Serg. & Rawle, 240. *Mitchell v. Osgood*, 4 Greenl. 124. *Wheeler v. Raymond*, 8 Cowen's Rep. 311. *Shumway v. Stilwell*, 6 Wend. Rep. 447. *Starbuck v. Murray*, 5 id. 148. *Holbrook v. Murray*, 5 id. 161. *Rogers v. Coleman*, Hard. Rep. 413. *Scott v. Coleman*, 5 Litt. Rep. 349. *Evans v. Tatem*, 9 Serg. & Rawle, 259, 260. *Kean v. Rice*, 12 Serg. & Rawle, 203. *Gilman v. Houseley*, 5 Martin's Lou. Rep. N. S. 661. *Mackee v. Cairnes*, 2 id. 599. *Clarke's adm'r v. Day*, 2 Leigh's Rep. 172. *Hayman's ex'r v. Miller*, 1 Baily's Rep. 242. *Holt v. Alloway*, 2 Blackf. Rep. 108. *Gulick v. Loder*, 1 Green's Rep. 68. *Earthman's adm'r v. Jones*, 2 Yerg. Rep. 484. See also, *Jacobs v. Hull*, 12 Mass. Rep. 25. *Wade v. Wade*, Cam. & Norw. 486. *Betts v. Death*, Addison's Rep. 265. *Armstrong v. Carson's ex'rs*, 1 Dall. Rep. 302. *Ben's Guardian*, 2 Bay, 485. *Curtis v. Gibbs*, 1 Penn. Rep. 399. *Kibbe v. Kibbe*, Kirby's Rep. 124. *Smith v. Rhoades*, 1 Day's Rep. 168. *Wernwag v. Pawling*, 5 Gill & Johns. Rep. 500. *Bradshaw v. Heath*, 13 Wend. 407. *McRae v. Mattoon*, 13 Pick. Rep. 53. *Tipton v. Mayfield's ex'rs*, 10 Lou. Rep. (Curry,) 189. *Hinton v. Townes*, 1 Hill's Rep. 439. *Adams v. Rowe*, 2 Fairf. Rep. 89. 1 Baldw. Rep. 617. *Goodrich v. Jenkins*, 1 Wright's (Ohio) Rep. 348. *Hunt v. Lyle*, 8 Yerg. 142. 6 id. 412. *Hall v. Williams*, 1 Fairf. Rep. 278.)

All the cases above cited will be found to agree that the judgment of a neighboring state may be wholly impeached by showing that the court rendering it had not jurisdiction; and it makes no difference whether the judgment comes in question directly or incidentally. (See *Elliott v. Piersoll*, 1 Peters' Rep. 328, 340; *Thompson v. Tollmie*, 2 id. 157; *Holmes v. Boughton*, 10 Wend. Rep. 75; *Bradshaw v. Heath*, 13 id. 407; *Walker v. Maxwell*, 1 Mass. Rep. 103; *Fisher v. Harnden*, 1 Paine's Rep. 55; see also the next succeeding note, and cases there cited.)

And if the judgment is inconclusive, in the state where it was rendered, or if it is inquirable into there during a particular period, and on certain conditions, it will be open to investigation to the same extent every where else. This is an obvious deduction from the foregoing position with regard to the effect of such judgments generally. It is, moreover, directly sanctioned by several well considered cases. (See *Green v. Sarmiento*, 1 Peters' C. C. Rep. 74; *Baugh v. Baugh*, 4 Bibb, 556; *Curtis v. Gibbs*,

1 Pennington's Rep. 399, 403, 404; Rogers v. Coleman, 1 Hardin's Rep. 420; Armstrong's ex'rs v. Carson, 2 Dall. Rep. 302; 1 Story's Comm. on the Const. 183; Wernwag v. Pawling, 5 Har. & Johns. Rep. 500; Spencer v. Sloo, 8 Lou. Rep. (Curry,) 290.)

Some of the authorities speak in a vague way of impeaching such judgments by showing that they were *fraudulently obtained*. (See *Andrews v. Montgomery*, 19 Johns. Rep. 162; *Borden v. Fitch*, 15 id. 121, and cases there cited; *Holt v. Alloway*, 2 Blackf. Rep. 108; *Silver Lake Bank v. Harding*, 5 Hamm. Rep. 545, 547.) Possibly this may mean fraud in acquiring jurisdiction; as where jurisdiction has professedly been obtained against a non-resident by attaching his property, and the property attached was merely nominal, as a chip or the like, or did not belong to the defendant: in such case the judgment might be void, even by the local law; (*Beech v. Abbott*, 6 Verm. Rep. 59, per Williams, C. J.; *Rogers v. Coleman*, *Hardin's Rep.* 418;) or it may relate to instances where jurisdiction has been exercised in fraud of the sovereignty which had the rightful and exclusive jurisdiction. (See *Borden v. Fitch*, 15 Johns. Rep. 121; *Jackson v. Jackson*, 1 id. 424; *Harding et ux. v. Alden*, 9 Greenl. Rep. 140, 150, 151.) It is clear, that wherever the point has been started, courts, in examining these judgments, have generally felt themselves restricted to inquiries respecting the effect to which they would be entitled in a collateral suit, in the state where they were pronounced. In *Moren v. Killibrew*, (2 Yerg. Rep. 379,) Whyte, J. delivering the opinion in a case which involved the extent to which such inquiry might go, said—"I disclaim all power over that court, or its proceedings, whether it hath rendered a correct, a regular, or an erroneous judgment, upon the subject matter before it. This court confines itself within that narrow limit of enquiry, incidental from necessity to all courts which are called on to enforce and carry into effect the judgment of some other court. That limit is, an inquiry into the jurisdiction of the court rendering the judgment." In Massachusetts, it has been directly determined, that in an action on the judgment of another state, the defendant cannot be allowed to show that it was obtained by fraud and misrepresentation. (*McRae v. Mattoon*, 13 Pick. Rep. 53; see also *Smith v. Lewis*, 3 Johns. Rep. 517; also, ante, note 610, p. 854.)

Some discussion has arisen as to what kind of judgments were included within the constitution and the law of congress. In Massachusetts, it has been very deliberately settled that they embraced only civil judgments, and did not extend to judgments in criminal proceedings. Hence, a conviction of an individual in New-York of an infamous offence, was held, in the former state, not to disqualify him from being a witness. (*Commonwealth v. Green*, 17 Mass. Rep. 515.) But in North Carolina a different doctrine is maintained. There it has been held, that a judgment of conviction in a neighboring state of an infamous crime, was within the constitution and act of congress, and rendered the person convicted incompetent. (*State v. Candler*, 3 Hawks' Rep. 393; see ante, note 58, p. 64; also, ante, note 635, p. 890.)

In New-Hampshire, it is held, that the judgment of a justice of the peace of another state cannot be authenticated according to the law of congress, and it is, therefore, regarded as standing upon the same footing with a foreign judgment, leaving the whole merits open to re-investigation. (*Robinson v. Prescott*, 4 New-Hamp. Rep. 450. *Mahurin v. Bickford*, 6 id. 567.)

In Massachusetts, the courts are not disposed to extend the constitution and law of

congress any further than the decisions of the federal court necessarily require, and have accordingly held with New-Hampshire in respect to the judgments of justices of the peace. Their language on this subject is as follows: "Certainly we think the judicial proceedings referred to in the constitution were supposed by the congress which passed the act providing the manner of authenticating records, to have related to proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required, that the copy of the record shall be certified by the clerk of the court, and that there shall be also the certificate of the judge, chief justice, or the presiding magistrate, that the attestation is in due form. This is founded upon the supposition, that the court whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; and the act has wisely left the records of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every state, to be governed by the laws of the state into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than *prima facie* evidence of debt, and liable to be defeated in their operation, under the plea of *nil debet*, as other foreign judgments are." (*Warren v. Flagg*, 2 Pick. Rep. 448.) Whether this is the law in Indiana, *quere*. (*See Cone v. Cotton*, 2 Blackf. Rep. 82.)

In Connecticut, a justice's judgment, rendered in "those states where justices of the peace hold courts of record," has been held within the act of congress, and not re-examinable when properly authenticated. (*Bissell v. Edwards*, 5 Day's Rep. 363.)

In Vermont, the same doctrine prevailed formerly as in New-Hampshire and Massachusetts, viz. that the justice's judgments of neighboring states generally, were not contemplated by the act of congress and the constitution, and consequently were re-examinable upon the merits, when sued upon, like foreign judgments. (*King v. Van Gilder*, 1 D. Chip. Rep. 59.) But more recently it has been held otherwise in regard to the judgment of a justice, "where the law requires him to keep records." (*Starkweather v. Loomis*, 2 Verm. Rep. 573. *Blodget v. Jordan*, 6 id. 580.) In Kentucky, it seems that a judgment of an Indiana justice of the peace is within both the constitution and the act of congress. (*Scott v. Cleveland*, 3 Monroe's Rep. 62.)

In Ohio, the doctrine is, that the mode of certifying the judgments of justices of the peace has not been provided for by the act of congress; but when duly proved in the common law mode, they are within the provisions of the constitution, entitled to "full faith and credit," and not subject to re-examination. (*Silver Lake Bank v. Harling*, 5 Hamm. Rep. 545, 546. 1 Wright's Rep. 430. *Kuhn v. Miller*, id. 127.) So also, it seems, in New-York. (*Thomas v. Robinson*, 3 Wend. Rep. 263, 269. *See Sheldon v. Hopkins*, 7 id. 435.)

And is not this doctrine of the Ohio courts more consistent with the leading adjudications of the federal court, than that of New-Hampshire and Massachusetts, which seems to make the effect of the judgment of a neighboring state dependant altogether upon the ability of the court rendering it, to comply with the act of congress as to the form of authentication? In *Mills v. Duryee*, (7 Cranch, 481,) the question arose upon pleadings; and the decision, we think, should be viewed as proceeding entirely irrespective of the mode of proof; for how could the court say, in that stage of the proceedings, that the party would adopt the statute, instead of the common law mode?

The same remark applies to *Hampton v. McConnell*, (3 Wheat. Rep. 234,) and several other cases decided in a similar way.

A decree of the court of chancery has been held within the constitution and act of congress, in Kentucky. (*Barbour v. Watts*, 1 Marsh. Rep. 292, 293. *Tarleton v. Briscoe*, 1 id. 67.) So also, in Louisiana; (*Scott v. Blanchard*, 8 Mart. Lou. Rep. N. S. 303;) in Tennessee, (*Hunt v. Lyle*, 8 Yerg. 142; 6 id. 412;) and *semble*, in South Carolina, (*Miller's ex'rs v. Miller*, 1 Bailey's Rep. 242.) In New-York, a regular decree of *divorce*, by the superior court of Connecticut, has been viewed as standing upon the same footing. (*Bradshaw v. Heath*, 13 Wend. 407.) So also in Maine. (*Harding et ux. v. Alden*, 9 Greenl. Rep. 140, et seq.)

The judgment of a neighboring state being dependant for its effect mainly upon the law of the place where it was rendered, a question of much practical moment arises as to the mode in which the local law shall be ascertained. In *Thomas v. Robinson*, (3 Wend. Rep. 267,) the action was on a justice's judgment of Pennsylvania, and Sutherland, J. delivering the opinion of the court, said—"It appeared affirmatively in this case, that justice's courts in the state of Pennsylvania were created and organized by statute. The superior courts of that state would take judicial notice of the authority and jurisdiction conferred by statute upon these courts; but the courts of another state have no judicial knowledge of the statute law of Pennsylvania. It was essential, therefore, in order to shew what faith and credit would be given to the judgment of these courts in Pennsylvania, to produce and prove the authority under which they were organized and proceeded; this could only be done by producing and proving the statute by which they were created. If that shewed that the subject matter of the suit was within the jurisdiction of a justice's court, and the proceedings appeared from the record to have been in conformity with the directions, then it would be entitled here (in New-York,) to full faith and credit." (See *Sheldon v. Hopkins*, 7 Wend. Rep. 435.) In Indiana, an action of debt was brought on a decree in chancery of another state, and the court said, that by the general doctrine, debt could not be maintained on such a decree, and that if the decree was entitled to that effect by the law where it was rendered, the law should be averred and proved. (*Elliot v. Ray*, 2 Blackf. Rep. 31.) If a peculiar effect is given to the proceeding by a statute of the state where it was had, such statute should be produced. (id. See *Cone v. Cotton*, 2 Blackf. Rep. 82.) Other cases seem to stand more directly upon the principles of presumptive evidence. In Kentucky, the general rule is stated to be, that when the judgment or decree of a sister state is produced, the court will presume the tribunal rendering it possessed of competent jurisdiction and authority, and that the act done in pursuance of that authority, concludes and binds the parties. As to impairing its full credit, the onus lies on him who resists it, to show that by the local law it is not conclusive. (*Scott v. Coleman*, 5 Litt. Rep. 349, 350. See the next note, pl. 1 and 2, and cases there cited, as to the presumption of jurisdiction.) In New-Jersey, where it appeared by the record produced, that the judgment and proceedings on which the action was founded, were on a foreign attachment, Pennington, J. said—"The court will take notice of the record itself, and examine whether it is of such a nature as to be entitled to full credit or not; and whether it would be conclusive evidence of a debt in the courts of the state from whence it is brought, (viz. Pennsylvania.) And I am not ready to say, nor do I believe, that a judgment founded on a foreign attachment,

would be conclusive evidence of a debt in the courts of Pennsylvania. Foreign attachments are from their nature *ex parte*, and their proceedings *in rem*. The proceedings are not of a common law nature, but special remedies given the creditors against the rights, credits and effects of the debtor in his absence, in this country by acts of our assemblies; in Great Britain by the custom of particular cities. They do not, therefore, constitute such records as full faith and credit ought to be given them, and against which nothing can be averred. I find that very little credit is given to judgments on foreign attachments in the courts of Westminster Hall; the original debt on which they are founded is permitted to be denied; or, in more technical language, traversed, not from disrespect to the courts where the proceedings on attachment are had, but from the nature of the proceedings, their liability to fraud and error, and to collusion between the plaintiff in the attachment and garnishee. We, therefore, in my opinion, have a right to presume that the courts of Pennsylvania would suffer the defendants in this action to plead *nil debet*." (Curtis v. Gibbs, 1 Pennington's Rep. 399, 406.)

We know of no decisions expressly settling that the court before which the judgment of a neighboring state is brought, may take judicial notice of the law under which it was rendered in ascertaining its local effect; but there are some which manifest no ambiguous inclination to that doctrine. In Clarke's adm'r v. Day, (2 Leigh's Rep. 172,) to a declaration on two Kentucky judgments, the defendant pleaded *nil debet*, and the plaintiff demurred. Coulter, J. delivering the opinion of the court, said—"As the judgments sued on in this case are to have the same effect here as they would have if sued on in Kentucky, it follows that this court must ascertain what would be the effect of them there. But then the question occurs, how this matter of law and usage of another state is to be ascertained by the courts of this state? It is said, that the federal courts, as well supreme as inferior, may adjudge the law in such a case, because, considering their relation to the states, they may be supposed to have judicial knowledge of the laws and usages of all the states; but that in the state courts, notwithstanding the constitution of the United States, and the act of congress of 1790 on this subject, the laws of the other states, in this respect, can only be ascertained as any other matter of fact, and in the way in which *foreign* laws and usages are usually ascertained. But if such a difference does exist between the two sets of tribunals in deciding in cases of the *lex loci*, (concerning which I give no opinion,) it does not seem to me to have any important bearing on the question before us. It will be conceded, I presume, that but for the provision in the constitution and the act of congress before referred to, a judgment in the state of Kentucky, when sued on in a federal court of this state, would no more be in the nature of a domestic judgment in that court, than it would be if sued on in a state court; in both it would be equally a suit on a foreign judgment. No question concerning the *lex loci* arises in the case; it is merely a question of evidence; and although the weight to which it may be entitled, depends on the weight or effect it has in the state where the judgment was pronounced, according to the laws and usages of that state, I cannot see why a different mode of deciding on such a question should prevail in the state and federal courts. The constitution and law having made the states, as it were, domestic to each other, in this respect, as to both tribunals, it would seem to follow that both tribunals should take cognizance of the case as though founded on a domestic judgment." (id. 175, 176.) "The constitution and act of congress, then, having made the states domestic to each other, in regard to this

matter, the court of the state must try this issue in the usual way, by informing itself of the law of the state of Kentucky, as the federal courts must do, should there be any doubt about it. In this case, the judgment sued on was affirmed on an appeal to the supreme court of that state; and, I presume, we can safely say, as the federal court said in a similar case, that such judgment must be conclusive on the parties in that state." (id. 177.) In *Curtis v. Gibbs*, (1 Pennington's Rep. 399,) the same point arose on a similar state of pleadings, with respect to a judgment of the common pleas of Pennsylvania. It was contended by counsel, that the effect of the judgment of a neighboring state was a question of fact to be tried by a jury, and therefore, that the plea of *nil debet* was proper to put that fact in issue. But, per Pennington, J., "I think differently. It must be an intelligent jury indeed that could mark the precise limits between conclusive and prima facie evidence. This court will certainly take notice of the constitution of the states forming the union, if not of their statutes; and in doing this, we find that by the constitution of the state of Pennsylvania, the courts of common pleas in the several counties of that state are common law courts, having important jurisdiction, possessing an authority, in one particular case, of issuing certioraries to inferior jurisdictions: no doubt can be entertained but that a judgment, obtained in one of these courts in a regular course of the common law, on both parties being in court, and a defence made or an opportunity to make it, would be conclusive evidence of debt; and that *nil debet* to a declaration founded on a judgment so obtained, would be a bad plea." (id. 405.) In *Hoxie v. Wright*, (2 Verm. Rep. 263, 267,) the action was on a judgment of the supreme court of Massachusetts; no proof was given, (at least, so it seems from the report,) respecting the effect to which the judgment would be entitled by the law of Massachusetts. But Prentiss, J. delivering the opinion, in order to ascertain what such effect would be, referred directly to the Massachusetts reports. (See *Wernwag v. Pawling*, 5 Gill & John. 500, 508; also, *Spencer v. Sloo*, 8 Lou. Rep. (Curry,) 290, 293, 294.) In connection with this view, the case of *Mills v. Duryee*, (7 Cranch, 481,) deserves again to be noticed. The plaintiff there declared in a territorial court of the district of Columbia, on a judgment of the supreme court of the state of New-York. The plea was *nil debet*, to which there was a demurrer, and judgment passed for the plaintiff. On appeal, the judgment was sustained on the ground that the constitution and act of congress having placed all the judgments of neighboring states on the footing of domestic judgments, *nil tiel record* was the only proper plea. Now it is observable, that the federal court not only, but the court below, did take judicial notice of the law of New-York, for they overruled the plea of *nil debet* simply because it would be inadmissible in New-York. And it can be hardly said, that there is any room for a distinction between the federal and state courts in this respect: both, according to the doctrine of the case under consideration, are equally bound *ex officio* to inquire into, and take judicial notice of the *lex loci*; for the federal court in this instance was acting as an appellate court; and it is of the nature of an appellate court that it must deal with the matter submitted to it precisely as the court *a quo* should have done. Indeed, all the decisions which have been made, overruling the plea of *nil debet*, when pleaded to a declaration on the judgment of a neighboring state, seem to us as virtually maintaining the domestic character of such judgment, to the extent of requiring the court which is to pass upon its effect, to take judicial notice of the local law upon which that effect depends. For how else can it be determined, upon demurrer, that the plea

of *nil debet* is improper? (See *Hall v. Williams*, 6 Pick. Rep. 232, 237; *Field v. Gibbs*, 1 Peters' C. C. Rep. 155; *Evans v. Tatem*, 9 Serg. & Rawle, 259; *Earthman's adm'r v. Jones*, 2 Yerg. Rep. 484; *Wade v. Wade*, Cam. & Nor. 486; *Armstrong v. Carson's ex'rs*, 2 Dall. Rep. 302; *Phelps v. Holker*, 1 id. 261; *Hampton v. McConnell*, 2 Wheat. 234; *Mayhew v. Thatcher*, 6 id. 129; see ante, note 619, p. 860.)

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Buchanan v. Rucker, cited in the text, proceeds expressly upon the ground of a total want of jurisdiction. On the argument it was attempted to maintain the judgment by the local law of the island of Tobago where it was rendered, which, in terms, authorized proceedings of a similar nature against persons *absent from the island*. Lord Ellenborough, who delivered the opinion, (9 East, 192,) said—"absent from the island must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an *assumpsit* upon the judgment so obtained."

The proposition that a judgment pronounced without jurisdiction is void, and can be no evidence whatever, is universally acknowledged, not only in respect to foreign judgments, but to judgments as among the neighboring states, as well as to domestic judgments. (See ante, note 551, p. 801; note 586, p. 826.) And we had occasion to observe in the next preceding note, that it makes no difference whether the judgment is sought to be enforced directly by action, or whether it comes incidentally in question. The application of this doctrine to foreign judgments, and to judgments as among the several states, will be found recognized in nearly all the cases which we shall have occasion to cite in this note. So far as the general principle is concerned, there is no difficulty; but the point of embarrassment usually lies in determining whether the court had jurisdiction in fact, and in ascertaining how far that jurisdiction extended in the particular instance.

1. This will lead to the enquiry among others, *was the court properly constituted?* Such enquiry is always allowable when a foreign judgment, or the judgment of a neighboring state, comes in question; (*Rose v. Himely*, 4 Cranch, 241, 269, per Marshall, C. J.; *Cherriot v. Foussat*, 3 Binn. Rep. 220; *Moren v. Killibrew*, 2 Yerg. Rep. 376, 379, 380; *The Nueva Anna and Liebre*, 6 Wheat. Rep. 193;) but to what length is not very clearly defined. In the *Bank of N. America v. McCall*, (4 Binn. Rep. 371,) an objection was started as to the jurisdiction of a court, acting at St. Domingo, which was said not to have been derived from the proper authority; and it was held sufficient that the court was one *de facto*, deriving its authority from those in whom the power of the country was for the time being vested; and, therefore, it was deemed to have the jurisdiction of a legitimate court. (*S. P. Ingram's heirs v. Cocks*, 1 Overton's Tenn. Rep. 22. See per Best, C. J., *Yrisarri v. Clement*, 2 Carr. & Payne, 223.) If the origin of the foreign court does not appear, it seems that it will be presumed le-

gitimate; but where the source of its authority is stated, the tribunal before which its judgment is produced will examine it; and if it be contrary to the usual mode of constituting courts, it shifts the *onus probandi* upon the party who would sustain the judgment, and it will then be for him to establish that the foreign court was properly organized. (See per Washington, J., *Snell v. Foussat*, 1 Wash. C. C. Rep. 271, 274; S. C. 3 Binn. Rep. 239.) See ante, note 632, p. 886, as to this doctrine as applicable to admiralty decrees.

2. Another enquiry will be, *has the foreign court, or the court of the neighboring state, as the case may be, complied with the local law, so as to have enabled it to acquire jurisdiction over what it has assumed to decide?* That this enquiry is admissible, results necessarily from the legal truism, that a judgment void where it is rendered, is void every where. It has, indeed, been said in a general way in reference to admiralty proceedings, that a foreign court, so far as its jurisdiction depends upon municipal rules, must judge whether it has jurisdiction or not, and that such decision must be respected. (Per Marshall, C. J., *Rose v. Himely*, 4 Cranch, 276. See also *Cherriot v. Foussat*, 3 Binn. Rep. 255, per Tilghman, C. J.) But if, by our obligation to respect decisions of this character, it is intended to affirm that we are to regard them as conclusive, the doctrine, carried out and applied to foreign courts deriving their jurisdiction under local regulations, would obviously lead to an absurdity not to be countenanced; for every court, either expressly or by implication, passes upon the question of its own jurisdiction whenever it renders judgment; and to say that because it has so passed upon it, there shall be no further examination into the point, would be paying to foreign judgments a more deferential regard than is allowed even to domestic judgments. (See ante, note 551; p. 801; note 586, p. 826.) In *Earthman v. Jones*, the supreme court of Tennessee held a Missouri judgment, rendered upon attachment, void, because, among other things, the return of the officer to the attachment did not comply with the local statute. (*Earthman's adm'r v. Jones*, 2 Yerg. Rep. 484, per Whyte, J., Peck, J. concurring. See also *Cone v. Cotton*, 2 Blackf. Rep. 82; *Buchanan v. Rucker*, 9 East, 192, 194; *Moren v. Killibrew*, 2 Yerg. Rep. 376; *Elliott v. Piersol*, 1 Peters' Rep. 340, 1; *Thompson v. Tolmie*, 2 id. 157; *Fisher v. Harnden*, 1 Paine's Rep. 55.)

A question somewhat perplexing not unfrequently arises under this branch of the enquiry, viz. what is the presumption where a foreign judgment, or the judgment of a neighboring state, is introduced, respecting its jurisdiction, as depending upon its compliance or non-compliance with the local law? In *Umbragio v. Bligh*, (8 Bing. Rep. 335,) a suit was instituted in England, to recover damages awarded by the vice-admiralty of the island of Malta; and it was held, that the decree, in order to be evidence of indebtedness, must show expressly and not by mere inference, that the defendant was brought within the jurisdiction of the vice-admiralty court, and that the court where the suit was pending would not presume it. So also in *Thurber v. Blackburne*, (1 New-Hamp. Rep. 242, 246,) where debt was brought, in New-Hampshire, upon a judgment of the common pleas of Rhode-Island, held, that inasmuch as it did not appear by the record that the defendant had personal notice of the suit, or appeared to the action in the court where the judgment was pronounced, the judgment must be regarded as obtained without jurisdiction, for these facts would not be presumed. In *Bradshaw v. Heath*, (13 Wend. Rep. 407,) the plaintiff, Mary Bradshaw,

brought ejectment, in New-York, for dower, and in answer to proof on the part of the defendant, that the plaintiff, previous to the marriage in virtue of which she claimed dower, was a married woman, and that her first husband was still alive—the plaintiff produced a record of the superior court of Connecticut containing a sentence of divorce, on her petition, from her first husband. The petition, as stated in the record, alleged that the first husband had deserted the petitioner, and had ever since been to parts unknown. No appearance on the part of the husband was shown by the record, nor did it state that he was served with process, or had notice of the proceeding; but, on the contrary, the adjudication was alleged to have been made on hearing “the plea and evidence produced by the plaintiff.” The defendant proved that the first husband, at the time of the presentation of the petition and of the granting of the divorce, was an inhabitant of the state of New-York; and the court held, that although the record of a court of competent jurisdiction of another state, granting a *divorce*, is conclusive, and entitled to full faith and credit, yet it is so, only as to matters clearly and distinctly stated in it, and not as to those which are merely inferrible by argument from the judgment; that, in the particular case, the record of divorce was no evidence of the jurisdiction of the court over the person of the defendant in those proceedings, because no fact was stated giving jurisdiction; and if jurisdiction was inferrible at all, it was only so, by argument from the judgment; and consequently that the presumption under the circumstances was against the validity of the decree. See *Harding et ux. v. Alden*, 9 Greenl. Rep. 140 et seq. In *Scott v. Coleman*, (5 Litt. Rep. 350,) the rule on this subject with regard to the ordinary judgments of neighboring states, is laid down as follows: “that when the judgment or decree of a sister state is produced, rendered by one of its tribunals, we must presume that tribunal had jurisdiction and authority,” and the *onus* of impeaching it is thus thrown on him against whom it is urged.

A distinction, however, is taken in this particular in several cases between judgments of courts of *limited and special jurisdiction*, and those of *general jurisdiction*. But what is a court of limited and special jurisdiction, as contradistinguished from a court of general jurisdiction? and in what way is the tribunal before which a judgment of a foreign court is produced to determine whether such court belongs to the one or the other of these classes? These and other points suggest themselves, when the mind is brought to bear upon the subject, and without attempting any thing like a solution of them, we shall content ourselves with using the terms mentioned as they are used in the books. In respect to courts of *general jurisdiction*, then, the rule is, that they are presumed to have had jurisdiction until the contrary clearly appears. (See *Mills v. Martin*, 19 Johns. Rep. 33, per Spencer, J. See also *Thomas v. Robinson*, 3 Wend. Rep. 267; *Peacock v. Bell*, 1 Saund. Rep. 73, 74, 5.) This rule has been applied, in New-York, to the judgments of *courts of common pleas*, and *county courts* of neighboring states. Thus, in *Shumway v. Stillman*, (4 Cowen's Rep. 292, S. C. 6 Wend. Rep. 447,) debt was brought on a common pleas judgment of Massachusetts; the defendant plead, that at the time of the commencement of the suit in which the judgment was obtained, and ever since, he had been and still was a resident in Schenectady, in the state of New-York. To this there was a general demurrer, which the court sustained, on the ground that the defendant had not expressly nega-

tived the idea, that he appeared to the suit, and thus conferred jurisdiction. "Every presumption," says Sutherland, J., delivering the opinion, (4 Cowen's Rep. 294, 296,) "is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it; and will be held conclusive, until clearly and explicitly disproved." (See S. P. Harrod v. Barretto, 1 Hall's Rep. N. Y. C. P. 155.) In Wheeler v. Raymond, (8 Cowen's Rep. 311,) the court seem to have held similarly in respect to proceedings of a county court of Vermont, commenced under a statute of that state relating to foreign attachments. The same doctrine has been acted on in Connecticut. (Smith v. Rhoades, 1 Day's R. 168.)

But in respect to courts of *limited and special jurisdiction*, the rule is different; nothing is presumed in their favor so far as it respects jurisdiction; and the party, seeking to avail himself of their judgments, must show that they had jurisdiction affirmatively. (See Mills v. Martin, 19 Johns. Rep. 33; also 9 Mod. 95; 2 Wils. 16; Peacock v. Bell, 1 Saund. Rep. 73, 74; Kempe's lessee v. Kennedy, 5 Cranch, 173; S. C. 1 Peters' C. C. Rep. 30; Wheeler v. Raymond, 8 Cowen's Rep. 311.) Accordingly, in New-York, where an action was brought on a justice's judgment of a neighboring state, held that it could not be sustained until the statute, creating and organizing the court, was produced and proved, that it might be seen whether the justice had jurisdiction or not; for the courts of one state will not take judicial notice of the statutes of another. (Thomas v. Robinson, 3 Wend. Rep. 267. Sheldon v. Hopkins, 7 id. 435. See the next preceding note, p. 900.) Now, by statute of N. Y., a transcript from the docket of a justice of an *adjoining* state is made presumptive evidence of the facts stated in such transcript, when authenticated in the mode prescribed in the act. (Laws of 1836, p. 658, 59th sess. chap. 439. See post, as to proof of records and judicial proceedings.) The transcript, however, is liable to be controverted by evidence in all its parts relative to the validity of the judgment. (Id. § 4.) In Indiana, a *scire facias*, it appeared, had been issued by a justice of the peace of Ohio, and on a return of the writ "not found," judgment passed for the plaintiff, upon which action was brought, in the former state; and held, that the judgment, having been rendered without service of the writ or the return of two *nilis*, would not, on common law principles, support the action; and that if the judgment was authorized by a statute of Ohio on the return of "not found," such statute must be shown by the party setting up the judgment. (Cone v. Cotton, 2 Blackf. Rep. 82.) And in regard to this class of jurisdictions, it is observable generally, that where a statute prescribes a new proceeding, either unknown to the common law or contrary thereto, the statute, so far at least as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a nullity. (Per Whyte, J., Earthman v. Jones, 2 Yerg. 493.) The same has been said with regard to summary proceedings and extraordinary powers, exercised by any court under a special statute. (Thatcher v. Powell, 6 Wheat. Rep. 119, 127. See Holmes v. Broughton, 10 Wend. Rep. 75; Collett v. Keith, 2 East, 221; Walker v. Maxwell, 1 Mass. Rep. 103.)

3. A still further enquiry may arise, when a foreign judgment, or the judgment of a neighboring state, is produced, viz. *what measure of jurisdiction could the sovereign power of the place where the judgment was rendered, confer upon its courts?* Considered in an international point of view, jurisdiction, to be rightfully obtained, must be

founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise, there can be no sovereignty exerted, upon the known maxim, *extra territorium jus dicenti impune non paretur*. (Story's Conf. of Laws, 450. 3 Dig. Lib. 2, tit. 1, ch. 20. 1 Boullenois' Pr. Gen. 1, 2, p. 2, 3. Vattel, B. 2, ch. 8, § 84.) Even, therefore, should the legislature of a nation or of a neighboring state expressly grant jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it, held utterly void for every purpose. (See Buchanan v. Rucker, cited in the text. Also, Picquet v. Swan, 5 Mason's Rep. 35, 42, 3, per Story, J.; Story's Conf. of Laws, 450, 1; Kilburn v. Woodworth, 5 Johns. Rep. 37; Robinson v. Ward's Ex'rs, 8 id. 86; Borden v. Fitch, 15 id. 121; Hall v. Williams, 6 Pick. Rep. 232, 240, et seq.; Flower v. Parker, 3 Mason's Rep. 251, per Story, J.; Bartlett v. Knight, 1 Mass. Rep. 401; Miller's Ex'rs v. Miller, 1 Bailey's Rep. 242; Earthman's adm'r v. Jones, 2 Yerg. Rep. 484; Moren v. Killibrew, id. 376; Rogers v. Coleman, Hardin's Rep. 413; St. Albans v. Bush, 4 Vermont Rep. 58, 67.) Whether the doctrine applies to decrees of divorce obtained in one state strictly according to the local law, and sought to be used in another, *quere*; (see Harding et ux. v. Alden, 9 Greenl. Rep. 140; Bradshaw v. Heath, 13 Wend. 407.) In Harding et ux. v. Alden, *supra*, the supreme court of Maine seemed to think that it did not, so far as the mere question of conjugal rights was concerned, they being the subject of a suit in the nature of a proceeding *in rem*; but otherwise, if the decree was sought to be enforced as to alimony. See this case stated and commented on ante, note 623, p. 878.

A person, however, though a citizen of another state or country, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may justly be subjected to its process, and bound personally by the judgment of its courts. And whether jurisdiction be founded upon the *person* being within the territory, or the *property* being there, the judgment will be deemed valid, so far as that jurisdiction could legitimately extend; but no farther. Thus, a very common course, in many of the United States and in many other countries, is to proceed against non-residents, by an arrest or attachment of their property within the territory. Judgment obtained upon process of this kind, will generally bind the property so arrested or attached; for to that extent the court has or can have jurisdiction. But such judgment will not be regarded by neighboring states or other nations as evidence of indebtedness or as operative in any measure *in personam*; and for this very obvious reason, viz. that except so far as the property attached is concerned, there is and can be no jurisdiction, no power of adjudication. (Picquet v. Swan, *supra*. Story's Conf. of Laws, 461. Kilburn v. Woodworth, 5 Johns. Rep. 37. Pawling v. Bird's Ex'rs, 13 id. 192. Sergeant on Attachments, 112, 113, 114, et seq. M'Clenachan v. M'Carty, 1 Dall. Rep. 375. Phelps v. Holker, id. 264. Robinson v. Ward's Ex'rs, 8 Johns. Rep. 86. Borden v. Fitch, 15 id. 121. Hall v. Williams, 6 Pick. Rep. 232. Betts v. Death, Addison's Rep. 265. Fenton v. Garlick, 8 Johns. Rep. 194, 197. Flower v. Parker, 3 Mason's Rep. 251, per Story, J. Wilson v. Graham, 4 Wash. C. C. Rep. 53, 57, per Washington, J. Bissell v. Briggs, 9 Mass. Rep. 462. Kibbe v. Kibbe, Kirby's Rep. 119. Denison v. Hyde, 6 Conn. Rep. 508. Aldrich v. Kinney, 4 id. 380, 387. Earthman's Adm'r v. Jones, 2 Yerg. Rep. 484. Hoxie v.

Wright, 2 Verm. Rep. 263. Rogers v. Coleman, Hardin's Rep. 413. Newton v. Newell, 10 Pick. Rep. 470, 472. Starbuck v. Murray, 5 Wend. Rep. 148. Holbrook v. Murray, id. 161. Bradshaw v. Heath, id. 407, 416. Bates v. Delavan, 5 Paige's Rep. 299, 305. Armstrong v. Harshaw, 1 Dev. Rep. 188.)

So as to judgments or decrees in other cases, obtained against persons resident abroad without notice to them, and an opportunity afforded of defending. (See the above cases. Also, Bellows v. Ingham, 2 Verm. Rep. 576, 577; Woodward v. Tremere, 6 Pick. Rep. 354; Newell v. Newton, 10 id. 472; Bartlett v. Knight, 1 Mass. Rep. 401; Cone v. Cotton, 2 Blackf. Rep. 82; Moren v. Killibrew, 2 Yerg. Rep. 376; Thurber v. Blackbourne, 1 N. Hamp. Rep. 242; Bradshaw v. Heath, 13 Wend. Rep. 407; Hart v. Lodwick, 8 Lou. Rep. (Curry,) 164; Spencer v. Sloo, id. 290.) And in order that the judgment under these circumstances may be rendered binding upon the defendant *in personam*, the notice must be *personally served* upon him. This will be found sustained by all the cases; and where notice was given by publication in the newspapers, as is frequently done in certain chancery proceedings in several of the states, to bring in some of the parties who are absent, held, that a decree, pursuant to notice of that character, as against such absent defendants, was no evidence of indebtedness. (Miller's ex'rs v. Miller, 1 Bailey's Rep. 242. See Moren v. Killibrew, 2 Yerg. Rep. 376; Cone v. Cotton, 2 Blackf. Rep. 82; Rogers v. Coleman, Hardin's Rep. 413; Warren v. Hall's Ex'r, 10 Lou. Rep. (Curry,) 377.) The notice must, moreover, be served upon the defendant, while he is within the jurisdiction of the sovereignty under which the court acts; for no sovereign has a just right to issue such notice to the citizen of another state or country, and thereby draw the party from his own proper forum *ad alium examen*. (Picquet v. Swan, *supra*. Dunn v. Dunn, 4 Paige's Rep. 425. Fenton v. Garlick, 8 Johns. Rep. 194, 197. Flower v. Parker, 3 Mason's Rep. 251, per Story, J. Wilson v. Graham, 4 Wash. C. C. Rep. 53, 56, 57, per Washington, J. Woodward v. Tremere, 6 Pick. Rep. 354. Harrod v. Barretto, 1 Hall's Rep. N. Y. C. P. 155. Kilburn v. Woodworth, 5 Johns. Rep. 161. Arnold v. Tourtelott, 13 Pick. Rep. 172. Adam v. Rowe, 2 Fairf. Rep. 98.) But if the party, in any of these instances, chooses to appear and contest the merits, thereby waiving his personal immunity, and submitting to the jurisdiction of the court, the judgment would then doubtless bind him personally, and be entitled to the same measure of respect with the judgment of a neighboring state or a foreign country, as the case may be, obtained in the ordinary mode. (Picquet v. Swan, 5 Mason's Rep. 43. Flower v. Parker, 3 id. 251. Hall v. Williams, 6 Pick. Rep. 237. Shumway v. Sullman, 6 Wend. Rep. 447. 4 Cowen's Rep. 292, S. C. Starbuck v. Murray, 5 id. 148. Hoxie v. Wright, 2 Verm. Rep. 262. Bellows v. Ingham, id. 575. Mayhew v. Thatcher, 6 Wheat. Rep. 129. Wheeler v. Raymond, 8 Cowen's Rep. 311. Price v. Higgins, 1 Litt. Rep. 276. Moore v. Spackman, 12 Serg. & Rawle, 287. See also Bradshaw v. Heath, 13 Wend. Rep. 407.) Otherwise, however, it has been said in cases of foreign attachments, where the defendant has merely appeared to protect his property. (*Semble*, Bissell v. Briggs, 9 Mass. Rep. 469, per Parsons, C. J. Pawling v. Bird's Ex'rs, 13 Johns. Rep. 207.) But, in Starbuck v. Murray, (5 Wend. Rep. 159,) Marcy, J., delivering the opinion, after referring to the above case of Bissell v. Briggs, lays down the law as follows: "The court would not, in such a case, I concede, have jurisdiction over the defendant's person for any other but the direct

objects of the proceedings; and so far as those were concerned, he would be subjected to the authority of the court. If a citizen of one state should go into another to claim property seized on attachment, and subject the attaching creditors to costs and expenses, which, in the due course of the proceedings, should be adjudged to them by a court of competent authority, will it be pretended that he could resist the payment of these costs on the ground that he was not subject to the jurisdiction of the court? For all the fair and direct objects of the suit, he was within its jurisdiction. So if the proceedings were not in *rem*, but the property of the defendant was attached to compel him to appear and answer to proceedings in *personam*, and he did in fact appear and litigate the cause with the plaintiff, he could not be heard to question the jurisdiction of the court over his person. I do not think Chief Justice Parsons intended to say more than this, that when a court had the jurisdiction of a defendant for one purpose, it could not legally bind him by a judgment or sentence in a distinct and different matter." (See *Moore v. Spackman*, 12 Serg. & Rawle, 287.)

If the party, by an act of lawless violence on the part of a few citizens of a particular state, is seized and brought within its jurisdiction from another state, he may, nevertheless, be subjected to the jurisdiction of the courts of the state into which he is so brought. (*State v. Smith*, 1 Bailey's Rep. 283. See S. C. before the chancellor, id. 290, note (a).)

Where the record of a foreign judgment states that the defendant appeared by attorney, this will be *prima facie* evidence of the fact, and the attorney will be presumed to have been regularly constituted. (*Maloney v. Gibbons*, 2 Camp. Rep. 502. See *Robison v. Eaton*, 1 T. R. & E. 62; *Tipton v. Mayfield's Ex'rs*, 10 Lou. Rep. (Curry,) 189.) So, with respect to judgments as among the neighboring states. (*Field v. Gibbs*, 1 Peters' C. C. Rep. 155. *Hall v. Williams*, 6 Pick. Rep. 232. *Aldrich v. Kinney*, 4 Conn. Rep. 380. *Starbuck v. Murray*, 5 Wend. Rep. 148. *Hoxie v. Wright*, 2 Verm. Rep. 263. *Shumway v. Stillman*, 6 Wend. Rep. 447.) But as we have already seen, (ante, note 551, p. 799, et seq.,) some diversity of opinion exists, whether this statement of appearance in the record of a neighboring state may be contradicted. In *Field v. Gibbs*, (1 Peters' C. C. Rep. 155,) it was held it could not, on the general principle forbidding the impeachment of records. So, also, in Vermont; (*Hoxie v. Wright*, 2 Verm. Rep. 263, 268.) See ante, note 620, p. 868. And in Massachusetts; to a qualified extent only, however, (*Hall v. Williams*, 6 Pick. Rep. 232; see ante, note 551, p. 800.) But in New-York and Connecticut, the direct contrary has been held; and in the former state the broad ground is taken, that every fact stated in the record upon which jurisdiction depends, may be controverted. (See the note above referred to; also, *Starbuck v. Murray*, 5 Wend. R. 148; *Aldrich v. Kinney*, 4 Conn. Rep. 380; *Barber v. Winslow*, 12 Wend. Rep. 102, and the cases there cited; *Shumway v. Stillman*, 6 id. 447; *Bradshaw v. Heath*, 13 Wend. Rep. 407, 418.)

In a somewhat recent case, the validity of judgments rendered against persons, who were non-residents, and had no actual notice of the suit, and did not appear and answer the same, came before the court of common pleas of England, upon a Scottish judgment rendered against a Scottish absentee, upon due attachment of his heritable property in Scotland, and due proclamation by what is there technically called *horning*, and a judgment by default for non-appearance. An action of debt was brought on

the judgment, and the question was, whether it was void or not. It was held, that it was valid. This was partly the result of the articles of union between Scotland and England, and partly of the recognition of such practice, as valid by a British act of parliament; and partly also of the fact that the judgment was against a Scottish subject. Best, J., who delivered the opinion of the court, said, "A natural born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could." After adverting to the case of *Buchanan v. Rucker* and some others, he added, "To be sure, if attachments, issued against persons who were never within the jurisdiction of the court issuing them, could be supported and confirmed in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country, his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." (*Douglas v. Forrest*, 4 Bing. Rep. 686.)

Thus far, to avoid unnecessary prolixity, we have treated of foreign judgments and judgments as among the neighboring states of the union, without discriminating very particularly, except in a few instances, between the two classes; for, in regard to the matters relating to jurisdiction which we have noticed, there is seldom a discernible shade of difference between them. The latter class, however, owing to the provisions of the act of congress and the constitution, mentioned in the next preceding note, may, perhaps, with respect to some other particulars under this head, claim a distinct and separate consideration. Where the legislature of a state has undertaken to confer upon its courts the power of exercising jurisdiction over the persons of the citizens of other states, who have in no sense subjected themselves to its authority, nor been within its territory, we have seen, (*supra* of this note, pl. 3,) that all judgments rendered in pursuance of such regulations will be held utterly void. The legislature, the principal, having no jurisdiction, can confer none upon its agents, the courts. (*Per Catron, J., Earthenman v. Jones*, 2 Yerg. Rep. 484.) But, in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such mode of judicial proceeding as it may deem proper; to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice. (*Per Williams, J., Beech v. Abbot*, 6 Verm. Rep. 591. See also, *Douglass v. Forrest*, 4 Bing. 686, *per Best, C. J.*) Should a state, then, adopt absurd or unjust provisions in this respect, and give full jurisdiction to its courts over resident citizens, without requiring any thing more than a constructive notice to them; should it allow, for instance, the rendition of a judgment, after service of process upon the property of the defendant, or by publication of notice in the newspapers, or by affixing the same against the door of a court house or church, and declare such judgment final and conclusive, what would be its effect in a neighboring state? If it were

a strictly *foreign judgment*, it might, perhaps, be treated as a nullity, provided there was clearly no appearance, and no opportunity of defending; but such is not the case. It is now settled, by as strong and unbroken a current of authority as can be brought to bear in favor of any position, that the several states in this respect are not foreign to each other; that the effect to which the "acts, records, and judicial proceedings" of one state are entitled in the courts of a neighboring state, does not depend upon volition or comity as among the respective members of the union, but is defined and peremptorily enforced by the paramount sovereignty of the federal government. (See the next preceding note, and the cases there cited, p. 897.) Many of the decisions seem at a first glance to maintain the doctrine, that judgments obtained without personal notice to the defendant, and without any opportunity afforded him of contesting the plaintiff's claim, would not come within the general rule, but constitute an exception to the provisions of the constitution and the act of congress. (See *Aldrich v. Kinney*, 4 Conn. Rep. 380; *Kibbe v. Kibbe*, Kirby's Rep. 119; *Robinson v. Ward's ex'rs*, 8 Johns. Rep. 86; *Fenton v. Garlick*, id. 194; *Kilburn v. Woodworth*, 5 id. 37; *Borden v. Fitch*, 15 id. 121; *Pawling v. Bird's ex'rs*, 13 id. 192; *Starbuck v. Murray*, 5 Wend. Rep. 148; *Holbrook v. Murray*, id. 161; *Shumway v. Stillman*, 6 id. 447; S. C. 4 Cowen's Rep. 292; *Wheeler v. Raymond*, 8 Cowen's Rep. 311; *Andrews v. Montgomery*, 19 Johns. Rep. 162; *Bartlett v. Knight*, 1 Mass. Rep. 401; *Jacobs v. Hull*, 12 id. 25; *Bissell v. Briggs*, 9 id. 462; *Hall v. Williams*, 6 Pick. Rep. 232; *Woodward v. Tremere*, id. 354; *Dennison v. Hyde*, 6 Conn. Rep. 508; *Rogers v. Coleman*, Hardin's Rep. 413; *Hitchcock v. Aicken*, 2 Cain. Rep. 460.) But on examination it will be seen that these authorities all relate to cases where the person against whom the judgment was pronounced, was a resident citizen of another state when the suit was commenced, and had contracted no allegiance to the sovereignty where the court sat, nor given it any power over him. They proceed upon the total absence of jurisdiction in the court not only, but the sovereignty under which the court acted, and the absolute impossibility of acquiring jurisdiction without the party's consent in such cases. (See *supra* of this note, p. 906, 7, pl. 3, and the cases there cited.) The question, therefore, as to judgments rendered in accordance with the local law by a state court against its *resident citizens*, over whom it has exclusive sovereignty, did not arise and was not discussed. In *Thurber v. Blackbourne*, (1 N. Hamp. Rep. 242, 245,) Bell, J. delivering the opinion of the court, lays down a position, which, if correct, would indiscriminately exempt *all* judgments of other states from the operation of the act of congress and the constitution, provided they were obtained without personal notice to the defendant, and an opportunity afforded him of defending. "The words *records and judicial proceedings*," he says, "are words of definite meaning at common law, and by settled legal rules in the construction of statutes, they are to have the same meaning attached to them when used in this statute. The common law never recognized judicial proceedings as *foreign judgments*, unless rendered by a court of record upon personal notice given to the defendant, or his appearance to the action. Without these requisites, such foreign judgment is a mere nullity, and does not afford even *prima facie* evidence of a debt. 3 Wilson, 303, *Fisher v. Lane*. 9 East 192, *Buchanan v. Rucker*. The judicial proceedings or judgments contemplated by the act of 1790, were therefore not judgments rendered without notice to the defendant or appearance to the action, but judgments which were recog-

nized and enforced at common law as foreign judgments. Judgments of the courts of record of one state, rendered without notice or appearance of the defendant, when sued in the courts of another state, are therefore not affected by the statute of 1790, but remain, as at common law, mere nullities, unless within the jurisdiction where they were rendered." (And see *Hall v. Williams*, 1 Fairf. Rep. 278, 286.) A similar doctrine has been acted upon in Indiana. Thus, in *Holt v. Alloway*, (2 Blackf. Rep. 108,) in an action on a Kentucky judgment, the defendant pleaded that the judgment was obtained against him on a recognizance of special bail without any notice having been served on him; and without any ca. sa. having been issued against his principal. To this plea there was a general demurrer, which was overruled and judgment given for the defendant, because no ca. sa. had gone. The court, after observing that the judgment of a neighboring state may be impeached for fraud, or for want of jurisdiction, say—"The cause under consideration does not belong to either of those classes of cases. On the one hand, it is a case to which, for the want of personal notice, the act of congress giving to the judgment of one state when sued upon in another, the same conclusive effect as it has where rendered, does not properly apply. That act is based upon the principle that the merits of a cause once fairly and fully tried and determined in one state, should not be subject to the subsequent investigations and decisions of the courts of other states; but a judgment rendered, like the one in question, in the absence of the defendant, and without any personal notice to him of the suit, cannot be said to have been thus fairly obtained, and consequently does not come within the principle of the act of congress. On the other hand, although the defendant had no personal notice of the original suit, yet as it does not appear but that he was a resident of the state of Kentucky when the action was commenced, and that the judgment was recovered in conformity with the laws of that state, we would not, it is conceived, be warranted in determining that the court had no jurisdiction. We are, therefore, of opinion, that according to the facts on record, the judgment in this case must be viewed not as conclusive, for the want of personal notice; not as absolutely void, since the defendant must be presumed a resident of Kentucky when the suit was commenced, and amenable to its laws; but we must consider it as a *foreign* judgment and *prima facie* evidence of the debt. It is *per se* a cause of action, and may be declared on as in the present case without setting forth the original demand. Its justice, however, is subject to be impeached; and it may be shown to have been unduly or irregularly obtained." (See *Cone v. Cotton*, 2 Blackf. Rep. 82; *Elliott v. Ray*, id. 31.) So also in New-York, (*Robinson v. Ward's ex'rs*, 8 Johns. Rep. 86, 91.) But as it respects the latter, the adjudication referred to was made at a period when the judgment of another state was regarded as standing upon the same footing with judgments strictly foreign in their character. Since the decision of the federal court in *Mills v. Duryee*, (7 Cranch, 481,) and the solemn recognition of its doctrines in New-York, which followed soon after, the subject has not been there presented; and if it should be, there is great reason for doubting whether the case of *Robinson v. Ward's ex'rs*, *supra*, would stand as a true exposition of the law. In Louisiana, a Tennessee judgment, obtained under a statute requiring no notice or citation, was held of no validity whatever. (*Patterson v. Mayfield's ex'rs*, 10 Lou. Rep. (Curry,) 220. See *Warren v. Hall's ex'rs*, id. 377; but see *Pool v. Brooks*, id. 14, 18.) In Massachusetts, in a suit on a judgment against the defendant as bail, recovered in North Carolina by

scire facias on a return of two *nihil*s, the defendant showed that he had no actual notice of the judgment against his principal, and no notice that any process had been instituted against himself as bail. It was proved, however, on the trial, that by the laws of North Carolina and the usage there, the bail was so far a party to the record against his principal, as to be bound to take notice of the proceedings against the principal and the subsequent proceedings against the bail. And the court held, that the want of actual notice under such circumstances did not prevent the judgment from operating conclusively. "The defendant," say they, "must be considered as affected by that constructive notice, which would avail the plaintiff just as effectually as if an actual notice were given; so far, at least, as we are to consider the matter." (*M'Rae v. Mattoon*, 13 Pick. Rep. 53.) A similar doctrine seems to prevail in Ohio; (*Poorman v. Crane*, 1 Wright's Rep. 347. See *Spencer v. Brockway*, 1 Hamm. Rep. 259.)

Indeed, notwithstanding some respectable opinions to the contrary, we venture to affirm that in order to give the constitution and act of congress their legitimate effect, both principle and authority require, that the judgment of a neighboring state should be treated in all respects as though the court before which it is brought were sitting and acting under the laws of the state where it was rendered. (*Hinton v. Townes*, 1 Hill's Rep. 439, per O'Neill, J. delivering the opinion of the court. See also per Catron, J. *Hunt v. Lyle*, 8 Yerg. 142, 144.) If it would be conclusive there, it should be held equally so in every other state. An exception to the generality of this proposition might very properly be allowed where the local law, in virtue of which the court rendering the judgment proceeded, infringed upon the sovereignty of other states with regard to their own citizens; but thus qualified, it will be found sustained not only by *M'Rae v. Mattoon*, supra, but by a majority of the cases cited in the next preceding note, (p. 897.) We think it strongly sanctioned, moreover, by the opinion of Washington, J. in *Green v. Sarmiento*. (1 Peters' C. C. Rep. 74.) "In some of the states," he says, "perhaps judgment upon an attachment may be conclusive only as to the thing attached; in others, it may be so as to the matter decided, and to operate against the person and estate of the defendant generally. In others again, the judgment may be so far inconclusive that it may be opened and examined upon the performance of certain conditions, within a limited period. The present case affords a strong illustration. The judgment is against Sarmiento and Mahoney, although process was not served on the latter, nor did he appear or take defence. Is the judgment, by the law of New-York, conclusive as to Mahoney? Possibly it might be so, upon the ground that it was a partnership transaction; and that as one partner may bind, so may he defend his associate. But a different course of reasoning might prevail in other states, and the law might consider it only *prima facie* evidence, or no evidence at all, against the defendant, who was not served with process. These, and a variety of other cases which might be put, show the wisdom of the legislature in giving to such judgments only such credit as they possess in the state where they were rendered. Now let me ask this question of those who deny the conclusiveness of the judgment: If a court in Pennsylvania should declare, that a judgment of a court of New-York is evidence only that such a judgment was rendered, and that the same is only *prima facie* evidence that a debt is due or not due; does that court give such faith and credit to such judgment, as is given to it by the laws and usages of the state of New-York, which pro-

nounce it to be evidence, and conclusive evidence, not only of the existence of the judgment, but of the right which it has decided? If, then, you deny to such judgment the *force and effect* given to it by the laws of New-York, you deprive it of *the same faith and credit* which the laws attribute to it; and in truth, the latter expressions, as used in the act of congress, are synonymous with the former." The same learned judge further remarks—"It is said, that the judgment which thus claims an exemption from re-examination, may have been *ex parte*; the defendant having had no opportunity to make his defence. If the law of the state does not prohibit such an outrage upon the immutable dictates of justice, then the court which inadvertently gave the judgment, or a superior court, would provide the redress. If the law or the courts should leave the injured party without remedy, I will not say (because in this case it is unnecessary,) whether the courts of another state would be bound to consider such judgment conclusive. But if they should be so bound, then I can only say, that the act of congress was not passed with sufficient consideration; and that it may and ought to be so amended as to give a conclusive effect to judgments only in cases where the trial was perfectly fair, and where both parties were, or might have been heard." (id. 81, 2, 3.) The editors of the American edition of Mr. Starkie's Treatise on Evidence, observe on this subject, that "it follows, perhaps, from the construction given by the supreme court of the United States to the constitution and to the statute of 1790, that a judgment upon an attachment merely, without actual notice to the defendant, must have the same effect when put in suit in another state, as it has in the state where it was rendered. If in such case, therefore, a judgment thus rendered, is in any state conclusive only as to the property attached, it can have no greater effect, when sued in another state. Whereas, if in any state such judgment is conclusive as to the matter decided, and will operate against the person and estate of the defendant generally, or is so far inconclusive that it may within a limited time be opened and examined, upon the performance of certain conditions, the same effect is to be given to it in the courts of other states." And they add, that this is the view taken of the subject by Washington, J. in *Green v. Sarmiento*, supra, (2 Starkie's Ev. 233, note, 6th Amer. ed.) The same doctrine seems to be supported by Pennington, J. in *Curtis v. Gibbs*, (1 Pennington's Rep. 399 et seq.) The latter part of his opinion, in which the whole court seem to have concurred, is as follows: "It appears by the record produced, that the judgment and proceedings on which this action is founded, is a proceeding on a foreign attachment. The court will take notice of the record itself, and examine whether it is of such a nature as to be entitled to full credit or not; and whether it would be conclusive evidence of a debt in the courts of the state whence it is brought. And I am not ready to say, nor do I believe, that a judgment founded on a foreign attachment, would be conclusive evidence of a debt in the courts of Pennsylvania." He then proceeds to show that such proceedings are from their nature *ex parte* and *in rem*—that they are not of a common law character, but special remedies, depending in this country upon our acts of the legislature, and in England upon the custom of particular cities—that very little credit is given to judgments thus obtained in the courts of Westminster Hall, the original debt being there liable to be controverted, not from any disrespect to the court which rendered the judgment, but from the facilities which such proceedings afford for fraud and error, and for collusion between the plaintiff in the attachment and the garnishee. He concludes thus—"We therefore, in

my opinion, have a right to presume that the courts of Pennsylvania would suffer the defendants in this action to plead *nil debet*. For this reason, I am of opinion, that the plea of *nil debet* is good, and that of course the defendant must have judgment." (id. 406.) The decisions in South Carolina also, are in favor of according a complete domestic operation to the judgments of neighboring states. Per O'Neill, J.—"After reading the constitution of the United States, and this provision of the act of congress, it would seem too plain to admit of doubt, that a recovery in another state must, when authenticated as directed by the act, be regarded for all the purposes of evidence in this state, to have precisely the same effect, as if the case was trying in the state where the judgment was recovered." (Hinton v. Townes, 1 Hill's Rep. 439, 444.) "Would such a plea be good in the courts of the state whence the judgment is? The question concedes to the judgment the faith and credit which it would have at home, and this is giving effect to the act of congress. It is not pretended that the plea would be good in the state from which the judgment comes, and therefore it cannot be good here." (id. 445.) Further, see *Beech v. Abbott*, 6 Verm. Rep. 591, 2, per Williams, J. and the cases cited ante, note 619, p. 860, 1.

Within the principles allowing the judgment of another state to be impeached for lack of jurisdiction, it has been held in Tennessee, that no action could be maintained on a Mississippi decree, rendered against one who died during the pendency of the suit. (*Kelly v. Hooper's ex'rs*, 3 Yerg. Rep. 394.)

NOTE 638—p. 353.

The officer's return to an attachment, in which he described the defendant as *late* of a particular place, has been deemed evidence that he was a non-resident of such place. (*Robinson v. Ward's ex'rs*, 8 Johns. Rep. 86, 90, 91.)

NOTE 639—p. 358.

United States v. Nourse, 9 Pet. 8, 28. *Strike v. M'Donald*, 2 Har. & Gill, 191, 216. *Irvin v. Divine*, 7 Monroe, 246, 7. *Garnett v. Macon*, 6 Call, 338. *Arnold v. Styles*, 2 Blackf. 391, 393. *Bugg v. Norris' lessee*, 4 Yerg. 326. *Hunt v. Lyle*, 6 Yerg. 412. An existing judgment or decree of a competent court, upon a matter within its jurisdiction, is conclusive of the rights of the parties, on the same point, in any other court of concurrent jurisdiction, (see the cases to this point cited *infra*, in a note to p. 380 of the text;) nor do the decrees of a court of equity form any exception to the general rule. (*Starke v. Woodward*, 1 Nott & M'Cord, 329, note. Ante, note 587, p. 828, S. C.) In this case, being between the same parties, it was held to bar an action of trover. A decree is a bar in a subsequent contest between the same parties on the same demand. (*Garner's adm'r v. Strode*, 5 Litt. 314. *Thompson v. Clay*, 3 Monroe, 359, 360. *Cates v. Loftus' heirs*, 4 Monroe, 443, 4.) A decree on a bill filed alleging payment of a note, declaring that the facts alleged in the bill as amounting to payment were not true, was held to conclude against evidence of the same facts offered to show payment in a suit at law on the same note. (*Coit v. Tracy*, 8 Conn. Rep. 268, 276.) A bill was filed by distributees

against administrators, on which the latter accounted for the hire of slaves. Then one of the distributees died, and her husband filed his bill against the administrators and remaining distributees for a partition and account of hire. Held, that he was barred as to the hire accounted for in the former suit. (*Irvin v. Divine*, 7 Monroe, 246, 7.) A junior mortgagee made party to a bill of the elder for a foreclosure, and failing to defend, will be barred of his right to redeem. (*Cooper v. Martin*, 1 Dana, 23, 27.) An injunction issued at the suit of N. to stay an *ex parte* treasury warrant of distress on a treasury account against him. The cause was heard; large allowances were made to N. against the United States; and the injunction made perpetual. Held, that this suit concluded the United States against their action to recover the same account. (*United States v. Nourse*, 9 Pet. 8, 29.) The defence by an endorser was special, and had been heard, and relief denied in chancery. Held conclusive against it at law. (*Winans v. Dunham*, 5 Wend. 47.)

In Connecticut, the decree must specially find the matter to operate as a bar. On a bill alleging a mistake, and seeking to rectify a deed, a decree finding all the facts in the bill untrue, was held, 1. To negative the court's jurisdiction, which it had not, unless the amount in dispute was less than a given sum which was averred in the bill; and 2. That the finding was not so particular as to conclude against litigating the point in another cause. (*Abbe v. Goodwin*, 7 Conn. Rep. 377, 382, 3.) And see *Fairman v. Bacon*, 8 Conn. Rep. 418. But see *Coit v. Tracy*, 8 Conn. Rep. 268, 276.

The general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter. (*Holmes v. Remsen*, 7 John. Ch. Rep. 286.) In ejectment, which was defended on the ground of a judgment, *fi. fa.*, and sheriff's sale, the lessors would have attacked the sale for fraud; but held, that they were concluded by a dismissal of their bill filed to set aside the same sale on the ground of fraud. (*Morgan's heirs v. Patton*, 4 Monroe, 453, 457, 8.) A decree dismissing a bill, on an entry, where the defendant had relied on an adversary possession under his elder grant for twenty years, and the court declared such possession to be the ground of the decree, was held pertinent evidence on the question of such possession, in an action of ejectment by the complainant claiming to recover on the ground that he had held the possession for the same time; but not conclusive. (*Speed v. Braxdell*, 7 Monroe, 568, 572, 3.) A bill filed on the equity side of the U. S. C. C. of Georgia by the maker of a note, for relief from a judgment against him because the endorser had paid it, was dismissed, and the plaintiff paid the judgment. On a bill subsequently filed in the U. S. C. C. 3d Cir. Pennsylv., to recover back the money, the same facts being relied on to show payment as in the former suit, that was held a bar. (*Montford v. Hunt*, 3 Wash. C. C. Rep. 28.)

Mere dismissal, however, for want of prosecution, is no more than a non-suit at law, (ante, note 589, p. 336,) and therefore concludes nothing either against the complainant (the tenant in tail) or his issue (the privy in estate.) (*Ball's lessee v. Ball*, 2 Fox & Smith, 249, 262.) A bill dismissed without prejudice shall not bar; nor will a decision on summary application, which goes off for want of notice or some other formality, bar a renewed application in proper form. (*Bleight v. M'Ilvoy*, 4 Monroe, 142, 143, 4.) And a bill dismissed for want of parties should be dismissed without prejudice. If not, on appeal, the appellate court may remand the cause, with directions,

either to add the proper parties, which should almost always be allowed, or to correct the style of the dismissal by pronouncing it to be without prejudice. (*Thompson v. Clay*, 1 J. J. Marsh, 413, 417.) But see an opinion of the late Judge Mills, *id.* 419, et seq., objecting to such direction; and insisting that the chancellor below ought to have discretion to dismiss absolutely, or without prejudice, or let the cause stand over, and that he is not controllable by appeal.

Facts found by a former decree which are not necessary to uphold the decree, do not conclude the parties. (*Coit v. Tracy*, 8 Conn. Rep. 268, 276.) And see this and other cases to this point cited ante, note 587, p. 826, and especially *Hopkins v. Lee*, stated in same note, p. 827, from 6 Wheat. 109. On a bill to foreclose a mortgage, and a defence that the debt had been paid in part, the court found certain circumstances (and inter alia, certain money paid) specially, without in terms pronouncing on their effect, or drawing a conclusion of part payment or not; but decreed a foreclosure in opposition to the claim of payment. Held, that in a subsequent suit by the mortgagor's administrator to recover of the mortgagee's representative the money claimed to have been paid in the former suit, the proceedings were not evidence as to the facts found, as they were not pertinent or necessary to uphold the decree. (*Fairman v. Bacon*, 9 Conn. Rep. 418, 425, 6.) The dismissal of a bill in equity does not bar a suit at law, where it does not cover the same ground; as where, for aught that appeared, it might have been dismissed, because the case was not one of equity jurisdiction. Such a decree was held not to conclude against an ejectment at law. It proves nothing for or against a strictly legal title; but operates in a court of law only when it appears that the same matter has been directly decided in the court of equity. (*Wright's lessee v. Deklyne*, 1 Pet. C. C. Rep. 199, 202.) If a decree find an immaterial fact, it will not prove that. (*Hotchkiss v. Nichols*, 3 Day, 138.) See ante, note 587, p. 826. The dismissal of a bill for specific execution of a parol contract to convey land, is not a bar to an action for the recovery of money paid on such contract. (*Webb's heirs v. Webb's adm'r*, 6 Monroe, 163, 165.) And where a bill is filed on such contract to charge the land with the money advanced, or fix a resulting trust in a third person who purchased from the vendor, and both objects fail for want of proof, and the bill is dismissed; this will not bar an action for the money advanced by the vendee. (*Hickey v. Young*, 1 J. J. Marsh. 1, 4.) The subject matter of the two suits should appear to be the same. (*Newson v. Lycan*, 3 J. J. Marsh. 441, 2. *Pleasants v. Clements*, 2 Leigh, 474.) The dismissal of a bill filed, charging fraud in the sale of a chattel, and claiming to avoid the sale on that ground, is no bar to an action at law to recover damages for the breach of a warranty in a sale, for the questions are not the same—fraud to avoid the sale being different from that entitling to damages in an action brought on the warranty in affirmance of the sale. (*Pleasants v. Clements*, 2 Leigh, 474, 483.) A judgment had been formally satisfied by selling the defendant's supposed property by execution; but it finally turning out that the title was in another, a bill was filed by the plaintiff against the defendant to relieve the former from the consequences of the sale by reinstating the judgment, and compelling actual payment. In declaring that such a case was proper for chancery, the judge said that the decree would be no bar to a bill founded on the same equity, to subject the defendant's choses in action on the ground of his insolvency. (Per Robertson, C. J. in *Price v. Boyd*, 1 Dana, 436.) Where a link in the chain of title to land is the proceedings and decree

for the sale of heirs' land, if the record do not contain evidence that they were heirs, this must be proved aliunde. (*Beckwith v. Marryman*, 2 Dana, 371, 373.)

A decree may be relevant in some of its parts, but not in others; and if offered entire as evidence when some portions of it alone are relevant, it should be rejected in toto. (*Chiles v. Conley's heirs*, 2 Dana, 21, 2.) The rule as to proof by records is, that the whole need not be produced, or at least, not read; but only so much as concerns the matter in question. (Per Boyle, C. J. in *Francis v. Hazlerig's ex'rs*, 1 Marsh. Kentucky Rep. 95.)

An interlocutory decree of another state has been deemed no bar. The chancellor of Virginia pronounced an interlocutory decree on the construction of a will, declaring the complainant entitled under it to a moiety of certain slaves. But before the decree could be made final, the defendant removed to Kentucky, where the plaintiff now filed his bill for partition of the slaves. Held, that as the Virginia chancellor had power to set aside the interlocutory decree, it did not conclude; and the Kentucky court differing from him in the construction of the will, dismissed the bill. (*Baugh v. Baugh*, 4 Bibb, 556.)

The common law rule in respect to judgments equally applies to decrees in chancery, that the order or decree is not evidence against strangers, but is confined in its operation to parties or privies. (*Rice v. Cannon*, Car. Law Repos. 493. Anonymous, Car. Law Repos. 195. Per Duncan, J. in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 433. *Ives v. The Commissioners of Ins.* 1 Wright's Rep. 626. *Carter v. Bishop*, 1 Hill's Rep. 403. *Loop v. Summers*, 3 Rand. 511. *Mankin v. Chandler*, 2 Brockenb. 125. *Dorsey v. Gassaway*, 2 Har. & John. 409. *Newson v. Lycan*, 3 J. J. Marsh. 440, 441. *Parks v. Jackson ex dem. Hendricks*, 11 Wend. 442. *Frazier v. Frazier's ex'rs*, 2 Leigh, 642, 644, 650. *Brown v. Wyncoop*, 2 Blackf. Rep. 230, 231. *Beckwith v. Marryman*, 2 Dana, 371, 373.)

A decree against a guardian touching the ward's land is not admissible against the latter. (*Este v. Strong*, 2 Hamm. 404, 5, 6.) The attachment of an equity of redemption creates a lien, and the attaching creditor will not be affected by a decree of foreclosure on a bill filed subsequent to the attachment, unless he be made a party. (*Lyon v. Sanford*, 5 Conn. Rep. 544, 546, 7.) Such a decree on a bill brought by the first mortgagee, will not affect the assignee (not a party,) of the second mortgagee. (*Swift v. Edson*, 5 Conn. Rep. 531.) A master's deed under a decree directing it, is not, *per se*, sufficient evidence in trespass to try title (ejectment,) against a defendant, not a party or privy to the chancery suit. (*Drayton v. Marshall*, 1 Rep. Const. Ct. 184.) In general, a decree against the *cestui que trust*, will not affect the trustee. (*Thomas' trustees v. Brashear*, 4 Monroe, 65, 68.) Junior incumbrancers known to the senior mortgagee should be parties to his bill for a foreclosure. And even though they are not known to him, and he have no notice of their claim, still they are not barred by the decree of foreclosure; but may still come in and redeem. Held, of the holder of a junior mortgage or other incumbrance or the equity of redemption. (*Cooper v. Martin*, 1 Dana, 23, 25. *Haines v. Beach*, 3 Johns. Ch. Rep. 459, and the cases there cited.) A writing binding the obligor to convey land, is a covenant real, which, if not broken in the lifetime of the covenantee, goes to his heirs; if broken in his lifetime, it goes to his personal representative, who is entitled to the damages for the breach. And though the covenantee in his lifetime and after the breach, may have

sought a specific execution by bill in chancery, and his heirs may have revived the suit and obtained the decree, without making the personal representative a party, he will not be bound by it; his right to the damages is not destroyed, nor his action barred by such decree. There may be a decree in favor of the heirs for a specific execution saving the rights of creditors; but the personal representative is an indispensable party; and his right is not affected where he is omitted. (*Combs v. Tarlton's adm'rs*, 2 Dana, 464.) A person cannot be bound by a proceeding which in effect divests him of a legal right and transfers it to another, unless he be a party. (*id.* 466.) A decree cancelling a sale made by a lunatic, in a suit in which his vendee was not before the court, does not bind the latter. (*Cates v. Woodson*, 2 Dana, 452, 454, 5.)

A slave has been held an exception to the above general rule. Where a testator declared him free at 25 years of age, a decree against the executors, made before the slave reached that age, nullifying the will, was therefore held conclusive on the slave, who could not be made a party. (*Chasteen v. Ford*, 5 Litt. 268, 270.)

A decree on the merits against the party, (the tenant in tail,) shall conclude his privy in estate, (the issue in tail.) Agreed, in *Ball's lessee v. Ball*, 2 Fox & Smith, 262 et seq. per Bushe, C. J. A decree of foreclosure and sale was held conclusive in trespass (ejectment,) by the purchaser against the defendant, though not a party, who entered under the mortgagor a little before or just after bill filed. (*Griffin v. Wardlaw*, 1 Harp. Law Rep. 481.)

A feme covert is bound by a decree equally as if sole; and especially, if after becoming sole she acts in confirmation of the decree. (*Bradstreet v. Clarke*, 12 Wend. 602, 670, 1; and see *Martin v. Martin's heirs*, 5 Mart. Lou. Rep. N. S. 165. *Brousard v. Bernard*, 7 Lou. Rep. (Curry,) 216, 223, 4.)

Nor can a person, not a party to a bill, use the decree as to the facts it finds, as evidence against one who was a party. (*Dorsey v. Gassaway*, 2 Har. & John. 409.) To warrant the former decree as evidence, both parties, or those under whom they claim, must be parties to both suits; for one cannot take the benefit of a suit, who would not have been prejudiced had it gone against him. (*Paynes v. Coles*, 1 Munf. 373. Per Roane, J. *id.* 394. *Rees v. Lawless*, 4 Litt. 218, 219.) "The rule is, that a judgment or decree cannot be evidence in favor of any one against whom it cannot be used." (*Rees v. Lawless*, 4 Litt. 219, per Boyle, C. J. Per Mills, J. in *Thompson v. Clay*, 3 Monroe, 361, 2.) And it was held, in one case, that a plea at law of a former suit depending in equity, could not be sustained where the parties in each suit were not nominally the same, though the suit at law was against the same defendant as the former, and averred to be for the benefit of the complainant in equity. (*Davis v. Hunt*, 2 Bail. 412.) The rule is laid down with great strictness on English authority by Harper, J. in S. C. (*id.* 415.) A record which cannot be used against parties to a suit on trial, because some of them were not parties to the record, cannot be used for them. (*Chiles v. Conley's heirs*, 2 Dana, 21, 2, 3.)

But this rule of strict mutuality of parties is not universal. On an injunction bill filed by T. against Young and Martain as administrators of Jackson, and one Clay in his own right, praying a discount on a judgment obtained by the two former on two notes in favor of Clay against T., assigned by Clay to Young and Martain; the defendants pleaded a former decree against T. on the merits, upon a bill praying the same relief; but the former bill alleged that the assignment of one of the notes was to Young alone,

and that the other note was assigned to Young and Martain, without averring that they received the assignment in their capacity of administrators. As to the latter variance, the court held it merely one of description, and not, therefore, material. As to the other note, they admitted that Martain, one of the now defendants, was not to be considered as a defendant in the former bill; but if T. had succeeded against Clay and Young, neither of them could have asserted their claim on the note afterwards; T. made too few parties, and the decree was, therefore, erroneous; but still, not being reversed, it was binding. He was not entitled to take relief against one of two holding the same right, and then proceed against them jointly. (*Thompson v. Clay*, 3 Monroe, 359, 360, 1.) Though a decree against several defendants will not affect the rights of one who was not before the court, and is erroneous as to all; yet, until reversed, it is operative on those defendants who were regularly before the court. (*Cates v. Woodson*, 2 Dana, 452, 455.)

The decree and proceedings in chancery are equally admissible as a record at law, to show *rem ipsam*, though between strangers, and especially between privies. (*Schooling v. M'Gee*, 1 Monroe, 234.) Where F. stipulated that if there was a decree for a deed of certain land for which he (F.) held a note of M., payment should be postponed till the title was tried, and if the land should be lost, the note should be void; the record of such decree was held evidence against F. and his assignee in a suit with respect to the note. (*Schooling v. M'Gee*, 1 Monroe, 232, 3.) A decree of foreclosure and sale were held evidence in deriving a title to premises between persons, strangers to the defendant, though he was no party to the suit for foreclosure. (*Sinclair v. Jackson ex dem. Field*, 8 Cowen, 543, 578.) Such a decree is evidence of the mortgage, which need not be produced. (*id.*) In like manner a decree in favor of A. against B. that the latter make title, was received as evidence of a power of attorney to sell from D. to B., in trespass (ejectment,) brought by A. against C. a stranger. (*Koogler v. Huffman*, 1 M'Cord, 495.) So a decree for specific execution in deraigning a title was held evidence of its own existence and its effect against a stranger. (*Hall v. Carruth*, 1 M'Cord, 507. And see *Barney v. Patterson's lessee*, 6 Har. & John. 182.) A decree that the vendor of land shall convey to a third person, though the vendee be not a party, dissolves the relation of vendor and vendee, and the latter may obtain title from a third person; and on ejectment by his vendor, the articles of purchase shall not conclude as to the title; but the decree is admissible as evidence against the vendor, though it be between third persons. (*Logan v. Steele's heirs*, 7 Monroe, 101, 106, 7.) A decree obtained by the purchaser of land against M. the enterer, by which the title of M. was decreed to the complainant, has been held evidence against a third person, purchasing such title afterwards, of the facts which it proves. And in this case it was received to show that the person in whose favor it was rendered, had paid M. the consideration for the land, and so was a bona fide purchaser. (*Irby v. M'Kissack*, 8 Yerg. 42.) In Louisiana, a judgment or decree in favor of minors against the representatives of their tutor, connected with the tacit mortgage which the old code created on the land of the tutor as security in favor of the minor, was holden to be prima facie evidence of the debt in favor of the minors, as against persons claiming the land of the tutor under a sale and conveyance by him. (*Winter v. Thibodeaux's ex'rs*, 8 Lou. Rep. (Curry,) 193, 199.) But it is subject to be assailed as fraudulent or collusive. (*id.* 199.)

How far a decree against an executor is evidence of a debt against devisees, on a bill filed to charge the real estate, is a question upon which there has been some slight diversity of opinion. In Maryland, it seems to be no evidence of the debt, nor to affect the heirs or devisees in any respect. (*Duvall v. Green*, 4 Har. & John. 270. See also *Harwood v. Rawling's heirs*, id. 126. *Carnan v. Turner*, 6 id. 65. *Gaither v. Welsh*, 3 Gill & John. 259.) In New-York, the same doctrine has been recognized; (*Osgood v. Manhattan Co.* 3 Cowen's Rep. 612, per Sudam, senator. *Scott v. Young*, 4 Paige 542, 546; per Walworth, Ch.) So also it seems in Tennessee; (*Neal v. M'Combs*, 2 Yerg. Rep. 10.) In Virginia, an early case, (*Mason's devisees v. Peter's adm'rs*, 1 Munf. Rep. 437,) inclines strongly in favor of the rule as understood in Maryland and New-York; and in *Deneall v. Stump's ex'rs*, (8 Peter's Rep. 528, 531,) *Marshall, C. J.* says—"It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them." But several years before the latter decision, the same learned judge, in the C. C. of the U. S. for the district of Virginia, held, that a decree against the executor was *prima facie* evidence against the heir or devisee, though not conclusive. (*Garnett v. Macon*, 6 Call, 308. S. C. 2 Brockenb. 185, 213.)

The regularity or error of the proceedings in the court of chancery where the matter was previously heard is not the subject of inquiry; held, of the U. S. circuit court in Vermont, (*Bates v. Delavan*, 5 Paige, 299.) In this case the circuit court had erred in granting relief in a case not proper for it. (*id.* and see per *Duncan, J.*, in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 433.) The decree is not impeachable by an action for fraud, while it is in force; held, in an action on the case for obtaining a chancery decree on a false and forged evidence, (*Peck v. Woodbridge*, 3 Day, 30, 36.) Not collaterally in any form because the merits were wrongly decided. (*Garner's adm'r v. Strode*, 5 Litt. 314.) Nor because it was entered as on the merits by mistake, when it was intended to be a dismissal for want of prosecution. (*id.*) Where there was an audit and decree against a trustee to pay over monies; in an action subsequently brought on his trustee bond and on executing a writ of inquiry, evidence that he had not received assets as trustee to satisfy the decree, was held inadmissible as impeaching the decree which went on the ground of assets. (*Butler v. The State*, use of *Contee*, 5 Gill & John. 511.) In ejectment, a party claimed title under a decree of sale against unknown owners, pursuant to a statute requiring, to warrant the decree, proof by affidavit that the owners were unknown. It was objected that no such proof appeared to have been made, as the law required, by affidavit annexed to the bill. Held error or irregularity only, not a want of jurisdiction, and that the decree could not be questioned for the former cause. (*Berry v. Berry's heirs*, 3 Monroe, 266, 7.) But see *Denning v. Corwin*, 11 Wend. 652, from which it appears that this would be a want of jurisdiction and all would be void. (See 2 N. Y. R. S. 322, § 35, in connection with *id.* 330, § 84 & 85.) In case against a sheriff for neglect to levy under a *fi. fa.* from chancery, though it was plainly irregular by the practice of the court, yet not being set aside, the court of law would not allow the irregularity to be set up as a ground of defence. (*Harvey v. Huggins*, 2 Bail. 252, 263, et seq.) The justice of the former decree cannot be questioned by an answer to a bill of revivor. (*Arnold v. Styles*, 2 Blackf. 391, 393.)

"It is very important to see how purchasers under an order of sale by a court of chancery stand, where sales can only be resorted to for payment of judgment creditors, in default of personal estate. A purchaser under the decree is never affected by even a palpable error in the decree, e. g. in not giving day to a judgment creditor to show cause, or in directing too much to be sold, or in decreeing sales to satisfy judgment debts without an account of the personal estate." (Per Duncan, J. in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 433.)

A decree of foreclosure and sale were proved in deraigning the plaintiff's title. The defendant objected certain irregularities; but the court answered that he could not do this, as he was a stranger claiming on the ground of title paramount. (*Sinclair v. Jackson*, ex dem. Field, 8 Cowen, 543, 578.)

But jurisdiction is inquirable into. (*Hines v. Oldham*, 2 Monroe, 267. *Williams v. Preston*, 3 J. J. Marsh. 603, 607, 610. *Rogers v. Wood*, 3 Barn. & Adolph. 245.) Agreed, per O'Neal, J. in *Harvey v. Huggins*, 2 Bail. 263. And it was held of a decree of the U. S. circuit court of Vermont, that a part of its decree being *in rem*, was good as to a non-resident having no notice; but another part *in personam* was held void. (*Bates v. Delavan*, 5 Paige, 299, 304.) And per Walworth, Ch. "By the *lex loci rei sita*, property belonging to a person who is not within the jurisdiction of a court of law or equity may be made subject to the jurisdiction of the court, so as to render the judgment or decree of such court binding, as a proceeding *in rem*, against the property within its jurisdiction. But where the defendant or any party proceeded against does not reside in the state or country where the suit is brought, and is not served with process and does not appear, the judgment or decree in such suit will not be allowed to operate *in personam*, against such party, in the courts of any other state.

"This question appears to have arisen and been decided in the same way in nearly half of the states of the Union; and I am not aware that the courts of any state have held such a proceeding conclusive upon the rights of a party proceeded against, who has not appeared or otherwise submitted his rights to the decision of the court in which such proceedings were instituted. (See 1 N. Hamp. Rep. 242; 6 Pick. Mass. Rep. 232; 4 Conn. Rep. 380; 2 Verm. Rep. 263; 5 John. Rep. 37; 1 Dall. Penn. Rep. 261; 2 Leigh's Virg. Rep. 172; 1 Dev. N. C. Rep. 187; 1 Bailey's S. C. Rep. 242; Hard. Kent. Rep. 413; 2 Yerg. Tenn. Rep. 484; 6 Ham. Ohio Rep. 44, 117; 2 Blackf. Indi. Rep. 108; 1 Breese's Ill. Rep. 259; 2 Stewart's Alab. Rep. 280, 399, 445; Missouri Rep. 517, 529; 3 Mason's C. C. Rep. 251.)" The learned chancellor also cites and adopts the argument of Judge Story, (Conf. of Laws, 458, § 546. *Idem*, 508, § 609.) That jurisdiction is inquirable of, see also *Williams v. Preston*, 3 J. J. Marsh. 610; and per Duncan, J. in *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 433; *Abbe v. Goodwin*, 7 Conn. Rep. 377, and ante, note 637, p. 903 et seq. A decree of a county court requiring a defendant (a resident of the county) to convey lands situate in another county, does not operate *in rem* so as to affect the title to the land, but can be enforced *in personam* only. (*Aldridge v. Giles*, 3 Hen. & Munf. 136.) But jurisdiction of the person, even in a court of chancery of a neighboring state, will be presumed, as well as that it acted in all other respects within its jurisdiction, and hence such jurisdiction need not be averred in pleading the decree; e. g. actual notice to the party will be presumed. If he had not any notice, it lies with him to shew that; and if the notice was constructive merely, so as to reduce the decree to the grade of *prima*

facie evidence only, he should show that. (*Williams v. Preston*, 3 J. J. Marsh. 600, 603.) But see *Elliot v. Ray*, 2 Blackf. Rep. 31, and note (2.) If chancery have not jurisdiction of the subject matter, as a bill filed for damages for breach of warranty in the sale of a chattel, a general dismissal will not bar an action for the damages. (Agreed per Cabell, J. in *Pleasants v. Clements*, 2 Leigh, 483.) In debt on a chancery decree of Mississippi, against executors, the defendants were allowed to show that the decree passed after the death of their testator. No notice being taken of his death on the record, the court there had no jurisdiction of the person; and the decree was therefore void. (*Kelly v. Hooper's ex'rs*, 3 Yerg. 395, 6.) In Kentucky, as a circuit court has no power to enjoin a judgment in another county, a bill for such injunction dismissed absolutely will be no bar to a similar bill in the proper court. (*Lancaster v. Lair*, 1 Dana, 109.)

It is not essential to a decree in chancery, as matter of evidence, that it should be enrolled. Even a final decree may be received without that formality. (*Bates v. Delavan*, 5 Paige, 299, 303, 4. *Winans v. Dunham*, 5 Wend. 47.) In this respect there is a difference between chancery and common law courts of record. See ante, note 550, p. 799.

The declaration in debt, on a foreign decree, claimed the principal sum, stating it; and the costs, stating them. Plea, *nul tiel* record. The clerk's certificate was formal as to the principal sum, but not sufficient as to the costs; being a mere memorandum at the foot. Yet held sufficient to support the declaration as to the principal sum, on that issue. The mere memorandum of the clerk is no part of the record. (*Hunt v. Lyle*, 6 Yerg. 412.)

The court will not look into the records of other causes in court, to search for proof; though they may know that it exists there. If pertinent, the records in such causes must be regularly introduced as evidence in the principal cause. (*Hart v. Bleight*, 3 Monroe, 274.)

NOTE 640—p. 358.

See *Gresley's Eq. Ev.* 322, 323. These rules were adopted by Oakley, J. in *Belden v. Davies*, 2 Hall's Rep. N. Y. C. P. 444. They are sustained by various American cases. (*Owens v. Dawson*, 1 Watts, 149, 150. *Francis v. Hazlerig's ex'rs*, 1 Marsh. Ken. Rep. 93, 94. *Rees v. Lawless*, 4 Litt. 218.) The doctrine of the text as to bills in evidence is ably sustained by Judge Mills' argument in *Rankin v. Maxwell's heirs*, 2 Marsh. Ken. Rep. 488, 491. And see per Bailey, J. in *Rex v. All Saints*, 1 Man. & Ryl. 667.

A bill formerly filed by the witness was offered in evidence to contradict what he now swore. He said his counsel filed it, that he had never read it, but he believed his counsel told him what he meant to insert in it. The bill was neither signed nor sworn to by the witness: held inadmissible. (*Belden v. Davies*, 2 Hall's Rep. N. Y. C. P. 433.)

But on a question whether the parties' alleged agent had acted within the scope of his authority in making a deed, a bill filed by some of the parties, even while infants, recognizing the title set up in ejectment as derived under that deed to one J. was received among various other circumstances, though, for aught that appeared, the bill

had been filed by counsel and contained merely his own suggestions. (*M'Connell v. Bodwry's heirs*, 4 Monroe, 392, 395.) Quere.

And a part of the records of a bill and decree between the same parties, were received as evidence to identify land conveyed under the decree with that which the party had contracted to convey as the condition on which his antagonist was to pay him money. And the court held, that only so much of the proceedings in chancery need be read as were pertinent to show the identity. (*Francis v. Hazlerig's ex'rs*, 1 Marsh. Ken. Rep. 93, 94, 5.) And per Boyle, Ch. J. "The general rule on this subject is, that the whole of the record which concerns the matter in question should be produced; and as the bill and decree were all that was necessary to shew the identity of the land conveyed, and that which the defendants in error had contracted to convey, it was evidently not incumbent upon them to produce any other part of the record." (*Francis v. Hazlerig's ex'rs*, 1 Marsh. Ken. Rep. 95.)

NOTE 641—p. 359.

We saw, ante, p. 154 of the text, and note 292, p. 284, 5, that a clear and positive denial on oath must be overcome by more than one witness, or a decree cannot be made against the answer. In this general position, there is no disagreement among the cases cited, or others. (*Bibb v. Smith*, 1 Dana, 580, 581. *Webb v. Pell*, 4 Paige, 368, 372, 3. *M'Neil v. Magee*, 5 Mason, 244. *Green v. Vardiman*, 2 Blackf. 324. *Jenison v. Graves*, 2 Blackf. 440. *Hoomes v. Smock*, 1 Wash. Rep. 389, 392. *Love v. Braxton*, 5 Call, 537, 542, 3. *Gray v. Farris*, 7 Yerg. 155.) The answer of a defendant is equally within the rule, though it be doubtful whether he was properly made a party. (*Field v. Field*, 6 Cranch, 8, 24, 25.) So, whether it answer the charging or stating part of the bill. (*Smith v. Clark*, 4 Paige, 368, 370.)

We noticed, also, in the same note, that if the answer set up a distinct fact, not responsive to the bill, and issue be taken on such fact, it lies with the defendant to prove it; for then the answer cannot be taken as evidence. In addition to the cases there cited, and to the same effect, see the following: *Taylor v. Knox's heirs*, 1 Dana, 391, 394. *Green v. Vardiman*, 2 Blackf. 324. *Green v. Hart*, on appeal, 1 Johns. Rep. 580. The case of *Green v. Hart* furnishes a very exact illustration of this rule. There the complainant claimed in his bill, that a certain note against the defendant had been assigned to him, the complainant, for a valuable consideration, but inquired nothing as to usury. The defendant in answering, alleged usury in the assignment. This not being responsive, it was held, that proof of the written assignment, endorsed by the assignor, established a valuable consideration; and the distinct fact of usury being put in issue, the defendant must prove it. But had he denied a valuable consideration, it would have lain with the complainant to make that out with the usual strength of proof required to meet a responsive denial; though the endorsement of the note imported a consideration, and there was no need of the averment of any consideration in the bill. (See the opinion of Spencer, J. 1 John. 590.)

We likewise noticed what would or would not amount to a clear and positive denial within the rule, ante, note 294, p. 287. That the defendant does not recollect, is not a denial, nor equivalent to an allegation that he does not believe. (*Talbot v. Seabee's*

heirs, 1 Dana, 56.) And if he have no personal knowledge of the fact, though he deny it, the testimony of one witness will be sufficient to countervail it. (Combs v. Boswell, 1 Dana, 473, 474.) The answer of a minor by his guardian *ad litem*, must have some effect where it denies a fact, and should be overcome by proof. (Doyle v. Sleeper, 1 Dana, 531, 541.) Where administrators answer, professing ignorance, &c. but at the same time putting the matter distinctly in issue by a denial, how far a court of equity will decree on the oath of a single witness against the answer, *quere*. (Hunt v. Rousmanier, 3 Mason, 294, 302.) Even the total omission in an answer to notice facts charged in the bill, but not there stated to be within the defendant's knowledge, and which are not presumably within his knowledge, shall not be taken as an admission of those facts, but they must be proved: Held, of a bill filed to charge a surety separately, which bill charged the death and insolvency of the principal as the ground of proceeding against the surety; these two facts not being noticed in the answer of the surety. (Long v. Dupuy, 1 Dana, 104, 5.)

It is also proper to observe, that though an answer responsive to a bill be evidence, yet it is but *parol* evidence, subject, as such, to every objection of incompetency where it seeks to vary, contradict, or impeach a writing, &c. Therefore, where the answer admitted a deed, but spoke of its object, in order to vary its apparent effect, though the deed was inquired of by the bill, and the answer was responsive as to its execution, &c. the answer was held inadmissible when offered to vary its effect. (Jones v. Sluby, 5 Har. & Johns. 372, 381.)

The general force of an answer as evidence, in any respect, may be overcome by strong contradictory testimony in respect to particulars, especially if it amount to the establishment of perjury against the answer. (Countz v. Geiger, 1 Call, 190, 192.) On trying an issue of fact awarded by chancery, the defendant's answer being offered in his behalf was rejected as proof, because it had been overcome by depositions of more than one witness contradicting it. (Cartwright v. Godfrey, 1 Murph. 422.) On an issue to try the validity of a will under the Ohio statute, the answer cannot be read. (Green v. Green, 5 Hamm. 278.)

Where an answer on oath is waived pursuant to the New-York statute, (2 R. S. 175, stated *ante*, note 392, p. 285,) the answer is not evidence in favor of the defendant for any purpose; but, as a pleading, the plaintiff may avail himself of its admissions and allegations to establish the case made by his bill. (Bartlett v. Gale, 4 Paige, 503, 507.)

How an answer in response to the bill is to be construed in other parts in support of itself, see Clason v. Morris, 10 Johns. Rep. 524. Although such an answer may contain circumstances discrediting itself, and making out the complainant's case contrary to a general denial of that case in the answer, yet where the answer denied all fraudulent intent against creditors, which was charged in the bill, though it admitted certain circumstances which might have been relied on as *indicia* of such intent, the cause being heard on bill and answer, held, that the general denial of the intent should prevail. (Cunningham v. Freeborn, 11 Wend. 240, 252, 3.) But it would be otherwise if circumstances had been admitted showing fraud *per se*. (*id.* 252, 3, per Nelson, J.) How far an answer, though responsive to the bill, shall be held to destroy its own denial or explanations, by the admission of inconsistent circumstances, see Jackson v. Hart, 11 Wend. 343, and especially the opinion of Savage, C. J. *id.* 348, 9, and a strong minor-

ity of the court of errors, the general views of whom were not denied by the majority, though they came to a different result. The former thought the circumstances disclosed by the answer itself sufficiently strong to overcome the matter of defence it set up. The latter thought they amounted to no more than suspicion of its falsity. And see *Pierson v. Catlin*, 3 Verm. Rep. 272, stated ante, note 293, p. 287.

NOTE 642—p. 359.

One's answer in chancery being a confession, is always evidence against him, when pertinent, whoever may have been parties in the cause wherein it was interposed. (*Grant v. Jackson*, 1 Peak. Cas. 203. *Kiddie v. Debrutz*, 1 Hayw. 420. *Mims v. Mims*, 3 J. J. Marsh. 103, 109, 110. Per Bayley, J. in *Rowe v. Brenton*, 3 Mann. & Ryl. 271, 2. *Roberts v. Tennell*, 3 Monroe, 247, 249. *Hunter v. Jones*, 6 Rand. 541. *Gresley's Eq. Ev.* 323.)

But it is not at law evidence for the party in any respect, unless his antagonist choose to use it, even though it was called out on a bill of discovery for the purpose of the very suit at law in which it was offered. It is therefore entirely in the election of the party calling for it, whether he will use it or not. He may refuse, and prove his entire cause by other evidence, or he may use it and disprove by other evidence, all allegations in it detrimental to his cause. (*Nourse v. Gregory*, 3 Litt. 378.) The same rule holds of a bill of discovery in aid of a defence in chancery. Held there, that a defendant to a cross bill could not use his answer in evidence, unless it was first introduced by the plaintiff. (*Phillips v. Thompson*, 1 John. Ch. Rep. 131.)

A demurrer or plea to a bill is not evidence. The now defendant at law had filed a bill against the plaintiff, setting up the matter of defence to the present action. The plaintiff (defendant in the first suit) had demurred to the bill, but the demurrer being overruled, he had pleaded to that part of the bill respecting the defence. The defendant in the suit at law proposed to read the chancery proceedings in evidence on the trial, as amounting to an admission of the matter of defence. But Abbott, C. J., refused the evidence, observing that, "after a demurrer to a bill in equity, if the demurrer were overruled, the party might still go on and answer; and that consequently the demurrer was not to be taken as an absolute admission of the facts charged; and that on the same principle a plea in equity could not be so; for it amounted merely to a statement of the circumstances to prove, that, supposing the facts charged to be true, the defendant is not bound to answer. It could, therefore, no more amount to an admission of those facts, than a witness who declines to answer a question can be held to admit the fact inquired into." (*Tompkins v. Ashby*, 1 Mood. & Malk. 32, 3.)

NOTE 643—p. 359.

See the next succeeding note.

Such is the general rule. (*Crummen v. Cavenah*, 1 Mart. Lou. Rep. N. S. 532. *Roberts v. Tennell*, 3 Monroe, 249. *Lawrence v. Ocean Ins. Co.* 11 John. Rep. 241, 260, per Thompson, C. J. And see ante, notes 200, 201 and 202, pp. 223 to 231, as to the taking of confessions together. Also *Gresley's Eq. Ev.* 324, 5.) But it is not true

that because the whole may be read, all parts of an answer indiscriminately are evidence even at law, and in respect to a bill of discovery. The plaintiff's counsel having read in evidence the answer of the defendant at law to a bill of discovery, and the defendant's counsel offering to read the residue; on objection, the court said—"The bill, if it contain any facts useful to the defendant, is evidence for him against the plaintiff. The answer of the defendant is evidence for him, so far as it is responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it. So far as the answer in such a case sets up matter not responsive to the call of the bill, or is not necessarily connected with or explanatory of it, it cannot be used in evidence by the party making it. (*Methodist Church of Cincinnati v. Wood*, 5 Ham. Rep. 284, 5.) And though a defendant has a right to claim that the whole shall be read and taken together, yet it does not follow that all in his favor shall operate as evidence for him of equal weight with that which goes against him. But the allegations adverse to the plaintiff may either be discredited by matter apparent on the answer itself, as we noticed ante, note 294, p. 287, 8, or by proving perjury in some particulars, (*Countz v. Geiger*, 1 Call, 190, 192,) or by direct proof contradicting all the allegations adverse to the cause of the party who called for the answer. (*Nourse v. Gregory*, 3 Litt. 378.) For as we have seen both by the text, ante, 359, and several of the notes, an answer is like any other confession, and must be governed by the same rules; and we saw a great variety of cases, ante, note 202, p. 230, wherein the jury might give full credit to the portion making against the party, and reject all that made for him, though *prima facie*, both confession and answer must receive equal credit whether for or against, and one would balance the other. (Ante, note 201, p. 226.)

Where parts of the answer are used as evidence against the defendant in equity, he is not entitled as of course even to read the whole. The master of the rolls ruled, that if a plaintiff read a passage of the defendant's answer as evidence of a particular fact, the defendant had no right to read, as evidence, any subsequent matter, although it might be connected with the passage which the plaintiff had read by such words as "but," "and," &c. unless the subsequent matter was explanatory of the passage read by the plaintiff. (*Davis v. Spurling*, 1 Russ. & Mylne, 64.) But the plaintiff is compellable to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects. (*Nurse v. Bunn*, 5 Sim. 225. And see *Bartlett v. Gillard*, 3 Russ. 149, *infra*.) An answer was put in without oath, that being waived under the N. Y. statute; and per Walworth, C. in *Bartlett v. Gale*, 4 Paige, 507: "The plaintiff's counsel is wrong in supposing that the whole answer must be taken together as evidence, and that the complainant cannot avail himself of the admissions in one part of it, without being also bound by the statements and allegations in other parts of the same answer. This is not so, even where the complainant calls for an answer on oath, except as to those parts of it which are responsive to the bill. But where an answer on oath is waived, although, as a pleading, the plaintiff may avail himself of admissions and allegations in the answer which go to establish the case made by the bill, such answer is not evidence in favor of the defendant for any purpose."

Where a passage read by a plaintiff refers to another passage, the latter is to be read only for the purpose of explaining or qualifying the thing in respect of which the refer-

ence is made ; and not for the purpose of introducing new facts which do not explain or qualify that thing, though such new facts be connected in grammatical construction with that which must be read. (*Bartlett v. Gillard*, 3 Russ. 149.)

NOTE 644—p. 359.

See the next preceding note ; also *Lawrence v. Ocean Ins. Co.* 11 Johns. Rep. 241, 260, per Thompson, C. J. *Roberts v. Tennell*, 3 Monroe, 249, S. P. adverted to as decided ; *Peak. Ev.* 56, is there cited by Boyle, C. J. and questioned as not being maintainable in principle.

Roberts v. Tennell decides, that where, at law, the answer in chancery of the defendant, as put in to the original bill, is used against him, he shall not be allowed to read his subsequent answer to an amended bill, though in the same cause. In that case it was not offered in explanation of the first merely, but as evidence in general. (3 Monroe, 249, 250.) "It is true," says Boyle, C. J., "that wherever the declaration of a party is used as evidence against him, the whole of it must be taken together, as well that which operates in his favor as that which makes against him ; and hence it is an established rule, that if an answer of a party is used against him, he has a right to insist upon the whole of it being read. But regularly it is only the whole statement which he makes at the same time, which he has a right to insist upon being read in his favor, when a part of it is used against him ; and therefore, if a statement made at one time is used against a party, it does not make a statement used by him at a different time evidence in his favor." (*id.* 249. See per Colden, senator, in *Murray v. Coster*, 4 Cowen, 630, S. P. ; and ante, note 201, p. 225, on the point that one distinct confession cannot be used to explain, qualify or contradict another.)

NOTE 645—p. 360.

See ante, note 294, p. 287, and the next note, post.

NOTE 646—p. 360.

See *Gresley's Eq. Ev.* 325.

This distinction, that by calling for discovery on oath, you merely admit the competency of your adversary personally as a witness, but not the competency of the matter he may set up, has been acted upon in other courts, and is obviously a distinction which must frequently arise. In *Jones v. Sluby*, stated ante, note 641, p. 925, we noticed that it was inadmissible to vary by parol the effect of a written instrument admitted by the answer. And the doctrine in the text, that where matter is set up as mere hearsay, or indeed, if it appears necessarily to be so on the face of the answer, it cannot claim the force of evidence, was, as we saw, recognized in various chancery cases, ante, note 294, p. 287. See also ante, note 641, for several cases on the same head.

NOTE 647—p. 361.

See *Gresley's Eq. Ev.* 324, 5.

Not only must the answer be taken together, but where it is an answer to particular interrogatories in the bill, that also must be read if in existence. Where the bill is lost, though you cannot read the answer as such, yet, as against the party answering, you are at liberty to read it as something said or written by him. (Per Bayley, J. in *Rowe v. Brenton*, 3 Mann. & Ryl. 271, 2. Per *Ld. Tenterden*, C. J. *id.* 273, and see post, 393 of the text.) Answers were produced, some portions of which were unintelligible, *per se*, for want of the bill, (which was lost,) such as, that "we do not know," &c. while other parts were intelligible; and it was strenuously insisted that they could not be read without violating the rule that the whole shall be taken together. But Lord Tenterden, C. J. said, if there be any obscurity in them that will take away from their effect. Bayley, J. agreed to a case cited, that a witness having in his power part of a document, which may throw light on the subject, must produce it before he can speak. Here, he observed, the party produces all that he has in his power. In the absence of the interrogatories, we shall see from the document itself whether it be or be not fairly and distinctly intelligible. The answers were received. (*id.* 272, 3.) See *Rex v. Picton*, 30 Howell's State Trials, 225; *Hart v. Harrison*, 1 Ford's MS. 145, cited 2 Stark.-Ev. 372, n. (p.) Where the bill of discovery, filed by the defendant, prayed the discovery and production of all the defendant's letters, or those of others written to the plaintiff, relating to the debt, and an answer had been filed, and various letters brought in, the court refused to receive any of the letters in evidence without the production of the bill and answer. Tindal, C. J. said—"The letter offered is not one from the plaintiff, but written and sent to him; nor is it proposed to put it in with any letter in reply. It may be that the answer would so contradict or explain as to neutralize its effect." (*Hewitt v. Piggott*, 5 Carr. & Payne, 75.) It was said by Thompson, Ch. J. in *Lawrence v. The Ocean Ins. Co.* (11 John. 260,) that letters called for and disclosed by the answer, are to be deemed part of it, and cannot be read without the production of the answer, inasmuch as the defendant is entitled to have the whole read. But, as was suggested in *Hewitt v. Piggott*, *supra*, there is a distinction between letters generally received and sent, respecting the subject of discovery, and those which are written by the party himself, or his agent. So it is necessary to distinguish between cases where the letter is produced as part of an answer, and where it is not. A letter from the plaintiff's agent having been referred to in the plaintiff's answer to a bill filed by a third person, and inspected by mutual consent, a copy of it was now offered by the defendant as evidence on the trial, without the answer. On objection, that the letter could not be read without the answer, the court, by Lord Tenterden, C. J. said—"If the letter, instead of being merely handed to the solicitor of one of the parties for the inspection of the other, had been produced in the court of chancery, and filed in the master's office, and the defendant here had wished to offer it as evidence in an action at law, it would have been for the Lord Chancellor to exercise his judgment, whether or not he would permit it so to be made use of, without the answer to which it related; or if, in such a case, the letter had been produced here, without the Lord Chancellor's order, this court would have determined, in their discretion, upon its admissibility.

But in this case the letter was not regularly before the court of chancery in the suit there, and we think it impossible, under the circumstances, that this court should exercise a discretion as to admitting or rejecting it. Whether it is necessary in every instance to read an answer in chancery for the purpose of making any documents evidence which may be annexed to it, we do not now decide. I should, at present, think it a very strong proposition, to say that the answer must, at all events, be read, though having no connection with the case in which the documents are produced. But here, at least, we think the copy in question was admissible." (*Long v. Champion*, 2 Barn. & Adolph. 284.) But where a party offered a sworn copy of a book to which his adversary had referred in an answer in chancery, and which, in pursuance of an order, he had left for inspection at the master's office, Lord Tenterden held, "that this was the same as if the whole book were appended to the answer, or the answer expanded to the extent of the book, and that advantage could not be taken of an inspection obtained through a conventional and economical proceeding between the parties in the chancery suit, to give in evidence a part of the answer without reading the whole." (*Anon*, cited 2 Barn. & Adolph. 285, by Pollock, arg. See *S. C. Gresley's Eq. Ev.* 324.)

When an answer is introduced merely for the purpose of impeaching a witness, its use will be confined to so much as relates to that single point. (*Sparin v. Drax*, 2 Bac. Abr. 622. *S. C. Gresley's Eq. Ev.* 324.)

NOTE 648—p. 361.

The answer is not only evidence against the immediate party making it, but against his privy; that is to say, any one coming to his rights and incurring the like liabilities in respect to the subject to which the matter of the answer, proposed as evidence, relates. This successorship may of course be either by purchase or by operation of law; and regarding the answer, according to its true nature, as the confession of the party, operating equally upon him and all those who claim under him, immediately or remotely, it is admitted subject to the same restrictions as common confessions when offered for a similar purpose. All the considerations, therefore, are applicable to it, which we had occasion so fully to notice, ante, note 481, p. 644 to 669, when speaking of the latter. At p. 645 of that note, we took occasion to notice in advance the leading case now reached in the course of the text, with several other cases specifically exhibiting the effect of the answer when brought to bear on the privy. These we shall not repeat, but merely add some few cases bearing on the same point.

It is said in *Mosely v. Armstrong*, (3 Monroe, 287, 289,) that the answer of one defendant is not evidence against the other, though the latter claim under the former. This is but the principle asserted in note 481, above referred to, that in order to commit the person claiming under the respondent, he must come in by conveyance or other title acquired subsequent to the answer being put in. (See that note, at p. 655, and the cases there cited. Also *Gully v. The Bishop of Exeter*, 2 Moore & Payne, 266, 273, 4, 5, S. P.; and see *Turner v. Holman*, 5 Monroe, 411.) In *Ward v. Davidson*, (2 J. J. Marsh. 448, 445,) Judge Robertson remarks—"Although it has been decided by the supreme court of the union in *Field v. Holland*, (6 Cranch, 24,) that the answer of a defendant may be evidence against a co-defendant, who derived his right

from him, yet the contrary doctrine seems to be so firmly settled in this state by repeated decisions of this court, that it would be an unexpected, and perhaps an injurious innovation, to recognize the authority of the national court, as superior on this question, to that of the supreme tribunal of Kentucky." We have not been able to perceive, after a close inspection of *Field v. Holland*, that the supreme court of the United States have made a decision so very unscientific as the one above imputed to them. Mr. Cranch's marginal note does, indeed, (6 Cranch, p. 9,) assert the rule in the terms mentioned by Judge Robertson, but we think the note is not sustained by the opinion of the court. The decisions in Kentucky doubtless proceed upon the sound distinction, that the answer, filed before the respondent has parted with his interest, shall be received against all to whom the subject afterwards comes, but not if filed after. (*Rees v. Lawless*, 4 Litt. 218, 219, ante, note 481, p. 645, S. C.)

NOTE 649—p. 362.

See *Gresley's Eq. Ev.* 323, S. P.

NOTE 650—p. 362.

The cases are uniform to the general rule that the answer of one defendant is not evidence against his co-defendant. (*Clark's ex'rs v. Van Riemsdyk*, 9 Cranch, 152, 156. *Leeds v. The Marine Ins. Co.* 2 Wheat. 390, 393. *Dade's adm'r v. Madison*, 5 Leigh, 401. *Gresley's Eq. Ev.* 24, 25. *Daniel v. Ballard*, 2 Dana, 296. *Field v. Holland*, 6 Cranch, 8. *Moseley v. Armstrong*, 3 Monroe, 287, 289. *Harrison's heirs v. Johnson*, 3 Litt. 286. *Hayward v. Carroll*, 4 Har. & John. 518. *Fanning v. Pritchett*, 6 Monroe, 79, 80. *Blight's heirs v. Banks*, 6 Monroe, 192, 197. *Hoomes v. Elliott*, 1 Wash. Virg. Rep. 389, 392. *Timberlake v. Cobbs*, 2 J. J. Marsh. 136. *Rundlet v. Jordan*, 3 Greenl. 47. *Webb v. Pell*, 3 Paige, 368, 370. *Per Hoffman, J. in De Forest v. Parsons*, 2 Hall's Rep. N. Y. C. P. 141. *Winters v. January*, Litt. Sel. Cas. 13. *Turner v. Holman*, 5 Monroe, 411. *Thomasson v. Tucker's adm'rs*, 2 Blackf. 172. *Phoenix v. Ingraham's assignees*, 5 John. Rep. 412, 426. *Jones v. Bullock*, 3 Bibb, 467. *Hardin v. Baird's heirs*, Litt. Sel. Cas. 340.) Nor is it, though the respondent be agent to his co-defendant against whom it is sought to be used. (*Leeds v. The Marine Ins. Co.* 2 Wheat. 380, 393.) And see ante, note 182, p. 180, et seq. In England, however, where a defendant stated that his memory was frail on account of age, and referred to another person as having been his agent and as possessing a more perfect knowledge of the matters inquired after than himself, the agent was made a party, and his answer was allowed to be read against the principal. (*Anon.* 1 P. Wms. 100.) See *Gresley's Eq. Ev.* 25. And agreed, that one defendant may adopt the other's answer, and so make it evidence against the former; (*Moseley v. Armstrong*, 3 Monroe, 289;) and this was resolved in *Nantz v. M'Pherson*, (7 Monroe, 597, 600.) The answer of the obligee is no evidence against his previous assignee, a party in the same suit. (*Fanning v. Pritchett*, 6 Monroe, 79, 80. *Turner v. Holman*, 5 Monroe' 411, S. P.) Nor the answer of the wife against the husband. (*The City Bank v. Bangs*, 3 Paige, 36.) Nor the answer of a principal

debtor admitting his insolvency, against his surety, a co-defendant, at the suit of a co-surety suing for contribution. (*Daniel v. Ballard*, 2 Dana, 296.) The mere silence of one defendant is, of course, no evidence against his co-defendant. (*Timberlake v. Cobbs*, 2 J. J. Marsh. 136. *Blight's heirs v. Banks*, 6 Monroe, 192, 197. *Harrison's heirs v. Johnson*, 3 Litt. 286.)

The general rule above stated it seems does not apply where all the defendants are proved to be partners in the same transactions. For, in respect to these, the answer of either is evidence against the others. (*Clark's adm'r v. Van Riemsdyk*, 9 Cranch, 153, 156, per Marshall, C. J. *Chapin v. Coleman*, 11 Pick. 331. *Williams v. Hodgson*, 2 Har. & John. 474, 477.) But upon a bill in equity by one against his co-partners for an account, the answer of one of the partners will not be evidence to charge another, (*Chapin v. Coleman*, 11 Pick. 331,) unless indeed it appear that the defendants as constituting a partnership *inter se*, of the one part, were in partnership with the plaintiff of the other part. (*id.*) See ante, note 175, p. 170, et seq. Also, ante, notes 176, 177.

It is hardly necessary to observe, that the admission of a grantee in a cross-bill filed against him and the grantor, (who was the complainant in the original bill,) of the fact of the grantor having conveyed to him, or permitted a conveyance to him, the grantee, in order to defraud the grantor's creditors, shall not prejudice the grantor. (*Hardin v. Baird's heirs*, Litt. Sel. Cases, 340.)

NOTE 651—p. 362.

A defendant friendly to the plaintiff was actually made defendant, in *Field v. Holland*, 6 Cranch, 8; and his answer sought to be used against his co-defendant; but of course not allowed. See *id.* 24, 5.

NOTE 652—p. 363.

The answer of the party to a bill filed either for relief and discovery, or more commonly for the latter only, forms a much less considerable head of evidence in those courts which possess a summary power to coerce discovery. The great expense and delay of resorting to a court of chancery for that purpose, induced the courts of common law, some years ago, to grant rules on motion for the discovery and production of material documents, in certain cases. In New-York, this power was finally confirmed, not to say enlarged, by statute: and pursuant to the same statute, the practice was rendered more systematic than formerly by general rules of the court. See the whole subject treated of in *Graham's N. Y. Pr.* 2d ed. ch. 5, p. 524 to 531. We there learn, that unless otherwise directed by rule, the cases proper for such discovery are to be taken as prescribed by the principles and practice in chancery on bills of discovery. (2 R. S. 119, § 22.) Doubtless various other parts of the practice in this particular may be improved by conforming it as near as may be to that of chancery; and both will derive much aid from an English tract of Wigram, entitled "Points in the the law of discovery," recently published here in the 38th No. of *Littell's Law Library*, Philadelphia.

NOTE 653—p. 363.

See ante, note 443, p. 585, as to sufficiency of proof of death; also, ante, note 381, p. 489. Further, see *Doe d. Knight v. Nepean*, 5 Barnw. & Adol. 42.

NOTE 654—p. 363.

Goodwin v. Mussey, 4 Greenl. Rep. 88.

In ejectment, the chancery deposition of Martha Mills being offered at the trial, a witness proved that he saw her a few days before the trial, and that she appeared to be nearly one hundred years of age, and was bed-ridden and quite unable to attend the trial. Taunton relied on *Kinsman v. Crooke*, cited in the text, note (3), from 2 Ld. Raym. 1166. But per Vaughan, B.: "These things are, in cases of issues out of chancery, regulated by an order of that court, that the depositions of particular witnesses may be read; but I think that the mere circumstance of the witness being unable to attend here, by reason of sickness, is no sufficient ground for admitting a deposition. This is generally a ground for postponing a trial." (*Doe, ex dem. Lloyd v. Evans*, 3 Carr. & Payne, 219. See *Rex v. Savage*, 5 id. 143. Also, *Bond v. Dimes*, 3 Moore & Scott, 161.)

NOTE 655—p. 363.

As to the mode of perpetuating testimony in New-York and in the supreme court of the United States, see ante, note 42, p. 32.

In that note, p. 37, we spoke of the officers in New-York who were authorized to take depositions in *perpetuam rei memoriam*, &c.; and we there showed that, among others, supreme court commissioners were authorized to take such depositions. A commissioner, however, cannot act in this capacity out of the county for which he was appointed; and where he had done so, held, that the depositions could not be used as evidence. (*Jackson v. Leek*, 12 Wend. 105.) It seems, however, that such depositions may be taken out of the county in which the witness resides, if he voluntarily appear and submit to an examination. (id.)

The general positions of our author as to the necessity of shewing a case of disability in the witness to attend, or of the party to procure his attendance, were recognized by Cabell, J. in delivering the opinion of the Virginia court of appeals. (*Pleasants v. Clements*, 2 Leigh, 482.) The depositions were offered without any attempt to show the disability. (id. 476.) See also *Trimmer v. Larrison*, 3 Halst. 56; *Tompkins v. Wiley*, 6 Rand. Rep. 242; *Carpenter v. Groff*, 5 Serg. & Rawle, 162; *Mifflin v. Bingham*, 1 Dall. 276; *Gordon v. Little*, 8 id. 583; *Wallace v. Mease*, 4 Yeates, 520; *Parker v. Farr*, 1 Browne, 252; *Rankin v. Cooper*, 2 id. 13; *Collins v. Lowrie*, 2 Wash. Rep. 75; *Minnis v. Echols*, 2 Hen. & Munf. 31; *Lawrence v. Swann*, 5 Munf. 332; *Butts v. Blunt*, 1 Rand. Rep. 255. And see ante, note 42, p. 36, as to this doctrine in the supreme and circuit courts of the U. S.; also the same note, p. 39, in respect to the rule in New-York. To authorize the production of a deposition in evi-

dence, taken under the act to perpetuate testimony, the party must *prove* his inability to attend court, and not rely on presumption merely, arising from his advanced age. (Jackson *ex dem.* Montessor v. Rice, 3 Wend. 180.)

NOTE 656—p. 364.

Gresley's Eq. Ev. 185. Goodenough v. Alway, 2 Sim. & Stu. 482. And see ante, note 654, p. 933.

In chancery, upon awarding an issue to try the validity of a will, the defendant moved the court to order that the depositions taken in the cause might be read on the trial. Curia, per Hitchcock, J.: They may be read, "provided the deponents are not within the jurisdiction of the court at the time of trial. They will be subject, however, to every exception which might be made to them if offered in chancery." See the order in full, (5 Hamm. Rep. 279.) It contained this clause: "It is further ordered, that either party may use on the trial of said issue, any of the depositions properly taken, and now on file in this cause, which contain relevant and competent evidence; provided the witnesses, whose depositions are offered at the trial, are deceased; aged, infirm, or without the jurisdiction of the court, as depositions *de bene esse* are allowed to be read in cases at law. (Green v. Green, 5 Hamm. Rep. 278.)

NOTE 657—p. 364.

Chess v. Chess, 17 Serg. & Rawle, 408, 412. Per Parker. C. J. in Le Baron v. Crombie, 14 Mass. Rep. 236.

But see Gold v. Eddy, 1 Mass. Rep. 1. There, a deposition made by one in a court of law, while he was disinterested, was received for him in a review of the same suit, though he had become administrator to the party in whose behalf he was sworn. The court however rely somewhat on the statute declaring what evidence shall be received on reviews. (See *id.* 3, 4.) See farther on this question, ante, note 441, p. 576.

NOTE 658—p. 364.

See Gresley's Eq. Ev. 185, 6, and Roberts v. Anderson, 3 Johns. Ch. Rep. 371; Walker v. Walker, 16 Serg. & Rawle, 379, 380. This case is wrongly cited as at p. 377, ante, note 438, p. 573.

The cases cited ante, note 439, p. 572 to 574, are also applicable as to identity of parties. See farther Jones v. Williams, 1 Wash. Virg. Rep. 230; Rowe v. Smith, 1 Call, 487, 8; Carrington v. Carnock, 2 Simons' Rep. 568.

Depositions, however, are sometimes introduced between other parties for the purpose of showing that a witness sworn has, on a former occasion, given a different account of the same matter, and in order to discredit his testimony. (See post, p. 371 of the text, and note 675.) And in such case if one party read part of the deposition in order to show that the witness swore differently from what he now swears, the other

may read the whole to show his consistency. (*Harrison v. Rowan*, 3 Wash. C. C. Rep. 580. See *Temperly v. Scott*, 5 Carr. & Payne, 341.)

NOTE 659—p. 364.

Gresley's Eq. Ev. 185, 6. *Welles v. Fish*, 9 Pick. Rep. 74. *Hovey v. Hovey*, 9 Mass. Rep. 216. *Bordereau v. Montgomery*, 4 Wash. C. C. Rep. 186.

See ante, note 438, p. 572 to 574, as to the exactness with which the law demands identity of parties in order let in the former deposition. But a qualification of that rule was held where a joint action by A. and B. was tried by consent with a several action by A. against the same defendant, on several accounts. A deposition taken in the latter suit was received as evidence in both. (*Smith v. Lane*, 12 Serg. & Rawle, 80.) See also *Austin v. Slade's adm'rs*, 3 Verm. Rep. 68.

NOTE 660—p. 364.

S. P. Barnett's lessee v. Day, 3 Wash. C. C. Rep. 243, where pedigree was held within the rule. See also *Gresley's Eq. Ev.* 186, 7. *Colvert v. Millstead's adm'r*, 5 Leigh, 88.

In Pennsylvania, the same was held of a question of boundary. (*Montgomery's lessee v. Dickey*, 2 Yeates, 212.) As to hearsay and reputation on subjects of boundary, see ante, note 447, p. 628 et seq: where several cases in which depositions and voluntary affidavits were held admissible, are noticed.

NOTE 661—p. 364.

See ante, note 474, p. 625, 6.

NOTE 662—p. 365.

See *Baxter v. Moore*, 5 Leigh, 219, and see ante, note 247, p. 256, 7.

But the relevancy of the deposition is a question on the trial. The particular part which is irrelevant must, however, be specified in the objection raised against it. If the whole be objected to, though a part be inadmissible, the objection is defective in form, and the receipt of the whole cannot be objected to on appeal or error brought. (*Buster's ex'r v. Wallace*, 4 Hen. & Munf. 82, 89.) See the form of the objection in that case, id. p. 83, and 89; and see ante, note 545, p. 790, and the cases there cited; also *Atchison v. McCulloch*, 5 Watts' Rep. 13.

NOTE 663—p. 365.

S. P. Gresley's Eq. Ev. 187; and see *Hopkins v. Stump*, 2 Har. & Johns. 301,

where depositions in a former cause, in which the plaintiff dismissed his own bill, were received for the defendant on a new bill filed against him.

NOTE 664—p. 367.

See additional English statutes, 2 Har. Dig. p. 1061, 2, 3.

We had occasion, ante, note 42, p. 32 to 41, to notice some of the various principles and modes of obtaining oral testimony by deposition, in the American common law courts. In addition to what is there said, the reader is referred to the American cases we have cited in the notes to the preceding head of depositions in chancery, most of which relate to common law depositions. They will be found obviously pertinent there, however, and the two systems may in many instances be relied on as reflecting light on each other.

In the note above mentioned, we saw, at p. 39, that in New-York, the course of securing the testimony of witnesses residing out of the state, was by obtaining a commission, or *dedimus potestatem*. Where testimony has been thus taken, the party is never bound to call the witness, even though he be in court at the trial, but may read his deposition; the opposite party, however, may have the witness sworn if he will, on his side, notwithstanding he omitted to join in the commission. (*Phenix v. Baldwin*, 14 Wend. 62.)

We had occasion in the same note, p. 40, 41, to make a general reference to many of the local cases. For reasons there assigned, we shall here superadd in the same way, a few others of the like character. Connecticut, 8 Conn. Rep. 169. Maryland, 2 Har. & John. 249; id. 268. 1 Gill & Johns. 54, 60; 5 Am. Dig. 447, 8. Ohio, 1 Wright's Rep. 651; id. 156; id. 672; id. 632; id. 637; id. 380; id. 746; id. 747; id. 755; id. 513; 5 Hamm. Rep. 330. New-Jersey, 1 Green, 5; 5 Am. Dig. 447. Illinois, 1 Breese, 255. Pennsylvania, 1 Pennsylv. Rep. 297; id. 306, id. 454, 485; 2 id. 149; id. 200; 3 id. 41; 4 Rawle, 394; 2 Watts, 288; 3 id. 56, 60, 250; 4 id. 165; 1 Dall. 2; 12 Ser. & Rawle. 80; Whart. Dig. tit. Practice, N. Kentucky, 1 Dana, 180; 3 Litt. Rep. 250; 3 Monroe, 56, 7, 413, 181; 5 id. 370; 7 id. 577; 2 J. J. Marsh. 55; 3 id. 261. Virginia, 3 Leigh, 682; Hall's, Dig. tit. Practice. New-Hampshire, 6 New-Hamp. 537. Maine, 8 Greenl. 326; id. 27. Louisiana, 7 Lou. Rep. 583, (by Curry;) 10 id. 534; 2 Miller's Lou. Rep. 96, 294; 4 id. 158, 118, 218, 228; 5 id. 264, 294, 453, 488; 1 id. 315, 320, 321, 425, 169, 173, 4; 2 Martin's Lou. Rep. N. S. 267; id. 617; 11 id. 222; 8 Mart. Rep. 208; 7 id. 71. Massachusetts, 1 Mass. 1; 16 id. 392; 1 Pick. 295; 3 id. 74. Vermont, 4 Verm. Rep. 405; 5 id. 209, 422; 7 id. 147. South Carolina, 2 Bay, 312. England, 6 Carr. & Payne, 289; 5 id. 341; 2 Harr. Dig. 1062, 3, 4, and cases there cited; 1 Bing. N. C. 721; 1 Moore & Scott, 384; 8 Bing. 274.

NOTE 665—p. 368.

In New-York, the examination of the complainant, the prisoner, the witnesses on

the part of the prosecution and of those of the prisoner, is regulated by 2 R. S. 708, 9, § 13 to 19.

By § 13, the magistrate before whom a person charged with any offence is brought, shall proceed as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent.

The next section, (§ 14,) relates to the examination of the prisoner, as do also §§ 15 and 16. On this subject, see ante note 218, p. 245, 6, and the notes preceding and following the one cited relating to the same matter. See also *Son v. The People*, 12 Wend. Rep. 344.

Section 17 provides, that after the examination of the prisoner is completed, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel on such examination. (See 12 Wend. 346, 7.)

Section 18 prohibits the witnesses, on either side, being present at the examination of the prisoner, and gives to the magistrate a discretionary power of causing the witnesses to be kept separate, and prevented from conversing with each other, until they shall have been examined. It also gives him power, when any witness is under examination, to exclude from the place of examination, all witnesses who have been examined.

§ 19. "The evidence given by the several witnesses examined, shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

By § 26, all examinations, &c., taken pursuant to the foregoing provisions, shall be certified by the magistrate taking the same, to the court at which the witnesses are bound to appear, on the first day of the sitting thereof.

The magistrates authorized to take examinations, pursuant to the above provisions are the chancellor; justices of the supreme court; judges of the superior court of law in the city and county of New-York: circuit judges; judges of county courts; mayors, recorders, and aldermen of cities; supreme court commissioners; the special justices, and the assistant justices in the city of New-York, and justices of the peace appointed for any city, or elected in any town; and no other magistrate can exercise this power. (2 R. S. 706, § 1.)

Nor does the statute confine this duty of taking examinations, to cases of felony merely, but extends it to all cases coming under the general definition of an "offence" (see § 13 stated above,) which includes misdemeanors of every kind, no less than crimes of a higher grade. (2 R. S. 702, § 32.) See ante, note 217, p. 245.

The rules, in respect to these depositions or examinations, as evidence, are not materially different from those which prevailed under the English statutes of Philip & Mary. (*Bellinger v. the People*, 8 Wend. 595, 599.)

NOTE 666—p. 369.

See *Rex v. Edmunds*, 6 Carr. & Payne, 164. *Johnson v. The State*, 2 Yerg. 53.

State v. Moody, 1 Hayw. 31, per Haywood, J. So, if the witness is proved to be insane. (*Rex v. Eriswell*, 3 T. R. 710.)

NOTE 667—p. 369.

But in *Rex v. Ann Savage*, (5 Carr. & Payne, 138,) it was held, per Patteson, J. that if a witness for the prosecution, in a case of felony, is too ill to attend, it will not, of itself, authorize the reading of his deposition, but is good ground for postponing the trial. This, however, must doubtless be understood of a mere casual and temporary inability of the witness to attend. (See *Roscoe's Cr. Ev.* 49; *Rex v. Edmunds*, 6. Carr. & Payne, 164, per Tindal, C. J.; 2 Stark. Ev. 275, 6th Am. ed; 1 Chitty's Cr. Law; (Springfield ed. 1836, 81,) note B.) Accordingly, where a prosecutrix was shown to be bed-ridden, and there appearing no probability that she would ever be able to leave her house, her deposition was admitted as if she were dead. (*Rex v. Hogg*, 6. Carr. & Payne, 176.)

NOTE 668—p. 369.

In New-York, the statute expressly requires, that the witnesses should be examined *in the presence of the prisoner*. (2 R. S. 708, § 13) If desired by the prisoner, his counsel may be present. (id. § 14, 17.)

The opportunity of cross-examining, is strongly insisted on by Johnson, J., in the *State v. Hill*. (2 Hill's Rep. 607; see post, note 673.) He held that circumstance indispensable to the admissibility of depositions in all instances, not even excepting those which are taken before coroners. (See post, note 677.) There seems, indeed, to be little or no conflict among the cases, on this subject; on the contrary, they are very uniform in regard to depositions taken before justices. The prisoner must have had the opportunity of cross-examining, or the deposition will be rejected. (See *The State v. Webb*, 1 Hayw. Rep. 103, 4; *Johnston, v. the State*, 2 Yerg. 58, 9; *Attorney General, v. Davison*; 1 McClell. & Y. 160. See post, p. 372 of the text; 2 Stark. Ev. 276, 7, 6th Am. ed.)

NOTE 669—p. 369.

As to the mode of taking depositions, with respect to the time of administering the oath to the witness, see *State v. Moody*, 2 Hayw. 31, stated post, note 673.

In New-York, it will be presumed that the deposition was read over to the witness before signing; indeed, upon the general presumption which prevails in favor of the acts of public officers, (see ante, note 298, p. 296, 7, also, note 371, p. 485, 6,) it seems, that a deposition, regular on its face, will be presumed to have been taken in exact accordance with the requirements of law, until the contrary be clearly shown. (*The People v. Moore*, 15 Wend. 419, 421.)

NOTE 670—p. 370.

In New-York, it is necessary that the witnesses should subscribe the depositions. (2 R. S. 709, § 19; see ante, note 665.)

NOTE 671—p. 370.

See ante, notes 213, 214, 216, 217, 218, p. 243, et seq.

NOTE 672—p. 370.

See ante, note 213, p. 243, 4.

Mr. Roscoe seems to think that, by analogy to the case of *Rex v. Harris*, (1 Mood. C. C. 338,) where a part of the *prisoner's* confession, not heard by the magistrate, was consequently not taken down, and yet allowed to be proved, the deposition of a *witness* may be added to, under similar circumstances. But he appears to be altogether unsupported by authority. (Roscoe's Cr. Ev. 52.) See 2 Russ. on Cr. 662.

NOTE 673—p. 370.

S. C. 2 Stark. N. P. Rep. 203, and see id. note (a) at p. 211.

In North Carolina, on an indictment for murder, the examination of the deceased, taken on oath, and subscribed by him before a justice of the peace, was offered in evidence on the part of the prosecution: held, not admissible. (*State v. Moody*, 2 Hayw. Rep. 31.) Haywood, J. at first thought it might be admissible as an examination under the act of assembly of that state, more especially as the prisoner was present when it was taken. The prisoner's counsel objected, because it appeared that the deceased was examined and the examination taken down, before he was sworn, whereas he should first have been sworn, and then afterward what he said taken down. Whereupon Haywood J. thinking there might be something in the objection, did not insist upon receiving the evidence; and it was excluded. It seems to have been offered as a dying declaration, and rejected upon the principles applying to such cases. See S. C. ante, note 453, p. 607; and see that note generally, as to the doctrine of declarations in *articulo mortis*; also notes 454, 455; and *The State v. Ferguson*, 2 Hill's Rep. 619, stated post, note 689.

In South Carolina, on an indictment for a rape, the deposition of the injured party, (who had died in the mean time,) made before a justice on applying for a warrant for the offence, and in the absence of the prisoner, has been held inadmissible. (*The State v. Hill*, 2 Hill's Rep. 608.) Otherwise, however, it seems, if the deposition had been made under circumstances which gave the prisoner the power of cross-examining. (id.)

NOTE 674—p. 371.

In New-York, the provisions of the statute cited ante, note 665, apply as well when the examination is taken out of the county in which the offence was committed, as where it is taken in such county. But in all cases, except where it is expressly otherwise provided, the examination is to be taken before the magistrate who issued the warrant, or if he be absent, before the next nearest magistrate of the same county. (2 R. S. 707, § 12; id. § 4 et seq.)

NOTE 675—p. 371.

See State v. McLeod, 1 Hawks, 344, cited ante, note 418, p. 547. 2 Russ. on Cr. 663. 1 Chitty's Cr. Law, 81, 2. Rosc. Cr. Ev. 52. See ante, note 536, p. 781, 2; also ante, note 533, p. 733; and ante, note 658.

The same doctrine prevails in New-York. (Bellinger v. The People, 8 Wend. Rep. 595.) And where a magistrate had been sworn, and (by consent as it seems) gave parol evidence of the deposition of one of the prisoner's witnesses, with a view of contradicting him; held, that the prisoner might produce the deposition itself, in order to sustain the witness by showing that he had been uniform in his statements, and also to show that the magistrate was mistaken. (The People v. Moore, 15 Wend. 419.)

NOTE 676—p. 372.

See ante, note 668.

NOTE 677—p. 373.

In New-York, it is provided by statute, that "the testimony of all witnesses examined before a coroner's jury shall be reduced to writing by the coroner, and shall be returned by him, together with the inquisition of the jury, and all recognizances and examinations taken by such coroner, to the next criminal court of record that shall be held in the county. (2 R. S. 743, § 8.) The statute, like that of Philip and Mary, does not seem to contemplate the presence of the prisoner at the time of taking the testimony before the jury.

With regard to these *ex parte* depositions taken before coroners, there would seem to be good ground for denying their competency altogether as evidence against the accused on his trial. Mr. Starkie, on a review of the cases cited in the text and others of a kindred character, has shown, we think, that they proceed upon reasonings so clearly artificial, and assumptions so glaringly unwarrantable, as hardly to justify the invasion of that great protective principle of cross-examination, which the common law in almost every other instance, and especially in criminal matters, has so carefully maintained. He comes to the conclusion that the distinction between depositions taken before coroners and those taken before justices is not sanctioned

by the legislature nor founded in principle, and that when the question arises, it may deserve very grave and serious consideration whether it ought to be supported. (See 2 Stark. Ev. 277, 8, 9, 6th Am. ed.) And this opinion has been concurred in by two other eminent text writers. (See 2 Russ. on Cr. 661; Roscoe's Cr. Ev. 53, 4.)

We find no authoritative American adjudications on this point. In South Carolina a learned judge, in speaking of depositions of another sort, viz. those taken before justices in the absence of the party, has expressed himself very decidedly on the point under consideration. After a review of several cases going to establish the principle that the party must have the privilege of cross-examining, he says—"Depositions taken upon a coroner's inquest, in pursuance of the statutes of 1 and 2 Phil. and Mary, ch. 13, seem generally to have been admitted as an exception to this rule, on the ground of the publicity and importance of the proceeding; but I incline to think with Mr. Starkie, that even this is not warranted, and that it will deserve grave consideration whether it ought to be supported. The rules of evidence, as Lord Kenyon observes, do not depend on technical refinement, but on good sense, and in their application we must constantly keep in view their practical effect and operation, and I venture to affirm, that no rule would be more productive of mischief, than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be given in evidence. Charges for criminal offences are most generally made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgment may detect, but which it is impossible exactly to describe; and we know too how necessary a cross-examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community." (Per Johnson, J., *The State v. Hill*, 2 Hill's Rep. 607, 610, 11.) See *Cox v. Pearce's trustees*, 7 John. Rep. 298, 9; *Jackson v. Bailey*, 2 id. 17, 20, per Thompson, J.

NOTE 678—p. 374.

In Massachusetts, an inquest of office, by the attorney general, for lands escheating to the government by reason of alienage, is evidence of title in all cases; but it is not conclusive against any person who was not tenant at the time of the inquest, or party or privy thereto. Such person may prove that there are lawful heirs, not aliens, *in esse*. (*Stokes v. Dawes*, 4 Mason, 268.)

The following cases, depending upon local statutes, may be consulted as showing in some degree the nature of these inquisitions in different states: *Ramsey's appeal*, 2 Watts, 228. *Commonwealth v. Selden*, 2 Munf. 160. *Hall v. Gittings*, 2 Har. & Johns. 112. *The People v. Cutting*, 3 Johns. Rep. 1.

NOTE 679—p. 375.

For the doctrine on this subject in Pennsylvania, see *Gist v. Wilson*, 2 Watts, 30; *Hale v. Henric*, id. 143; *White v. White*, 4 Rawle, 61.

NOTE 680 —p. 375.

In Pennsylvania, held, that an inquisition taken under a commission *de lunatico inquirendo*, finding that a person is of unsound mind, and has been so for a certain time prior to the finding, is *prima facie* evidence to show that a deed purporting to have been executed by such person, during that period, is invalid because of mental incompetency in the grantor. (*Hutchinson v. Sandt et al.* 4 Rawle, 234.) And this, though it was entirely an *ex parte* proceeding as it respected the claimants under the deed. (*Id.* 239.) So in New-Jersey, (*Den. v. Clark*, 5 Halst. 217;) New-York, (*Hart v. Deamer*, 6 Wend. 497; *Matter of Christie*, 5 Paige, 242;) and Kentucky, (*semble Craig v. Feland*, 4 Monroe, 228, 232. See *Pearl v. McDowell*, 3 J. J. Marsh. 658.) It is, however, liable to be rebutted by testimony showing the sanity of the grantor, or that he executed the deed during a lucid interval. (*Hutchinson v. Sandt*, *supra.*) But it cannot be invalidated by the testimony of members of the inquest, that they did not intend to find the person insane for the whole time specified in the inquisition, or that they did not know until after their report, that it was retrospective in its operation. (*id.*) The doctrine that an inquisition of lunacy is but *prima facie* evidence against persons not parties nor privies, has been recognized in the following cases: *Armstrong v. Short*, 1 Hawks' Rep. 11; *Den v. Clark*, 5 Halst. 217. If it merely find him "incapable of managing his affairs," it is not evidence of lunacy. (*Armstrong v. Short*, *supra.*) As to the effect of these inquisitions in Massachusetts, see *Stone v. Damon*, 12 Mass. Rep. 488; *Chase v. Hathaway*, 14 *id.* 222; *Wait v. Maxwell*, 5 Pick. 217. As in favor of the lunatic himself, the inquest, in North Carolina, has been held conclusive. (*Arrington v. Short*, 3 Hawks' Rep. 71.)

NOTE 691—p. 375,

The following miscellaneous cases, of inquisitions had in virtue of certain local statutes, may perhaps be worthy of notice. In Pennsylvania, the inquisition of a jury under the landlord and tenant law, to obtain possession by the landlord, is not conclusive as to title. (*Galbraith v. Black*, 4 Serg. & Rawle, 207.) The proceeding is a summary one. "The jury," say the court, "are to appear within four days after issuing the summons, and although the tenant is also summoned, and has an opportunity of being heard, yet it cannot be supposed that the matter in dispute can be decided in a manner as satisfactory as in a court of justice. If the landlord obtains his possession, the object of the law is answered, and it does not appear that justice would be promoted by extending the efficacy of the proceeding any further. Should an action afterwards be brought by the tenant, to try the title, the truth might be better ascertained by the evidence produced on the trial, without considering the tenant as estopped by the proceedings before the justices." (*id.* p. 211, 212.)

In New-York, an inquisition of damages by appraisers, pursuant to the act relative to turnpike companies, (1 R. L. 228, § 3—See 1 R. S. 582, § 26,) is conclusive as to the facts stated in it touching their own proceedings; and if enough appears to show jurisdiction of the subject matter, the court will not collaterally, in an action of trespass wherein it is alleged that the proceedings of the appraisers have been irregular,

inquire into the regularity of such proceedings; nor in such action will they allow it to be proved that one of the appraisers had not the qualifications required by the act; as, that he was not a freeholder. These defects must be corrected by certiorari. (*Van Steenberg v. Bigelow*, 3 Wend. Rep. 42.)

See, as to an inquisition of a riot in Virginia, *Mackaboy et al. v. The Commonwealth*, 2 Virg. Cas. 268.

NOTE 682—p. 376.

In New-York, this proceeding of the sheriff to ascertain the title to property, has long been recognized and sanctioned. If he has doubts whether property actually levied on, or about to be, belongs to the defendant in execution, he may summon a jury and try the title; and should the jury find the property out of the defendant, although it will not be conclusive upon the question of property, yet the sheriff cannot be compelled to proceed further without a full indemnity; and if the plaintiff refuses such indemnity, the inquisition will operate as a complete defence to the sheriff, in an action against him for a false return of *nulla bona*. (*Center v. Patterson*, 8 Cowen's Rep. 65. *Bayley v. Bates*, 8 Johns. Rep. 186. *Van Cleef v. Fleet*, 15 id. 147. *Williams v. Lowndes*, 1 Hall's Rep. N. Y. C. P. 579. *Townsend v. Phillips*, 10 Johns. Rep. 98. *Graham's Pr.* 371. *Platt v. Sherry*, 7 Wend. Rep. 236. See also *Hart v. Deamer*, 6 id. 499; *Magne v. Seymour*, 5 id. 309.) But if an adequate indemnity is tendered to the sheriff, and he should unreasonably refuse it, and return *nulla bona*, he will do so at the peril of being made liable for a false return. (*Bayley v. Bates*, 8 Johns. Rep. 186. *Van Cleef v. Fleet*, 15 id. 147.) The plaintiff, however, is not bound to tender an indemnity, till the jury shall have passed on the question of property. (*Center v. Patterson*, 8 Cowen's Rep. 65. *Platt v. Sherry*, 7 Wend. Rep. 236.)

The inquisition finding the property in the defendant in execution will not be evidence for the sheriff in an action against him for taking the property, brought by a stranger, except for the mere purpose of showing that he has not acted maliciously and to mitigate the damages. (*Townsend v. Phillips*, 10 Johns. Rep. 98. See also *Gilbert on Executions*, 21. *Graham's Pr.* 371.)

It seems that a constable has the same power, in this respect, as a sheriff. (See *Townsend v. Phillips*, 10 Johns. Rep. 98. *Platt v. Sherry*, 7 Wend. Rep. 236.) For the doctrine on this subject in Indiana, see *Chinn v. Russell*, 2 Blackf. Rep. 172, 3, and note (1) at p. 174. *Bosley v. Farquar*, id. 61, and note (2) at p. 70.

NOTE 683—p. 376.

In New-York it has been occasionally intimated that the rule demanding an opportunity of cross-examination, was not without its exceptions. (See per *Thompson, J.* *Jackson v. Bailey*, 2 Johns. Rep. 20.)

A deposition taken before trustees appointed under the act for relief against absent and absconding debtors, was held evidence in the same matter before referees nominated pursuant to the act, the witness being dead; and this, even though it was

taken in the absence of creditors, or *ex parte*: for, say the court—"the trustees act as the official agents of both parties, and under obligations, official and religious, to act impartially." (Cox v. The Trustees of Pearce, 7 Johns. Rep. 298. See ante, note 437 p. 571, 2.)

NOTE 684—p. 376.

See per Johnson, J. The State v. Hill, 2 Hill's Rep. 607, 8, 9, et seq. S. P.

NOTE 685—p. 377.

In Connecticut, in a prosecution for maintenance of a bastard child, by the selectmen, the deposition of the mother, taken before any suit was commenced, and without notifying the defendant, was held inadmissible, though the mother had since died. (M'Donald v. Hobby, 1 Root's Rep. 154.) See, as to the law on this subject in Tennessee, Goddard v. The State, 2 Yerg. Rep. 96.

NOTE 686—p. 378.

As to certain tribunals which have been recognized as competent to take depositions, see ante note 682. Many of the cases, moreover, cited ante, note 437, p. 571, 2, will throw light on this point.

NOTE 687—p. 379.

See M'Mahon v. Spangler, 4 Rand. Rep. 51, S. P.

NOTE 688—p. 379.

See per Chase Ch. J. Patterson v. Maryland Ins. Co. 3 Har. & Johns. 75, 6.

NOTE 689—p. 379.

A mere voluntary *ex parte* affidavit of a third person, neither a party nor a witness in the cause, is not admissible as evidence of what it states. It ranks in equal grade only with hearsay testimony. It differs from a deposition, properly so called, in two essential particulars; for first, depositions are taken by some court, or by an express authority derived therefrom, or under some statute; and secondly, they are always taken upon actual notice to the adverse party, if practicable. (Per Earl J. Patterson v. Maryland Ins. Co. 3 Har. & Johns. 71, 74, 5. See also Finlay v. Kirkland, 9 Mart.

Lou. Rep. 463; Farmer's Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 89; Stiles v. Bradford, 4 Rawle, 394; 1 Stark. Ev. 268, 6th Am. ed.)

But a voluntary affidavit or deposition, is sometimes admissible as a declaration in *articulo mortis*. (See ante, notes 453, 4, 5, p. 606 et seq.) In the State v. Ferguson, (2 Hill's Rep. 619,) the prisoner being indicted for murder, the deposition of the deceased, made under the following circumstances, was offered: On the day previous to his death, when, as it appeared, he manifested no apprehensions of dying of the wound, he deposed to the occurrence when the mortal blow was given; on the next day, being fully conscious that he was *in extremis*, the deposition was read over to him, and he said, "it was as nigh right as he could recollect." Held, that the deposition was admissible as containing the dying declarations of the deceased. "The contents of the deposition," says Johnson J. delivering the opinion of the court, "was as much a part of the declarations of the deceased, as the words which he uttered. The reading of the deposition was admissible, as containing better evidence of the contents than could be supplied by parol." (id. 624.) See ante, note 673.

NOTE 690—p. 380.

Where a defendant, in the progress of a cause, serves copies of affidavits on the plaintiff's attorney, as the foundation of an order obtained by him, he cannot object to the plaintiff reading the copies in evidence on the trial on the ground of a want of authentication, even though the originals are on file; such copies are equivalent to office copies. (Jackson ex dem Wood v. Harrow, 11 Johns. Rep. 434. See Urtetiqui v. D'Arcy, et al. 9 Peters' Rep. 692.)

NOTE 691—p. 380.

There is frequently a difficulty in ascertaining whether a particular court is or is not "inferior" in the meaning of that term as used in the books. In England, probably all courts except the King's at Westminster, the K. B., C. B., Exch. and Chancery, are treated as inferior courts; being as such controlled by the writ of prohibition. (3 Bl. Comm. 112; and see Vin. Abr. Com. Dig. and Bac. Abr. Tit. "Prohibition," *passim*.)

"All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgments may be carried; but they are not therefore inferior courts in the technical sense of those words. They [the words "inferior courts"] apply to courts of special and limited jurisdiction, which are erected on such principles, that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities which may be totally disregarded." (Per Marshall, C. J. in Kempe's lessee v. Kennedy, 5 Cranch, 185; and see the opinion of the same learned judge in the case of Tobias Watkins, 3 Pet. 202 to 209, in the Vol. 1.)

course of which he cites and illustrates the above quotation : also, see *Wood v. Mann*, 1 Sumn. Rep. 578, 580, 1.) This view was directly confirmed by *Skillern's Ex'rs v. May's Ex'rs*, (6 Cranch, 267,) and collaterally by *M'Cormick v. Sullivan*, (10 Wheat. 192, 199,) both arising on cases where jurisdiction was not stated upon the record. Held error, but that the records were available till reversal. But see *Hoyt v. Molony*, 2 N. H. Rep. 324.

The general sessions of the peace in the several counties of New-York, are inferior courts. (*The People v. The Justices of Chenango*, 1 Johns. Cas. 179; 2 Cain. Cas. Err. 319, S. C. and see *ex parte Gay v. Monroe* General Sessions, 12 Wend. 272.) So a judge of the supreme court, acting as a commissioner to discharge insolvents. (*Per Spencer, J. in Frary v. Dakin*, 7 Johns. Rep. 79, 80.) The surrogate's court of New-York also; (*Dakin v. Hudson*, 6 Cowen's Rep. 221; and see ante, note 620, p. 862, 3.) And the orphan's court of Pennsylvania; (*Whart. Dig. ed. 1829*, p. 160, pl. 205;) and of Maryland, (*Brodess v. Thompson*, 2 Har. & Gill, 120.) Courts martial are inferior courts, (*Mills v. Martin*, 19 Johns. Rep. 7.) The quarter sessions in England is a court of Oyer and Terminer, and therefore not a court of inferior jurisdiction. Hence the minutes are not evidence of their proceedings, but only the records. (*Rex v. Smith*, 8 Barn. & Cress. 341.)

Where a court of general jurisdiction has special authority conferred upon it by statute, it is, quoad hoc, an inferior or limited court. (*Shivers v. Wilson*, 5 Harr. & Johns. 130. *Thatcher v. Powell*, 6 Wheat. 119. See also, *South Car. Law Journ.* 195; *Denning v. Corwin*, 11 Wend. 647, 652; *Smith v. Fowle*, 12 id. 9, 11.) But there is a distinction between a special delegation of power over particular matters, and multiplying the offences which a court of general jurisdiction is authorized to try; e. g., where a court of general jurisdiction has authority to try for treason, and a statute extends the crime to other acts not before deemed treasonable, its judgment in regard to such newly acquired powers will not be treated like that of an inferior court. (*Kemp's lessee v. Kennedy*, 1 Pet. C. C. Rep. 30, 37, 38.)

Further as to what are inferior courts, see post, notes 692, 3, 4.

NOTE 692—p. 380.

There seems to be no distinction in this particular between inferior courts, and those of general jurisdiction. A judgment rendered by a court of the former class, acting within the scope of its rightful authority, and with due observance of all prescribed modes of proceeding, is equally conclusive, not only against further litigation of the same matters but in all respects, as the judgment of any other court. This was noticed ante, note 586, p. 824, 5, and several instances were there given in which the rule as to *res judicata* had been applied to the proceedings of inferior courts. For other like cases as to courts of probate, see ante, note 620, p. 861, 2, et seq. To the general doctrine above stated, see also, per Washington J. in *Blount v. Darach*, 4 Wash. C. C. Rep. 659; 14 Ser. & Rawle, 184, S. P.; and *Overseers of Milan v. Supervisors of Dutchess*, 14 Wend. 71, 75, 6. *Yard v. Crammond*, 5 Rawle, 18.

The proceedings of inferior jurisdictions cannot be assailed collaterally for mere error or irregularity, however imposing, unless it amount to a want of jurisdiction.

This doctrine has been extended to the appointment of a general guardian by the orphan's court in Maryland. The case was one of appointment while the natural guardian was alive and willing and every way competent. (*Fridge v. The State*, 3 Gill. & John. 108, 115.) Of all this the orphan's court was to judge, and therefore the decision cannot be questioned incidentally. (*id.*) See *Kraft v. Wickey*, 4 Gill. & John. 332. It was applied also to an insolvent discharge, granted under the statute by two justices of the peace, and to all the proceedings connected with it, after jurisdiction had once been acquired by petition, (*Jordan v. James*, 3 Hawks, 110;) to an adjudication of the board of health; e. g., that a certain building is a nuisance, (*Van Wormer v. The Mayor, &c.*, of Albany, 15 Wend. 262;) to a justice's judgment in North Carolina, though conceded that he could not hold a court of record; (*Hamilton v. Wright*, 4 Hawks, 283; *Bain v. Hunt*, 3 Hawks, 572.) So also in Ohio, (*Berry v. Greenfield*, 1 Wright's Rep. 348.) A judgment though quite irregular, and in proceeding to which, forms unknown to the law appeared to have intervened, was yet enforced by *sci. fa.* The court said, however summary and irregular the proceedings might have been, the court having jurisdiction of the parties and subject matter, the judgment could not be treated as a nullity. (*Weyer v. Zaue*, 3 Hamm. 305, 6.) And under the civil law, in an action of nullity to set aside and have declared void the proceedings of a *concurso* (insolvent proceedings) the defendant put in a peremptory exception that the plaintiff was put upon the *bilan* in the insolvent proceedings, and that he opposed the homologation of the *tableau* of distribution; and although several very imposing errors and irregularities were averred and offered to be shown, the exception was holden conclusive. The court said that after a creditor has appeared in *concurso*, he cannot afterwards allege errors such as these. It is similar to a party objecting to the mode in which a suit has been commenced and he brought into court, after he has pleaded to the merits. (*Croft v. Kirkland's Syndic*, 2 Mill. Lou. Rep. 155, 6.) The same doctrine was afterwards held in the same matter on the same questions coming up in a different shape; but still collaterally. (*Kirkland v. His Creditors*, 2 Mill. Lou. Rep. 205. *Mayfield v. Comeau*, 7 Mart. Lou. Rep. N. S. 180, 182, 3, S. P. And see *Lafon's ex'rs v. Desessart*, 1 Mart. Lou. Rep. N. S. 71; *Saul v. His Creditors*, 7 Mart. Lou. Rep. N. S. 433; and *White v. Lobre*, *id.* 566.) In ejectment against a schoolmaster, who has been removed by sentence of the trustees of the school for misbehaviour, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence; nor can the defendant disprove them. (*Doe, ex dem. Davy, v. Haddon*, 3 Doug. 310.) A trial and acquittal by the general sessions on a charge of bastardy, was held a bar to a second suit for the same cause. (*Burnett v. Commonwealth*, 4 Monroe, 106, 7.) The omission of commissioners for assigning dower, to take the proper oath, does not render the proceeding void. (*Hawkin's v. Craig*, 6 Monroe, 254, 258, 9.)

The same principles have been applied to various certificates partaking of the nature of judicial proceedings. (See post, note.)

It has lately been held at N. P. in England before Abbot, C. J., that the judgment of the county court dismissing the plaintiff's claim, though on the merits, was not a bar, but mere evidence; and it was left to the jury as such, who found against it, and in favor of the plaintiff. (*Barnes v. Winkler*, 2 Carr. & Payne, 345.) And see *Galbraith's lessee v. McGaw*, Addis. Rep. 305. Quere. Nearly all the American cases

hold such judgments conclusive. It is but fair to remark, however, that the learned C. J. is sustained by several modern dicta, not to say authorities, in his own court. Among the most imposing of these, is *Herbert v. Cook*, 3 Doug. 101. The same case is briefly reported in *Willes*, 36, 37, note, and is one of the two authorities cited by our author. That was an action of debt in the K. B. on a judgment in the Hundred Court of St. Briavell's in Gloucestershire. The declaration in the K. B. averred, that the cause of action arose within the jurisdiction of the hundred court. Plea, that it did not arise within the territorial jurisdiction of the hundred court. Demurrer. On *Baldwin* for the plaintiff citing *Gwinne v. Poole*, 2 Lut. 1568, and *Lucking v. Denning*, 1 Salk. 201, Lord Mansfield at once agreed that these cases were in point; and was for the plaintiff. Ashurst, J. said, if there had been an objection of locality, it should have been pleaded below: judgment for the plaintiff. And for this the court had not only the express authority of *Gwinne v. Poole*, and the opinion of *Powell, B.* there, that the want of locality must have been pleaded; but a like solemn opinion in *Truscot v. Carpenter*, (1 Ld. Raym. 229.) Yet a few days afterwards, in the same term, the court expressed themselves dissatisfied with the first judgment, and directed a re-argument; whereupon Lord Mansfield said, that upon looking into the record there is no question at all. The plaintiff takes it upon him here to state that the cause of action arose within the inferior jurisdiction. If denied, that fact must have been proved here. The defendant has pleaded that the cause of action did not arise within the jurisdiction; and to that plea the plaintiff has demurred, and thus admitted that it was not within the jurisdiction. "Besides, the judgment is not the judgment of a court of record; and being, therefore, *only evidence*, like a foreign judgment, the whole is open." The accuracy of this remark, as to foreign judgments, we before considered, ante, note 636, p. 891, 2, et seq. The decision itself is directly in the teeth of several high authorities, cited on the argument, without one word showing their inapplicability, or invalidating their force; and that, too, after they had been expressly recognized by the judgment first given in the principal case.

Sir W. Evans, in reference to this case, and particularly, to the observation of Lord Mansfield, that the argument how far the party was precluded after judgment from alleging that the cause arose out of the jurisdiction was not applicable, inasmuch as the demurrer admitted the fact, remarks, "But with deference, I should conceive that if the defendant was precluded from alleging that the cause of action did not arise within the jurisdiction, his actually making such an allegation could not reasonably be supported; and therefore the fictitious admission of the truth of the plea, which arises from denying its sufficiency, did not warrant getting rid, by a side wind, of the principal question, whether a new, perfect, and indefeasible cause of action, independent of all question respecting the rectitude of the original judgment, did not arise by virtue of the judgment itself." As to the concluding remark of Lord Mansfield respecting inferior courts, Mr. Evans says, "I conceive that there is no other instance in which it has been judicially decided that the judgment of a court not of record, or of a foreign court, was not conclusive with respect to the point decided, so far as the suit contained proper parties and incidents to have given it a conclusive effect, if that court had been of record; and many cases which have been decided respecting prize causes, are directly in support of the opposite proposition." (2 Ev. Poth. 349.) See also for a full examination of this subject, as to domestic inferior courts, the case of *Maingay v.*

Gahan, 1 Irish, T. R. 1 to 80. This case is also briefly stated in 2 Ev. Poth. 353. The learned editor of 3 & 4 Dougl. speaking of *Herbert v. Cook*, says (3 Dougl. 108, note,) "The doctrine of Lord Mansfield, that the judgment of an inferior court not of record and of a foreign court, is not conclusive, has been frequently recognized." The only two cases he mentions which relate to the former courts, are the above case of *Barnes v. Winkler*, and a previous N. P. case, (*Huxham v. Smith*, 2 Campb. 19,) before Lord Ellenborough. In the latter, the party was allowed to attempt an impeachment, collaterally, of a cause tried by the recorder of London in the Lord Mayor's Court. The editor, however, further remarks,—“It is very difficult to discover the grounds upon which these cases proceed. While a sentence of expulsion or deprivation of a member of a college, and a conviction by a justice of the peace, are regarded as conclusive, the judgment of an inferior court of competent jurisdiction may be examined, and all the grounds upon which it has proceeded once more inquired into. It does not appear that this doctrine has an earlier origin than the time of Lord Mansfield; and although it has been frequently incidentally recognized, it has never been solemnly adjudged to be law.” See ante, note 636, p. 891, for several cases going to show that adjudications, of inferior courts are conclusive.

We shall see hereafter, *infra*, additional ground for distrusting the notion that the question of conclusiveness is at all referrible to the dignity of the court, as being of record or not of record, of concurrent or exclusive jurisdiction. As bearing on this question, see ante, in the text, 354 to 357, and the cases there cited; also, *The Overseers, &c. of Milan v. Supervisors of Duchess*, 14 Wend. 71, 75, 6. See likewise, the cases cited in the next succeeding notes.

The general doctrine of *res judicata*, in addition to the cases before cited in these notes commencing ante, p. 824, at note 586, will be found laid down and illustrated in several other cases in the higher courts. (See *Hall v. Dana*, 2 Aik. 383 to 385, per Skinner, Chancellor.)

Where courts of law and equity have concurrent power, the court first applied to, grants the relief, which concludes against the second suit. (*Hall v. Dana*, 2 Aik. 381. *Thompson v. Hill*, 3 Yerg. 167, 170. *Smith v. M'Iver*, 9 Wheat. 532, 536, 7. *Winchester v. Evans*, Cooke's Rep. 420, 421. *Thurman v. Durham*, 3 Yerg. 99, 105, 6. *Kearney v. Smith*, 3 Yerg. 127, 131, 2, and the cases there cited. *Southgate v. Montgomery*, 1 Paige, 41. *Buell v. Cross*, 4 Ham. 327, 330. 1 Ham. 425, 435. *Reynolds v. Reynolds' adm'r*, 3 Ham. 268. *Price v. Boyd*, 1 Dana, 434, 5. *James' adm'r v. Neal's adm'r*, 3 Monroe, 369, 370.) “A party will not be aided by a court of chancery, after a trial at law, unless he can impeach the justice of the verdict, on grounds of which he could not have availed himself at law, or unless he was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part.” (*M'Micken v. Millandon*, 2 Mill. Lou. Rep. 181. *Monroe v. M'Micken*, 8 Mart. Lou. Rep. N. S. 513. Per Green, J. in *Kearney v. Smith*, 3 Yerg. 131, 2. *Lafon's ex'rs v. Dessessart*, 1 Mart. Lou. Rep. N. S. 71. *Greenup v. Brown*, 1 Breece, 193. *Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332, 336. *Peytavin v. Winter*, 8 Lou. Rep. by Curry, 271, 273. *Garlick v. Breece*, 8 Lou. Rep. by Curry, 101, 103, 4. *Stark's adm'r v. Thomson's ex'rs*, 3 Monroe, 296, 299, 302, 3. *Price v. Boyd*, 1 Dana, 434. *Winthrop v. Survivors of Lane*, 3 Desauss. 310, 324. *Payne v. Shotwell*, 2 Dana, 284. *Cameron v. Bell*, 2

Dana, 328. *Duncan v. Lyon*, 3 John. Ch. Rep. 351, 356. *Holmes v. Remsen*, 7 John. Ch. Rep. 286. *M'Vicar v. Wolcott*, 4 John. Ch. Rep. 320. *Beaugenon v. Turcotte*, 1 Breese, 126. *Penny v. Martin*, 4 John. Ch. Rep. 566. *Smith v. Lowry*, 1 John. Ch. Rep. 320, 323. *Harris v. Nettleship*, 2 Mylne & Keene, 423. *Brown v. Swann*, 10 Pet. 493, 504, 5. *Stone v. Moody*, 6 Yerg. 31. *Brown v. Wyncoop*, 2 Blackf. 230. *Norton v. Woods*, 5 Paige, 249.) The fact that a witness at the trial, accidentally omitted to state a material fact unknown to the party at the time, is not a ground for opening the cause in equity; (*Stone v. Moody*, 6 Yerg. 31;) nor is error or irregularity a ground of relief; (*Buell v. Cross*, 4 Ham. 327, 330; *Reynolds v. Mitchell*, 1 Breese, 135; *Pogue v. Shotwell*, 2 Dana, 284;) nor will the party be relieved on the ground that he mistook the law, and thereby lost his defence; as by not regularly or seasonably pleading the matter puis darrein continuance. (*King v. Bridge*, before Duer, late circ. judge, 3d circ. N. Y. (in equity) MS.) The party must be ignorant of the fact; or it must appear that it could not be received as a defence. (*Simpson v. Hart*, 1 John. Ch. Rep. 98. *Foster v. Wood*, 6 John. Ch. Rep. 87.) Prevention from attending the trial by public business, perjury on the other side, and consequently enlarged damages, are no ground for relief, though the former court refused to grant a new trial. (*Smith v. Lowry*, 1 John. Ch. Rep. 320.) And see *Woodworth v. Van Buskirk*, 1 John. Ch. Rep. 432. So if the party have not used due diligence at law in making his defence; in going to chancery to assist him by discovery, he cannot be relieved from a verdict against him. (*Barker v. Elkins*, 1 John. Ch. Rep. 465. *Dodge v. Strong*, 2 John. Ch. Rep. 228.) It is, consequently, no ground for relief that the defence at law could not be made out, without the oath of the adverse party. (*Bates v. Bagley*, 1 Breese, 60.) These rules extend to a scire facias. (*Thompson v. Hammond*, 1 Edw. Ch. Rep. 497, 502, 3.) It was held in one case, that after mutual accounts had been tried in the common pleas, chancery might still hear and decide on the same matter, or any part of it, and correct the judgment, on the ground, that the latter court had jurisdiction of the matter originally. (*Stothart v. Burnet, Cooke*, 417, 418.) Quere.

A judgment in ejectment is of the same binding force and efficacy as any other judgment; and is a bar except in a second action of ejectment. Therefore, where an action of ejectment was brought in the supreme court, to try the validity of a deed; and the question of fraud was ultimately passed upon by the court of errors, who rendered a judgment against the plaintiff, chancery refused to sustain a bill for the same relief to impeach the deed as fraudulent upon the grounds involved in the former trial. (*Van Wyck v. Seward*, 1 Edw. Ch. Rep. 327.)

The rule that a judgment is unimpeachable for error, irregularity, &c., while it stands neither reversed nor set aside, is of course applied with equal uniformity to the higher courts. (Ante, note 587, p. 326, and note 588, p. 330.) It can in no case be questioned by action, or in any other collateral proceeding. (*Andrus v. Harman*, 2 Mill. Lou. Rep. 587. *Keen v. M'Donough*, 8 Lou. Rep. by Curry, 185. *Cox v. White*, 2 Mill. Lou. Rep. 422. *Walbridge v. Hall*, 3 Verm. Rep. 114.) On this principle, the supreme court of North Carolina refused to inquire into the regularity of a proceeding by *sci. fa.* to execution in the circuit court of the United States, the execution being relied on in protection of the officer levying. (*Pigot v. Davis*, 3 Hawks, 25, 27, 8.) And in New-York, a former verdict for the defendant, although clearly rendered on

erroneous grounds, was held to bar a second action for the same cause. (*Morgan v. Plumb*, 9 Wend. 297.) This case is particularly stated, *infra*. So in *trover*, the defendant justifying under an attachment, judgment, and execution, though the attachment was irregular, two stated terms intervening between its test and return, yet the court refused to notice this, as it was but an irregularity, and held the whole to be valid. (*Olmsted v. Hoyt*, 4 Day, 436, 441, 2. And see as to an attachment issued from the C. C. U. S. *Barney v. Patterson's lessee*, 6 Harr. & John. 182, S. P.) Nor will a habeas corpus to discharge from final process lie for error or irregularity in the previous proceedings. (*Kellogg, ex parte*, 6 Verm. Rep. 509.)

We noticed *ante*, note 589, p. 834, that in general, it is only where the question between the parties has been decided upon the merits that the judgment thereon can be used as a bar. The principle is equally pertinent in respect to inferior jurisdictions. (See *id.* 836.) But when we come to make this application of the general proposition with which we commenced that note, it obviously needs to be so far qualified in terms as to embrace not only decisions upon confession or verdict, but also numerous adjudications made where there has been neither confession nor verdict. For there is not always a jury in these lower tribunals to try even issues of fact. The court itself is often substituted and pronounces a decision which may be said to partake both of the nature of a verdict and judgment. Nor is this feature unknown to the higher courts: the court of chancery often does the same thing; and in the common law courts of record, without exception, we have familiar instances, in the decisions made by them upon motions and applications to their summary jurisdiction, and in the familiar doctrine of trial by record.

The liberality which prevails with regard to the decisions of inferior courts, in disregarding mere informality, inquiring directly into the nature of the former adjudication, and giving it effect accordingly, will be seen by consulting several New-York cases relating to justices' courts, cited *ante*, note 589, p. 836, 7. We there saw, that a mere verdict on which the justice has neglected or refused to render judgment, is a bar. This was held in *Felter v. Mulliner*, (2 Johns. Rep. 181,) and the reason given is, that the court has no power either to arrest judgment or grant a new trial. It would be otherwise, however, if the finding of the jury was such that no judgment *could* be rendered upon it; as where the jury found a sum below the jurisdiction of the court. (*Offutt's adm'rs v. Offutt*, 2 Harr. & Gill, 178, 181.) Where the former verdict was informal, as "for costs" only, it was held a bar. (*Young v. Overacker*, 2 Johns. Rep. 191.) So, where the former judgment was wrongly framed, being in terms a nonsuit, at a stage of the cause when the justice had ceased to hold the power of nonsuit, (as where he had taken his four days for consideration,) yet, held final by construction and legal operation. (*Hess v. Beekman*, 11 Johns. Rep. 457.) See also, *Brintnall v. Foster* and *Elwell v. M'Queen*, stated *ante*, note 589, p. 836, 17.

These cases, connected with others mentioned in the note referred to, contain very full illustrations of the character which a former proceeding must assume in order to constitute a bar; and we shall content ourselves here with little more than adding some few supplemental cases, without distinguishing particularly whether the courts to which they were applied were inferior or superior.

A nonsuit we saw was no bar. *Ante*, note 589, p. 836. To the cases there cited

we may add *Youle v. Brotherson*, 10 John. Rep. 363, 4; *Perrillat v. Puech*, 2 Mill. Lou. Rep. 428; *Snowhill v. Hillyer*, 4 Halst. 38; and *Bates v. Jenkins*, 1 Breese, 25, in appendix.

So of a judgment on demurrer to a declaration, where the reason to be collected from the record appeared to have been matter of form merely. (*Brannau v. Hawk*, 1 Blackf. 392, 3.) Indeed, this seems to be put unqualifiedly in a previous case in the same book, (*Stevens v. Dunbar*, 1 Blackf. 56,) viz. that such a judgment would never be a bar under any circumstances. See *Dana v. Hall*, 1 Aik. 252, and *Hall v. Dana*, 2 Aik. 381.

Where the plaintiff withdrew his suit, on the intimation of an opinion against him by the justice, held no bar. (*Jones v. Walker*, 5 Yerg. 427.) See ante, note 589, p. 836. A *retraxit*, however, is a bar. (Ante, note 589, p. 836. *Lambert v. Sandford*, 2 Blackf. 137.)

A judgment of the U. S. Dist. Court in this form, "Judgment must be given for the defendant and the plaintiff's petition dismissed," held final, and a bar. (*Keene v. M'Donough*, 8 Lou. Rep. by Curry, 185.) See this case stated ante, note 589, p. 836, and erroneously cited there from Mart. Lou. Rep.

The failure of a trial in consequence of the withdrawal of a juror by consent, is no bar. (*Sanderson v. Nestor, Ryan & Mood*, N. P. Rep. 402.) So as to discharging a jury by consent. (*Everett v. Youells*, 3 Barn. & Adol. 349.) See the *People v. Judges of New-York*, 8 Cowen's Rep. 127.

Where the former recovery has been wholly reversed on error, it is no bar. (*Smock v. Graham*, 1 Blackf. 314. *Wood v. Jackson*, ex dem. Genet, 8 Wend. 10. *Close v. Stewart*, 4 id. 95.) A judgment collected, and afterwards reversed for defect of form with an award of restitution, is no bar to a subsequent action, even though the party elect not to avail himself of the judgment of restitution. (*Close v. Stuart*, 4 Wend. 95, on error from S. Court, for whose opinion, see S. C. 1 Wend. 433.) If a judgment of reversal state that it is not a bar to any future claim of the appellee made on fuller proof, to prevent this being a bar, the new suit must be shown to differ from the former. (*Innis v. Roane*, 4 Call, 379, 398.)

So if the demand be rejected as not yet due, the former judgment is no bar. (*M'Laughlin v. Hill*, 6 Verm. Rep. 20. *Estill v. Taul*, 2 Yerg. 467, ante, note 589, p. 835.) In *Estill v. Taul*, the justice was received to show by parol that he gave judgment against the plaintiff in the former action, because the rent now claimed by him was not then due; and held, that this being so, the court trying the second action ought to disregard the former judgment as not rendered on the issue they were now bound to try; and that they should so instruct the jury. Otherwise, however, it seems, if the demand was actually due, though erroneously rejected on the supposition that it was not due. Such we deem to be the result of *Morgan v. Plumb*, (9 Wend. 287.) The plaintiff there, in 1820, sued on a note of \$350, payable when a certain mortgage should be collected. On the trial of that suit it was shown that the mortgage had been foreclosed by an entry, &c., (in Massachusetts,) but no money having been paid, an objection was taken that the mortgage had not been collected within the terms of the note; on this ground, Spencer, J. who presided at the trial, directed a verdict for the defendant, instead of nonsuiting the plaintiff. Afterwards a new suit was instituted on the assumption, *inter alia*, that the note was not due when the former

action was tried: this was tried in 1830, (before Cowen, Cir. J.,) who held, that under the circumstances the former suit was no bar. On motion for a new trial, the supreme court, per Savage, Ch. J. expressed a different opinion, holding that the note was due at the first trial, and that though Spencer, J. erred on this point, yet that the second suit was barred. The cause, however, was decided upon other grounds and a new trial denied. (id. 293.)

The same principles apply to criminal cases. Accordingly, a *nolle prosequi* is no bar to another indictment; (Commonwealth v. Wheeler, 2 Mass. Rep. 272; Lambert v. Sandford, 2 Blackf. 137; The People v. Barrett, 1 Johns. Rep. 69.) unless it be after the jury are impanelled; (State v. M'Kee, 1 Bail. 651, 653, 4, and the cases there cited by O'Neal, J.) Regularly, that cannot be done after the jury are impanelled, it is said; but if they be discharged under pretence of a *nolle prosequi*, it will be equivalent to an acquittal. (id.)

The *dismissal* of a presentment by the court, at the instance of the prosecuting attorney, ordered without trial, is no acquittal; it is only an informal *nolle prosequi*; and is therefore no bar. (Wortham v. The Commonwealth, 5 Rand. 669.)

A *retraxit* is unknown to the law, so far as regards a prosecution at the suit of the commonwealth. It is a dispensing power, which the law has not entrusted to the prosecuting attorney. (id.)

If the prisoner escape a trial on the merits by *quashing the indictment, demurrer* or by *plea in abatement*, he may be prosecuted again. (People v. Barrett, 1 Johns. Rep. 66, 69.)

And the mere failure of a trial by the death or sudden sickness of a juror, the illness of the prisoner, discharging a jury, &c. will not in general operate as a bar whether in a civil or criminal proceeding. (People v. Olcott, 2 Johns. Cas. 301. People v. Barrett, 2 Cain. Rep. 100. State v. Woodruff, 2 Day, 504. State v. Waterhouse, Mart. & Yerg. 278. State v. Hall, 4 Halst. 256. Commonwealth v. Bowden, 9 Mass. Rep. 494. The People v. Goodwin, 18 John. Rep. 187. U. States v. Perez, 9 Wheat. 579. Per Shaw, C. J. in Commonwealth v. Roby, 12 Pick. 502, 503. State v. Spurgin, 1 M'Cord, 254; and Bostick's case there cited. People v. Denton, 2 Johns. Cas. 275. United States v. Coolidge, 2 Gallis. Rep. 364. Commonwealth v. Purchase, 2 Pick. Rep. 521. State v. Burket, 2 Rep. Const. Ct. So. Car. 155.) But this right to nullify the effect of a discharge, by the withdrawal of a juror, and the like, is not absolute and unlimited. In a late South Carolina case, where the offence was capital, it was said that authority was confined to the following cases. 1. The consent of the prisoner, 2. The illness of one of the jury, the prisoner or the court, 3. The absence of one of the jurymen, 4. The impossibility of their agreeing on a verdict. And it was also said, that the discretion of the court to discharge the jury and remand the prisoner for another trial, is a legal discretion, exercisable according to known rules. After the jury were impanelled for trial of a murder in killing a slave, the solicitor general was answered by the foreman, on inquiry, that he had declared he never would convict in such a case. Whereupon the solicitor, with permission of the court, entered a *nolle prosequi*, and the jury were discharged. Held a bar to a subsequent indictment. (State v. M'Kee, 1 Bail. 651, 652, 3.) But the

jury will be intended to have been discreetly and properly discharged, unless the contrary appear. (*State of Tennessee v. Waterhouse*, Mart. & Yerg. 278.) The rule in Pennsylvania is still more strict. The discharge of the jury so as to secure another trial, is allowed, in a capital case especially, only when required by *absolute necessity*. Even the illness of any of the jury, arising from privation, if removable by food, and the prisoner consent that it should be supplied, is not an adequate cause of their discharge; and if discharged under such circumstances, a new trial would be barred. Their inability to agree, is not a proper cause of discharge. (*Commonwealth v. Clue*, 3 Rawle, 498. *Commonwealth v. Cook*, cited id. 500; 6 Ser. & Rawle, 577, S. C.) The learned court admit a wide difference between their decisions and those of the neighboring states; but maintain their own ground with the argument, that the constitutional right of the subject not to be put in jeopardy a second time, ought not to depend on the arbitrary opinion of judges. (Id. 501.) After a prisoner has pleaded, the jury been sworn, and evidence offered, if the public prosecutor without the prisoner's consent withdraw a juror, merely because he is unprepared, the prisoner cannot afterward be tried for the same offence. (*People v. Barrett*, 2 Cain. Rep. 304.) Otherwise, if the indictment were defective in substance. (*People v. Barrett*, 1 Johns. Rep. 66: and see *infra*.) In Tennessee, where the jury were allowed by the court to separate after the prisoner had been put on his trial without rendering any verdict, it was held a bar to a subsequent trial. (*State v. Garrigues*, 1 Hayw. 241.) The power of discharging a jury is to be exercised with great caution. (*People v. Denton*, 2 Johns. Cas. 275. *People v. Goodwin*, 18 Johns. Rep. 187. *People v. Olcott*, 2 Johns. Cas. 301; and see the cases cited *supra*.) Where a witness on the part of the government refused to be sworn and was committed for a contempt, Mr. Justice Story held that the court might discharge the jury without the defendant's consent, and try him again at another time. (*United States v. Coolidge*, 2 Gallis. Rep. 364. See *People v. Judges of New York*, 8 Cowen's Rep. 131.) As to the right of allowing a jury to be withdrawn in cases of *misdemeanor*, see *People v. Ellis*, 15 Wend. 371; *People v. Olcott*, 2 Johns. Cas. 307.

Where the verdict was void, the jury finding petit larceny on an indictment for another offence not warranting such finding, a re-trial was ordered. (*State v. Spurgin*, 1 M'Cord, 252, 254. And see also *People v. Olcott*, 2 Johns. Cas. 301; *Pennsylvania v. Huffman*, Addis. Rep. 140.)

So where judgment has been arrested, it is no bar. (*People v. Casborus*, 13 Johns. Rep. 351. *Pennsylvania v. Huffman*, Addis. Rep. 140.)

If the cause go off upon the insufficiency of the indictment either in form or substance, this will constitute no bar.—(Per Shaw, C. J. in *Commonwealth v. Roby*, 12 Pick. 502; Per Williams, J., in *State v. Benham*, 7 Conn. Rep. 418; *Rex v. Taylor*, 3 Barn. & Cress. 502; *People v. Barrett*, 1 Johns. Rep. 66; 2 N. Y. R. Stat. 701, § 24; *Commonwealth v. Goddard*, 13 Mass. Rep. 459.)

So, if the former acquittal was on the ground of variance between the indictment and the evidence. (2 N. Y. R. Stat. 701, § 24. *Pennsylvania v. Huffman*, Addis. Rep. 140. *Burnett v. Commonwealth*, 4 Monroe, 106.) But otherwise in New York if there be a trial on the merits, though the indictment be defective. (2 N. Y. R. Stat. 702, § 25.) An acquittal, it has been held, shall not be deemed for variance, if the

prisoner *could* have been convicted upon the first indictment upon any evidence that might have been adduced. It is immaterial whether the proper evidence was adduced at the first trial or not. Thus, where the prisoner was indicted for the murder of a child, viz. *Charles William Beadle*, but acquitted because the name of the child was not proved to be as set forth, and was again indicted for the same murder of the same child by various other names, and it was *now* in proof, and so the jury found on an issue on the plea of *autrefois acquit*, that the child was in truth as well known by the name in the former indictment as any of the names in this; the court gave judgment for the prisoner. (*Rex v. Sheen*, 2 Carr. & Payne, 634.) Burrough J. thought that if the now evidence of the name had been given at the former trial, the prisoner ought to have been convicted. The baptismal register gave the name of *Charles William Beadle*; and one witness said she should have known him by that name; and it was suggested that if a legacy had been left him by that name, he would have taken it. (*Id.*)

It is perhaps proper to remark, that in all these cases of conviction, acquittal, &c. whether formal or virtual, it is not necessary, in order to secure the prisoner's plea in bar, that a judgment should have been rendered or signed on the former verdict or proceeding. The verdict itself, or discharge of the jury, &c. constitutes the bar. (*State of Connecticut v. Benham*, 7 Conn. Rep. 414, 418, et seq.) This is so even where judgment is improperly arrested upon a good indictment. (*The State v. Norvell*, 2 Yerg. 24.)

But the point or matter must be identical. A former judgment in general concludes only as to the ground covered by it, and the facts necessary to uphold it. (See ante, note 587, p. 826.) Accordingly, a verdict and judgment, in a court of law, is no bar to equitable relief which could not be allowed at law. (*Gallagher's ex'rs v. Roberts*, 1 Wash. C. C. Rep. 320.) A judgment against the assignee of a note, in an action against the assignor, is no bar to a bill by the assignee to subject estate which had been conveyed to the assignor to secure the payment. (*McClenahan v. Chambers*, 1 Monroe, 44.) A recovery of damages, in an action of disseisin, the declaration laying the disseisin in December, 1807, is no bar to a suit for rent of the same land claimed to be due prior to that time; there being no evidence *aliunde*, that such rent was actually recovered in the former action. (*Gunn v. Scovil*, 5 Day, 113, 115, 116.) A judgment, in an action of disseisin, does not prevent the losing party enforcing a title paramount subsequently acquired, or preclude either party from his bill in chancery to perfect his title or enjoin a judgment obtained contrary to equity. (*Taylor v. McCrackin*, 2 Blackf. 260. See *Burt v. Sternbergh*, 4 Cowen's Rep. 559, stated ante, note 594, p. 843.) A recovery in a writ of right does not affect a claim of the tenant to an easement in the land. (*Thompson v. The Proprietors of Androscroggin bridge*, 5 Greenl. 62, 65.) A former recovery against husband and wife for a tort, is no bar to an action for the same tort against the husband alone; for such an action as the former cannot lie. Husband and wife cannot, in law, commit a joint tort. If done by the wife in his presence or with his assent, it is his sole act. Such an action can be sustained for the separate independent act only of the wife. (*Park v. Hopkins*, 2 Bail. 411.) This case goes distinctly, as we deem, upon the ground that the record showed the former suit to have been for a different cause of action. It was decided upon the

pleadings; and what they were, whether there were any averments aliunde, going to show the identity of the two actions as to subject matter, cannot be collected from the report. Indeed, it would rather seem to have been regarded as a case in which such an averment would be inadmissible as contradicting the record: see *infra*. It is no bar to an action for obstructing ancient lights that the nuisance merely affects the plaintiff's right as reversioner, and that he has already, in a former action, recovered against the defendant for erecting the same obstruction. (*Shadwell v. Hutchinson*, 2 Barn. & Adol. 97.) A judgment for freedom concludes and entitles the plaintiff to recover for services against the defendant, only from the time of the first suit commenced. If more is claimed, a right must be proved independent of the record. (*Matilda v. Crenshaw*, 4 Yerg. 299.) A verdict in forcible entry will not conclude any thing in an ejectment. The former issue involved the mere question of possession and force; the latter the right of possession and title. (*Mattox v. Helm*, 5 Litt. 185, 6. *Peyton v. Stith*, 5 Pet. 485, 490, 1.) The caption of a warrant of attorney by the vouchee, appearing of record to have been taken before the Ch. J. out of court, was held not to conclude as to the mental capacity of the vouchee, on error assigned that he was *non compos* at the time; for mental capacity was not a point to be examined into by the Ch. J. It was his office to take a mere acknowledgment of a deed, which does not *conclude*, however it may be *prima facie*. (*Hume v. Burton*, 1 Ridgw. P. C. Ireland, 16 to 121, decided by a majority of one. - And see the same case on error from the K. B. on exceptions taken at the second trial. *Id.* 204 to 280.) A judgment, in covenant, will not bar a bill for specific performance of a particular stipulation in the articles, if it be manifest that the breach of that, though assigned, was not investigated, nor any damages given on that head. (*Givens v. Peake*, 1 Dana, 225.) Nor will a judgment on the merits in favor of the defendant, bar an action for the same demand on a subsequent promise of the defendant to pay the debt. Such promise is supported by the moral consideration, though the remedy for the demand was technically barred when the promise was made. (*Cook v. Vimont*, 6 Monroe, 284.) See *ante*, note 588, p. 833, and the case of *Bentley v. Morse*, there cited.

The same principles apply to criminal cases. Thus, an acquittal, on an indictment for forging and uttering an order, is no bar to a subsequent indictment for a misdemeanor in obtaining goods on the same order, by using it as a false token. (*Commonwealth v. Quann*, 2 Virg. Cas. 89.) In Virginia, a plea of *autrefois acquit* or *convict* by an examining court, must show the crime charged there to have been the same offence as that charged in the indictment to which the former trial is interposed as a bar. (*Commonwealth v. Somerville*, 1 Virg. Cas. 164.) Where a single act combines the requisite ingredients of two distinct offences, it has been held, in South Carolina, that the defendant may be separately indicted and punished for each; e. g. unlawfully trading with a slave, and by the same act knowingly receiving stolen goods from him; for the necessity of proving the stealing and scienter, in the last case, shows the point to be different from that in the former, which is sustained by showing a mere dealing with the slave. (*State v. Taylor*, 2 Bail. 49.) See *Conant v. Raymond*, *infra*. Proof of receiving goods, knowing them to be stolen, will not support an indictment for larceny of the same goods. The latter is the principal offence; the former the mere accessory; and an acquittal or conviction of the one, will not bar a prosecution for the other. (*Ross v. The State*, 1 Blackf. 390, 1.) That the counterfeit bill, for the pass-

ing of which the prisoner is now indicted, was given in evidence against him on a former trial for passing another bill, will not render such former suit a bar. (United States v. Randenbush, 8 Pet. 288.) In Kentucky, a trial of bastardy, on a warrant charging the birth to have been one day, will not bar a second trial, on a warrant stating a different day; for the day is material. (Burnett v. Commonwealth, 4 Monroe, 106, 7, 8. See also Rex v. Smith, 3 Barn. & Cress, 502.) An indictment was against three persons jointly for obstructing a highway. The evidence was that each separately obstructed it on his own farm. The variance was held fatal, because a trial on this joint indictment would not bar separate indictments for each offence. The indictment should have charged the offences to have been several, and then the defendants might have been severally convicted or acquitted. (The Commonwealth v. M'Chord, 2 Dana, 242.)

It is said to be the doctrine of the common law in respect to felonies, that a conviction judgment and execution for one felony, not capital, is a bar to all other indictments for felonies, not capital, committed previous to such conviction, judgment and execution. (Crenshaw v. The State of Tennessee, Mart. & Yerg. 122.) This was held by the supreme court of Tennessee, on great deliberation and a full examination of English authorities; and acted upon as the common law of that state in the case cited.

In determining the identity of the subject or point passed upon and adjudicated in the former suit, much depends upon the frame of the issue there joined; the matter which it confesses or denies; what it may receive on the one hand, or exclude on the other. With a view to these things the titles of the text—"evidence confined to points in issue," (p. 169 to 193,) and "the substance of issue proved," (p. 200 to 216,) as also the notes connected with them may become important. Where the matter sought to be litigated in the second suit was involved in the former issue, and essential to the finding of the verdict, we have seen that it shall be taken conclusively to have been decided. (Ante, note 594, p. 844, et seq.) Where the matter might or might not have been tried consistently with the issue, it shall be taken to have been *prima facie* passed upon. (Id. And see ante, note 590, p. 838, et seq.)

To illustrate the importance of going back to the substance of the issue, for instance; it has been held in England, recently, that if the crime for which the prisoner is indicted *might* have been proved under another indictment formerly tried, it shall be taken necessarily to have been tried, and let in the plea of *autrefois acquit* or *convict*. (See Rex v. Sheen, 2 Carr. & Payne, 634, stated supra.) In ascertaining what form of indictment would let in such proof, we go back to note 395, ante, p. 497, et seq., presenting a large class of cases where it is seen that an indictment for one crime will be sometimes maintained by proof of another of a different grade. An additional case is one of an indictment on the statute of Pennsylvania against adultery, whereon a conviction may be had for fornication. (Respublica v. Roberts, 1 Yeates, 6.) It follows, that a conviction or acquittal, under a former indictment, will be a bar to a second prosecution for an offence which might there have been tried. (1 Chit. Cr. Law, 455. 1 Green's Rep. 371, 374, 5. 2 Bail. Rep. 50. 12 Pick. 504. 1 Stark. Cr. Plead. 2d ed. 322. Rex v. Vandercomb, 2 Leach, 816. 2 East's P. C. 522. 4 Bl. Comm. 336.) And see several cases illustrating this rule, stated *infra*. An indictment is for an assault with intent to kill or murder; the prisoner may be

convicted of a simple assault. (*Stewart v. The State of Ohio*, 5 Hamm. 241, 2. *The State v. Coy*, 2 Aik. 181.) It has lately been held in Massachusetts, that a conviction of an assault with intent to murder, could in no case be pleaded in bar to an indictment for the murder itself. (*Commonwealth v. Roby*, 12 Pick. 496.) The court do not deny the general doctrine above advanced; they expressly recognize and fortify it. But they deny that the evidence, in support the latter indictment, could have been admitted on trial of the former, (*id.* 505;) and that the English doctrine which forbids a conviction for a misdemeanor, where the proof shows a felony, does not proceed upon considerations peculiar to the administration of justice in that country, but upon the broad ground that the offences are, in legal contemplation, essentially distinct in their character. The court certainly labor against a formidable array of authority, some of which may be seen collected, *ante*, note 395, p. 497, 8, and among others, as they admit, an express decision of their own court, (*Commonwealth v. Cooper*, 15 Mass. Rep. 187.) That the usual English argument against convicting of a misdemeanor, under an indictment for a felony, noticed, *ante*, note 395, p. 497, entirely fails us in this country, we add to the authorities quoted in that note, at p. 498, the following cases: *State v. Coy*, 2 Aik. 182, 3, per Skinner, Ch. J. *Stewart v. The State of Ohio*, 5 Hamm. 242, per Lane, J. An acquittal, on an indictment for a rape committed, is a bar to a subsequent prosecution for an indictment for an assault with an intent to commit a rape, but is no bar to a prosecution for the assault and battery. (*Case of Sargeant et al.* 2 City Hall Rec. 44.)

A former recovery, which does not merge the demand upon which it was rendered, is no bar to a subsequent suit on the same demand. On this principle, a recovery against the wife of the defendant was held not to bar a suit for the same debt against the defendant, though it was due for services done at the wife's request. (*King v. Bozarth*, 2 Serg. & Rawle, 275.) It is otherwise, where the first recovery, though against another party, merges the demand, or shows an election which concludes. (*See ante*, note 583, p. 823.) A judgment merges only the cause of action upon which it was rendered. (*Per Church, J.*, in *Fairchild v. Holly*, 10 Conn. R. 475, 478.) Hence, where a note is given for a demand under such circumstances as that the demand is not merged in the note, though a judgment be subsequently recovered on the note, it will not bar a suit on the original claim. (*Id.*)

It seems by *Andrews v. Smith*, that a recovery upon a judgment, is no bar to a second action on the same judgment. The case was an execution issued on the first (a justice's judgment) after a judgment recovered and execution thereon in a neighboring county. Held well, and that trespass would not lie for suing out the second execution. (*Andrews v. Smith*, 9 Wend. 53.) But whether a second action would lie on the first judgment, was, of course, not directly decided. The case goes upon the ground, however, that justice's judgments being securities of equal degree, the first was not merged in the second. (*Id.* 54.) The same doctrine applies as to judgments of courts of record. (*Id.* and see 11 Johns. Rep. 517, and cases there cited. 5 Wend. 222.) See *Utter v. Walker's adm'rs*, 1 Wright's Rep. 46.

And where the former court had not jurisdiction, the judgment will be no bar. This subject, however, and the cases connected with it will be found treated of post, note 694.

We noticed, *ante*, note 586, p. 825, that the rule of *res judicata* does not apply to summary applications. This must, however, be confined to orders or rules made on

motion in the course of practice in courts of record or other courts possessing corresponding powers. That will be seen by the cases cited there, beside which there are many other instances more or less strict, but in truth resting on discretion whether the matter formerly decided shall be opened upon the new circumstances disclosed. Such is the case of a motion for restitution, (*Crockett v. Lashbrook*, 5 Monroe, 542,) which, it is said, may be tried over again in an action. (*Id.*) But see *Mayor's heirs v. Chiles*, 3 Monroe, 260. So a decision on motion cannot be opened without leave, and the subject be reviewed on motion. (*Mitchell v. Allen*, 12 Wend. 290. *Standard v. Williams*, 10 Wend. 599.) A motion concludes only as to the ground covered by it. Thus a motion to quash a sale on one ground does not preclude a motion to set it aside on another ground. (*Sanders' heirs v. Buskirk*, 1 Dana, 410 to 412.)

But these and the like cases must not be confounded with the decisions of summary jurisdictions properly so called; which, we have seen, even a superior court may be, where it is clothed with such summary powers. It is there, *pro tanto*, an inferior court; and though it may proceed by way of motion, or in whatever form, its decisions conclude when once finally made upon the merits. This notion was extended to the decision on motion of a court to appoint commissioners under the Kentucky occupant land law, as well as to the award of the commissioners. (*Craig v. Bagby*, 1 Monroe, 148.) See also *Tribble v. Frame*, 3 Monroe, 51, 2, and *Mayo's heirs v. Chiles*, 3 Monroe, 260. A summary conviction and fine for an assault and battery, in view of the court, is no bar to a subsequent prosecution for the same assault by indictment. Although but one injury is done to the individual assaulted, yet the same act constitutes two public offences, punishable in different modes. (*State v. Yaney*, 1 N. Car. Law Repos. 519.) In New-York, it is provided by statute, that persons who have been summarily punished for a contempt under the law relative thereto, shall, nevertheless, be liable to indictment for such contempt, if the same be an indictable offence. (3 R. S. 278, § 15.)

The expedient sometimes resorted to of fraudulently going into a more favorable court, and submitting to a conviction and mild penalty, will not protect a criminal against a bona fide prosecution. Thus, the defendant was recognized to appear at the next superior court to answer an assault and battery. In the mean time he caused himself to be indicted, convicted and fined in the county court. This was all a collusion and trick to avoid a punishment, which he apprehended would be more severe upon an honest adverse prosecution in the higher court. He pleaded there his former conviction, to which the attorney general replied *per fraudem*, setting forth the particulars. Held a good replication. (*Commonwealth v. Jackson*, 2 Virg. Cas. 501, ante, note 589, p. 837, S. C. and *Hamilton v. Williams*, 1 Tyl. Rep. 15, also there cited.) So in New-Hampshire, where the defendant had procured a complaint to be lodged against him by a third person before a justice for an assault and battery, on which there was a conviction and a small fine imposed; held, no bar to an indictment for the same offence, as it was collusive and in fraud of the state. (*State v. Little*, 1 New-Hamp. Rep. 257.) In Massachusetts, the rule is laid down in general terms, that a conviction before a justice of the peace on the information of the offender, is no bar to an indictment for the same offence. (*Commonwealth v. Alderman*, 4 Mass. Rep. 477.)

It is stated ante, p. 333, 4, in the text, that a judgment is a bar to any other action of the same nature as the first, involving the same matter; and that to determine the identity of the matter, one test is to see whether the same evidence would equally maintain both actions. The doctrine was applied to the judgment of an inferior court in *Rice v. King*, (7 Johns. Rep. 20.) In respect to courts in general, it was discussed ante, note 588, p. 828, et seq. The reader will find it, moreover, ably illustrated by Kennedy, J. in *Marsh v. Pier*, 4 Rawle, 284 to 287. See also, *Crockett v. Routon*, *Dudley's Rep.* 254, 5. It has been said that a trial in an action on the case for damages in harboring an apprentice, would bar assumpsit for his services during the same period. (*Conant v. Raymond*, 2 Aik. Rep. 243, 246.) So vice versa; and yet evidence which would support assumpsit would not support the action on the case, and the measure of damages in the two instances is very different. (*id.*) See *State v. Taylor*, supra. Judgment for the defendant in trover or detinue, will bar trespass for the taking. (*Hite v. Long*, 6 Rand. 457, 462.) So trespass will bar trover for the same cause. (*Boynton v. Willard*, 10 Pick. Rep. 166.) A recovery in replevin for property distrained, is a bar to an action for an excessive distress. (*Phillips v. Berryman*, 3 Doug. 286.) A suit at common law for an excessive distress, will bar an action on the statute to recover double the value of the goods distrained. (*Garvin v. Dawson*, 13 Serg. & Rawle, 246, 7.) A recovery of damages in trespass on lands, was held a bar to a subsequent action for mesne profits. (*Coleman v. Parish*, 1 M'Cord, 264.) Where the plaintiff in an action at law against an administrator confesses a plea of plene administravit, and takes judgment for assets *in futuro*, he is barred of a bill in equity for the discovery of assets alleged to be in the defendant's hands at the time of or anterior to the plea put in in the court of law. (*Oreutt v. Orms*, 3 Paige, 459.)

The above cases and others of a kindred character, show how sedulously courts have exerted themselves to preserve in full vigour, those principles which forbid a second litigation of the same matter, and to what extent they have carried the doctrine. The mere difference in *name* between the first and subsequent suit, forms no sort of distinction in respect to the application of the rule: you shall look to their *nature*, and if, in fact, the matter sought to be litigated in the second suit, has been controverted and directly decided in the other, the first will conclude.

So, where the same matter has been once litigated by way of defence, between the same parties. (See ante, note 588, p. 829, 830.) This was directly assumed in the case of *Gardner v. Buckbee*, 3 Cowen's Rep. 120, stated ante, note 594, p. 847. See also *S. P. Crockett v. Routon*, *Dudley's Rep.* 254. In covenant for one instalment of the price of land, the defendant sets up and tries his defence on the ground of a failure of title; this precludes a like defence in an action for a second instalment. (*Kane v. Fisher*, 2 Watts, 246, 252.) Assumpsit for use and occupation for two years, from April 1, 1829, to April 1, 1831. Plea in bar of the first year's rent, that under the demise in question, which was for 10 years from the 15th Nov. 1825, at \$75 per annum, the now plaintiff had, in replevin in the Herkimer C. P. against him by the now defendant, avowed the taking a distress for the \$75 due the 1st of April 1829, as rent of one year ending on that day; that to this, the now defendant pleaded that the now plaintiff had, in the article of demise or lease, covenanted to make certain improvements, by

the summer of 1826, which he had omitted; and that the use and benefit of the premises depended on that improvement; that the now plaintiff replied performance, traversing that the use, &c., depended on the improvement; that the jury found non-performance, and that the use and benefit did depend, &c., and that the \$75 was not due as rent, arrear, &c.; whereon judgment was rendered for the now defendant. The plea averred farther, that the improvements were not complete on the 1st April, 1829, or at any time before the 1st April, 1830. The court held the principle of the plea sound; but overruled it as answering only a part of the plaintiff's claim. (*Etheridge v. Osborn*, 12 Wend. 399, 403.) See the case of *Cist v. Zeigler*, cited ante, note 588, p. 830.

That mere matter of defence involved in a former trial, whether in fact tried or not, cannot be made the subject of a subsequent suit by the defendant, we saw generally, ante, note 588, p. 830 to 834. The rule was very plainly illustrated on the question arising as to the effect of the judgment of an inferior court, in *Walker v. Ames*, (2 Cowen's Rep. 428.) There, the plaintiff had previously been sued by the defendant before a justice, in which suit, a judgment was taken by the latter, both for an account, and a note given upon the settlement of it; and the present action was brought to recover back money collected under such judgment. The supreme court say, this cannot be allowed; that the now plaintiff should have defended the former action, and thus cut down the recovery to the proper sum; that this was his only remedy, and they liken it to the case of a receipt of payment accidentally lost, by which a defence failed at the former trial, and yet the money could not be recovered back. *Marriott v. Hampton*, 7 T. B. 269. See the latter case, ante, note 588, p. 830; and in connexion with *Walker v. Ames*, see several cases cited in the same note, p. 833, 4, from the Massachusetts Reports. The general rule was applied to an inferior court by several cases cited in the note referred to; and also in *Curtis v. Groat*, (6 John. Rep. 168.) There, after a suit and recovery for cutting and coaling wood, the defendant sued the plaintiff in trover for the coal. The first suit was held a bar. And see *Chambers v. Patton*, 1 Bail. Rep. 130; and *Simkins v. Cobb*, 2 id. 130, stated ante, note 620, p. 866. A defence before a justice on the ground of usury, was held to be a bar to relief in equity on the same ground; but not where the defendant appealed to the circuit court, and was dismissed for the insufficiency of the appeal bond. (*Cave v. Davis*, 5 Monroe, 392, 394.) Creditors are deemed parties to insolvent proceedings for the discharge of their debtor. Now, the statute sometimes declares that certain frauds on the side of the debtor, shall render a discharge void; such frauds, too, as the creditors might shew before the commissioner. But aside from these, the whole subject is *res judicata*. If there were other frauds, they cannot be objected collaterally, any more than a fraudulent matter of defence in a common civil action could be objected in a suit to enforce the judgment rendered in that action. (*M'Kinney v. Crawford*, 8 Serg. & Rawle, 351, 353, cited and approved in *Coates v. Roberts*, 4 Rawle, 112. *Lester v. Thompson*, 1 John. Rep. 300.)

The rule is moreover illustrated by several additional cases relating to courts of superior jurisdiction. The vendee sued the vendor for the non-delivery of wheat, recovering the full value of the wheat, though only a nominal sum had been paid. Although the measure of damages was erroneous, and should have been only the differ-

ence between the agreed and the market price; yet this was a matter of defence: and on the defendant turning round and suing the plaintiffs, held, that he could recover nothing but was totally barred. (*Dey v. Dox* 9 Wend. 129.) After a suit and recovery for goods sold and delivered, the defendant sued the plaintiff for a non-delivery of the same goods. The first suit was held a bar. (*Smith v. Kelley*, 2 Hall's Rep. N. Y. C. P. 217, 224, 5.) And see *Britton v. Turner*, 6 N. H. Rep. 481. Where a suit was before a justice on a note; the defence, an agreement by the plaintiff to delay payment for five months; held, that this must be interposed as a defence; and whether omitted as a defence in an action on the note, or offered and overruled, a cross-action for a violation of the agreement was barred. (*Pearl v. Wells*, 6 Wend. 291.) Otherwise, if the agreement had been *not to sue* for a limited time. (*Per Walworth*, Ch. id. 295.) The defendant suffered judgment by default against him on a note; and then filed his bill on the ground that the note was given on a condition which failed. Relief was refused, the court saying such want or failure of consideration was a good defence at law. (*Rabun v. Shortridge*, 2 Blackf. 480.) A party is sued and the consideration money paid for land recovered back. This bars a bill by the defendant for a specific execution of the contract. (*Curtis v. Cisna's adm'rs*, 1 Ham. Rep. 425, 435.)

A distinction should, however, be carefully made between a mere matter of defence, and a cross claim, which may or may not be interposed as a defence, at the election of the defendant in the former action. The latter generally arises under the statute of set off in respect to courts of record, and sometimes, though not receivable as a set off, it may come in by way of recoupment of the plaintiff's damages. Thus, though in an action for the price of goods sold, the defendant may give in evidence the breach of a warranty in these particular goods, or a deceit in the sale, and so defeat the action in whole or in part; (*Reab v. M'Allister*, 8 Wend. 115 to 117, and the cases there cited;) yet if he choose, he may omit this, and go to his cross action for the damages, after having submitted to a judgment for the price. (*Cook v. Moseley*, 13 Wend. 277.) A covenant not to sue for a limited time is no defence. The remedy is a cross action on the covenant. (*Pearl v. Wells*, 6 Wend. 291, 295, *per Walworth*, Ch. *Winans v. Huston*, 6 Wend. 471, 473, et seq. and cases there cited. *Chandler v. Herrick*, 19 Johns. Rep. 129.) Where part performance of a special contract (e. g. to work for a year) forms the ground of an action of indebitatus assumpsit, subject to recoupment to the extent of damage for the breach, (as it does in New Hampshire,) it seems, the defendant may at his election waive his remedy by recoupment, and bring a cross action for the damages; for without this right, however much he may have been damnified, he cannot recover beyond the extent of the plaintiff's claim. (*Britton v. Turner*, 6 N. H. Rep. 481.) And see *Wadleigh v. Sutton*, 6 N. H. Rep. 15. The plaintiff gave the defendant a negotiable note, under an agreement that he would receive bank bills in pay, which were tendered and refused; the note was negotiated and a recovery had against the plaintiff by the holder. The plaintiff now sued the defendant for his act in refusing the bills and transferring the note; who pleaded that the matter was litigated in the suit on the note: this plea was held bad, because it did not shew that judgment in that suit was rendered on the ground that the facts were not sustained in evidence; for the evidence might have been rejected in that

suit on various grounds not applicable to this; and so the merits, in truth, have never been tried there. (*Noyes v. Evans*, 6 Verm. Rep. 628, 630.)

As to the case of set off, in a court of record, we have seen, ante, note 588, p. 831, that this also forms an exception to the general rule; and where a defendant omits to avail himself of this right, he may still recover his counter demand in a cross action. Not so, however, where the set off has been tried, though only a part of it was allowed; in such case even a bill in equity for the residue will be barred. (*Reynolds v. Reynolds' adm'rs*, 3 Hamm. 268.) In New York the rule is different with respect to a justice's court from that which prevails in the higher courts. The statute relating to the former requires a set off of certain demands the first opportunity, and the defendant is barred of his cross action by the mere omission; (2 R. S. 234, et seq.) *a fortiori*, if it be introduced and tried; and even if the set off be utterly inadmissible, yet where it is in fact received and tried on the merits without objection, no action can subsequently be maintained upon it. (*M'Lean v. Hugaren*, 13 Johns. Rep. 184. *King v. Fuller*, 3 Cain. Rep. 152. *Wilson v. Larmouth*, 3 Johns. Rep. 433.) Otherwise, if rejected as being in its nature inadmissible because not due, or if in truth not due and yet it be tried and submitted to a jury who disallow it. (*Bull v. Hopkins*, 7 Johns. Rep. 22. *Wolfe v. Washburn*, 6 Cowen's Rep. 261. *Beebe v. Bull*, 12 Wend. 504.) The duty of setting off demands proper for that purpose is enforced with great rigor, and the omission to do so the first opportunity will generally be a bar. (*Serjeant v. Holmes*, 3 Johns. Rep. 423. *M'Kerras v. Gardner*, id. 137.) In *Phinney v. Earle*, (9 Johns. Rep. 352,) it was held that a set off being offered in a justice's court, but objected to as inadmissible and excluded on that ground, a subsequent action lay for it. *A fortiori*, if it was improper matter of set off.

There is, in New Jersey, also, a statute like that in New York, compelling set offs in a justice's court; on which the like rules of construction prevail. (*Henry v. Milham*, 1 Green, 266.) It was agreed, in this case, that if the plaintiff had before suit assigned his demand, the assignee would be held the real party, in which case the omission to set off against the nominal plaintiff would be excused. (*Id.* 267.)

In Massachusetts where the plaintiff in a justice's court obtained judgment by default for a balance, crediting the defendant for certain services to their full value; held, a bar to the defendant's action for the value of the same services, though his action was brought pending the first suit. (*Briggs v. Richmond*, 10 Pick. 391 to 397.) The decision goes on the broad ground that the balance is the true debt, where there are mutual accounts; and it is the right and duty of the plaintiff to go for that balance. *Shaw, C. J.*, in a very able opinion, proves this on several English authorities, with reference to the amount for which a party may be held to bail; and he shows by a balance of English authority that an action for a malicious arrest and holding to bail will lie, where such balance is wilfully disregarded; and, as he remarks, the supreme judicial court in Massachusetts recognized the same doctrine in *Pierce v. Thompson*, 6 Pick. 196. He slightly adverts to the limitation of a justice's jurisdiction as fortifying the reasoning in the particular case; but there is no Massachusetts statute, it seems, like that in New-York, tying up the litigation of the cross account to the action first brought. None of the English cases, we suspect, nor any others of which we are aware, carry this right of ex parte set-off to the extent of maintaining a bar. Nor does the case we are upon go farther than to erect a bar where the plaintiff actually

credits the entire demand. (See *Minor v. Walter*, 17 Mass. Rep. 238, stated ante, note 588, p. 893, 4, and several other cases following it there.)

We have incidentally noticed several cases where equity has refused to relieve as to matter of defence barred at law. Equity will sometimes relieve where the matter was rendered unavailable at law by fraud, accident, or mistake. Thus, the defence of usury being interposed before a justice, failed; and so did an appeal from him, owing to an accidental informality in prosecuting it: yet chancery relieved; (*Cave v. Davis*, 5 Monroe, 392, 394.) In *Lucas v. Curry's ex'rs*, 2 Bail. 406, it was said by Harper, J., that where the principal in an administration bond submits to a decree for account in the orphan's court in fraud of the surety, the latter may be relieved in equity. An account taken in a probate court and a decree thereon, (though declared by statute to be final and conclusive,) was impeached in equity on the ground that the administrator had fraudulently suppressed a credit. (*Pratt v. Northam*, 5 Mason, 95, 103.) The court of chancery in one case relieved, where at the time of the former suit at law the matter was holden unavailable there, and so failed as a defence, though the courts of law afterwards changed their ground. It was the common case of a fraudulent release obtained from the assignor of a chose in action after notice. At the time of trial, the course of the law courts was to refuse such an answer to the release; and a bill was subsequently filed to avoid it. After the bill was filed, the courts of law adopted a different rule, holding that the fraud might be shown in their courts; yet chancery relieved. (*Dana v. Hall*, 1 Aik. 252, and *Hall v. Dana*, 2 id. 381.) For the rule as finally settled at law in Vermont, see *Strong v. Strong*, 2 Aik. 373. A party was relieved in equity, against a judgment at law, on the ground that he had not come to a knowledge of his defence until after the judgment was rendered against him. (*Hubbard v. Hobson*, 1 Breese, 147, 149.) So though he knew of the defence, but not of the proof, till after judgment and when a bill of discovery would have been therefore useless. (*Lewis v. Brooks*, 6 Yerg. 167, 184.) A bond was, by mistake, drawn so as to bind the agent personally instead of his principal; on which, after pleading the mistake, a recovery was had at law against the agent's executor. Held that he was relievable in equity; for the mistake was not available at law, though otherwise in equity. (*Lindley v. Cravens*, 2 Blackf. 426.) So of any mistake in the frame of a sealed instrument; as by omitting a proviso, by which the agreement is to become void. (*Burchet v. Faulkner*, 1 Dana, 99, 100.) The nominal plaintiff being, at law, incompetent in New-York as a witness for the defendant, (ante, note 122, p. 135, 6,) and he being the only person by whom the defence could be established, it was held, that the defendant might have relief in equity by filing his bill after verdict and reviewing the matter tried, inasmuch as the party would be competent according to the law of evidence in that court. (*Norton v. Woods*, 5 Paige, 249.) If the facts constituting a legal defence to an action at law can only be established by a discovery from the plaintiff, and the defendant can, by the aid of such discovery, avail himself of such defence at law, he should resort to that mode, or he may be precluded by the judgment. But in cases of that kind, chancery may, if a satisfactory excuse is shown for not resorting to a bill in the first instance, grant relief even after judgment. (id.) The general rule is, that matter constituting a defence at law must be used there, and if a party omits to do so, chancery will not relieve. (id.)

The doctrines of this head will be found still farther illustrated by many of the cases cited *supra*, (p. 949 et seq. of this note,) on the general question how far chancery will relieve in a matter already tried at law.

In identifying the point or subject matter of the former and present suit, we are frequently driven to a consideration of the apportionment, or splitting up of demands, a doctrine which we looked into *ante*, note 592, p. 842, et seq. This practice is more common where courts are limited in their jurisdiction to small amounts. In these the suitor finds less delay and expense, two objects which are often of such importance as to countervail considerable sacrifice in the principal demand. Courts therefore, both in England and this country, allow him to sue on a demand of any amount in truth, provided he will claim upon it a sum within the jurisdiction. (*Barnes v. Winkler*, 2 Carr. & Payne, 345, Cor. Abbott, C. J. *Tuttle v. Maston*, 1 John. Cas. 25. *Cahill v. Dolph*, id. 333. *Putnam v. Shelop*, 12 John. Rep. 435. *Boomer v. Laine*, 10 Wend. 525. *Lewis v. Spencer*, 12 id. 139.) Contra, in South Carolina, as to a demand on a promissory note; (*Simpson v. M'Million*, 1 Nott & M'Cord, 192. *Bent's ex'r v. Graves*, 3 M'Cord's Rep. 280.) But in *assumpsit* where the plaintiff sued for services on a *quantum meruit*, the same rule was held as in England and New-York. (*Goldthwaite v. Dent*, 3 M'Cord, 296.) But see *Wells ads. Reynolds*, 1 Const. Rep. So. Car. 478. And in *trover*, the plaintiff may relinquish a portion of his rightful claim and so bring his suit within the inferior jurisdiction. (*Huff v. Huff*, 2 Bail. Rep. 456.)

The motive above adverted to, added to circumstances which are common to all jurisdictions, such as a partial failure of proof, and a consequent withdrawal of the demand *pro tanto*, the virtual though not express inclusion of the present matter in the former record, &c. have made this head of apportionment a more common topic of investigation in connection with inferior than with the higher courts: In all, however, the principle is precisely the same: you shall not evade the bar for the residue, by alleging that you have before litigated but a portion of what is deemed an integral demand, whether it sound in contract, a private wrong, or public crime, and whether it be matter in action or defence. And as in the note just referred to we cited authorities common both to the superior and inferior courts, we shall here do no more than follow out the cases there put by additional instances of indiscriminate application.

In a case where a demand might have been separated and withdrawn, yet going to the jury among others, though without any proof, and being therefore disallowed, the remedy by subsequent suit was held to be barred. (*Irwin v. Knox*, 10 John. Rep. 365, wrongly cited *ante*, p. 842 of these notes; as 11 John.) A plaintiff may withdraw one independent disconnected claim before a justice, at any time before it is finally submitted; which will secure his subsequent action for so much. (*Ante*, note 592, p. 842. *Louw v. Davis*, 13 John. Rep. 227.) And it is inferrible from what was said in *Phinney v. Earle*, 9 John. Rep. 352, that even if not otherwise warranted in withholding it, if it be objected to as inadmissible by the defendant, and rejected on that ground, a subsequent action shall not be barred. But a late case in the king's bench will show that the courts are jealous of allowing the creditor to bring separate suits, even for items apparently disconnected. The defendant had been the plaintiff's steward, and had from time to time before April, 1822, received at different periods on sales of timber £3400; and in June following, two other sums. In August, 1822, the plaintiff's

agent investigated the defendant's accounts, and found due from him £7000, including every thing, except £46 not then known to have been received by the defendant. The plaintiff sued in an inferior court, laying his damages at £4000; had judgment by default, and a summary assessment of damages and judgment were taken by his agent for £3400, because the defendant, as the agent then thought, had not any property exceeding that sum. This was held a bar to a subsequent action as to all except the £46. The court considered the proceeding equivalent to a submission of the other items to a jury. (*Bagot v. Williams*, 3 Barn. & Cress. 235.) Where a suit is brought for a divorce, with or without allowance of alimony, no subsequent suit lies for alimony, or for increase of alimony: the matter should have been litigated in the divorce suit, the decree in which is final. An original suit does not lie for alimony; it is only incident to a suit for divorce. (*Fischli v. Fischli*, 1 Blackf. 360.) And this though the divorce were in a foreign state, and the defendant has property lying in the state where the second suit is instituted. (*id.*)

We made the remark, ante, note 592, p. 842, that the plaintiff may bring separate suits where his demand is divisible. An obvious instance is, where A. promised to save B. harmless of three several promissory notes of less than \$100 each, (a Vermont justice's jurisdiction,) payable in three successive years. A. failed, and B. was obliged to pay the notes as they fell due; B. in Vermont was allowed to recover before a justice for each successive demand as it became due, upon each successive payment by him; and one recovery was held no bar to the others. (*Hosford v. Foote*, 3 Verm. Rep. 391, 393.) It is likened to the case of a note payable by instalments. (See *Badger v. Titcomb*, 15 Pick. 409, 413, 414.) So where A. became indebted to B. less than 40s. (the jurisdiction of the county court in England) for carriage of goods; and less than 40s. for like carriage one month after; B. sued for each separately in the county court.* Held distinct debts; and prohibition refused. (*Rex v. Sheriff of Herefordshire*, 1 Barn. & Adolph. 572.) In this case two decisions were cited from 1 Ventr.; viz. *Anon.*, 65, and *Girling v. Alders*, 73; where it was held that such demands should not be severed. Such severance was said, in *Girling v. Alders*, to be in *fraudem legis*, to give the county court jurisdiction; and prohibition was granted for that reason. No attention, however, was paid in the principal case to these authorities. If the contract were entire, it was held that it could not be severed in fraud of the king's court, as early as the Year Book, 19 H. 6, 55; and a prohibition was then granted in such a case. (See the South Carolina cases cited supra, p. 965.) A singular illustration is put in the anonymous case from Ventris, "that if a man at divers times steals things, all which amount to above 12d. [the measure of petit larceny] it is felony capital," [grand larceny.] *Girling v. Alders* is reported in 2 Keb. 617, by the title of *Girling v. Aldas*. It there appears to be a case of splitting an entire account into several items, like some of the decisions cited ante, note 592, p. 842, from the New-York and Connecticut reports. The whole case is thus: "Coleman opposed a prohibition to the honor of ale, on splitting of actions because the party was insolvent, and the contracts really several and several deliveries of ale, by Maltster to Alewife; *sed non allocator*; but per curiam; a prohibition must be awarded. If the causes may be joined in one action, they must; and a prohibition was awarded." In *Badger v. Titcomb*, (15 Pick. Rep. 409,) the defendant being the keeper of an office for procuring crews for vessels, contracted with the plaintiff to pay the latter a certain sum for each man shipped, and to repay

certain advances to be made by the plaintiff; the plaintiff sued to recover the stipulated amount for men shipped at different times, and also for monies advanced pursuant to the agreement. The defence was, that after the demands sued for were all due, the plaintiff had recovered in a former suit for similar items accruing under the same contract. But it was held that the first suit was no bar; that though the agreement was entire, the *performance* was several, and that each breach of the defendant's promise would support a distinct action of assumpsit. It was conceded by Wilde, J., who delivered the opinion, that the case of *Guernsey v. Carver*, 8 Wend. 492, (cited ante, note 592, p. 842,) if rightly decided, would maintain the defence; but he denied that a running account for goods, money, &c., accruing at various times, and all due, would constitute an entire demand, unless there was some express or implied agreement to that effect; and in respect to *Guernsey v. Carver*, where this was held, he says, "we know of no principle of law, nor of any other decided case, on which that decision can be sustained." But see the cases cited *supra*, together with those ante, note 892, p. 842. *Guernsey v. Carver* stands directly supported by a still more recent case in the same court. (*Stevens v. Lockwood*, 13 Wendell, 644.) Again: the defendant bought of the plaintiff several lottery tickets, which were delivered by separate agents of the plaintiff, at different offices occupied by them, and at different times. Two separate suits by summons were simultaneously brought for the price of each, before the same justice. The trial and recovery first had, though but for the tickets sold at one office, were held a bar to a recovery in the other suit. And per Nelson, J.: "The splitting up of small demands to multiply suits, is strongly discountenanced by this court. It is unnecessary and oppressive." (*Colvin v. Corwin*, 15 Wend. 557-9.) The case of *Markham v. Middleton*, 2 Strange, 1259, seems also to have been regarded by learned judges as maintaining that a running account of various items, but all due, was an entire demand not severable. (See per Kenyon, C. J. in *Seddon v. Tutop*, 6 T. R. 609. Per Spencer, J., in *Philips v. Berick*, 16 John. Rep. 140, 1. Per Savage, C. J., in *Stevens v. Lockwood*, *supra*. See also *Avery v. Fitch*, 4 Conn. Rep. 362.) If a part even of an entire account, in an action of book debt for the whole, be rejected because it is not due, another action lies for it. (*M'Laughlin v. Hill*, 6 Verm. Rep. 20.) The plaintiff sued and declared in debt for rent and for money had and received; and furnished a particular under the last count for the proceeds of stone converted by the defendant. The plaintiff then sued in trover for the stone; and in the first action took a verdict for the rent only, and this was held no bar to the action of trover. (*Hadley v. Green*, 2 Tyr. 300.)

The rule as to severing an entire demand is equally applicable to matter introduced by way of defence. A man agrees with you to labor for a year. He works out half his time and sues and recovers, as he may do in some courts, subject to your damage for the breach. You may elect to defend the first suit by showing damage to the extent of his claim; but you can recover no more and are thus concluded as to your entire claim. Whereas if you allow him to take a verdict to the full value of his labor in the abstract, you may afterwards sue, and recover for your whole damage, though it exceed the value of his labor. (*Britton v. Turner*, 6 N. H. Rep. 481.) And see *Wadleigh v. Sutton*, 6 N. H. Rep. 15.

The prohibition against instituting several prosecutions for crimes of the like or of

different grades, founded upon the same transaction, is referrible to this principle forbidding several actions for the same demand. "If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen by unreasonable prosecutions." (Per Drake, J. in *State v. Cooper*, 1 Green's Rep. 375.) In *State v. Ingles*, (2 Hayw. Rep. 4,) A. had been indicted and convicted of an assault and battery upon B. and afterward, he was prosecuted along with others for a riot, and for beating and imprisoning B.; both offences grew out of the same transaction, and the former suit being relied on by A., it was held a bar. "The state," say the court, "cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offence compounded of them all; as for instance, just indict for the assault, then for a battery, then for imprisonment, then for a riot, then for a mayhem, &c.; but upon an indictment for any of these offences, the court will enquire into the concomitant facts and receive information thereof, by way of aggravating the fine or punishment, and will proportion the same to the nature of the offence as enhanced by all these circumstances, and no indictment will afterwards lie for any of these separate facts done at the same time." (id. p. 5.) So as to a former conviction under like circumstances. (*Commonwealth v. Kinney*, 2 Virg. Cas. 139.) The reporter (id. p. 140,) adds by way note as follows: "In this case the court was of opinion, that as the inferior offence of an assault and battery was included in the higher offence of a riot, and constituted a part of it, and the commonwealth had already elected to indict, and had actually convicted the defendant of that inferior offence, it was barred from prosecuting the defendant for the higher offence; for if this proceeding were allowed, then the defendant having been already fined and imprisoned for the battery, might be again placed in peril of another fine and imprisonment for a riot of which the battery of which he had before been convicted was a part and perhaps the chief part.

"An acquittal of manslaughter will bar a future prosecution for murder; 1 Chitty, 455, 6; 2 Hale, 246. And an acquittal of murder is a bar to an indictment for petty treason; Foster, 329. And I presume by parity of reasoning, a conviction of manslaughter will bar a prosecution for murder, and a conviction of murder a prosecution for petit treason; for the plea of *autrefois convict* depends on the same principle with the plea of *autrefois acquit*. 1 Chitty, 461.

"In cases of this kind, where two grades of offence are the result of the same act, it would seem that the attorney for the commonwealth should either begin with the higher, and, on failure, prosecute for the lower, or unite both offences in the same indictment under separate counts. Thus the three defendants might have been indicted for a riot and beating a man. If convicted, their punishment covers the whole ground, and they or either of them cannot be indicted for the battery alone. If acquitted, however, they could not plead *autrefois acquit* to a second indictment charging them with the battery, because, although they might not be guilty of a riot, yet they or some of them, might be guilty of the inferior offence. See 2 Leach, 716, *Vandercorn's case*, and 2 East's C. L. 519. But the better way is to charge the battery in the same indictment with the riot, under separate counts; there is no doubt that several misdemeanors may be joined in the same indictment. 1 Chitty, 254; 2 Chitty, 489, note." (id.)

The above distinction of the learned reporter between a conviction and acquittal, must depend on the question whether the indictment for the higher offence necessarily involve the lower. If it do, then no matter whether the result were a conviction or acquittal; the whole ground was covered and shall not be gone over again in whole or in part. To warrant the trial for the battery, after acquittal of the riot, we must first learn that there cannot be a conviction of the former under a simple indictment for the latter; for then, in respect to the verdict of acquittal, we cannot see that the whole ground was covered, though it would be by a verdict of conviction. (See ante, p. 956, et seq.)

The severance of the subject matter in any form, and prosecuting for part, followed by a trial on the merits, equally bars the whole. A criminal has in his possession forged bank bills on different banks, with intent to pass them. He is indicted and tried for the intent in respect to one of the bills: the whole being an entire offence, this will bar another indictment in respect to any other of the bills, though on a bank different from the first. (*State of Connecticut v. Benham*, 7 Conn. Rep. 414.) The decision is ably maintained in argument, and illustrated by several authorities from the English books, by Williams, J. who delivered the opinion of the court, (*id.* 417, 18;) thus: "It has been decided that a person indicted for stealing nine one pound notes, may be convicted upon proof of stealing only one. (*Rex v. John*, 3 Mau. & Selw. 539, 548. *Rex v. Clark*, 1 Brod. & Bing. 473.) There, the substance of the offence is stealing notes. Here, the substance of the offence is having in possession counterfeit bills or notes. The number may add to the evidence of guilt, but not to the number of the offences. In an action for the penalty for insuring tickets in a lottery, where ten tickets were insured at one and the same time, Lord Kenyon held that but one penalty could be recovered. *Holland, q. t. v. Duffin*, Peake's Cas. 58," &c. A plea of a former acquittal of the defendant, for an assault and battery, by a justice of the peace, was held a sufficient bar to an indictment alleging the same offence with the additional aggravating circumstance of the complainant's life having been thereby endangered. (*Commonwealth v. Cunningham*, 13 Mass. Rep. 245.) Where there was an assault and battery upon A. & B. by the same stroke, and the offender was legally convicted of the offence upon one, held that this barred a prosecution for the offence upon the other. (*State v. Damon*, 2 Tyl. Rep. 390.) The prisoner had been indicted and tried for the murder of Mary Anne Condon, and convicted of manslaughter. He had before been tried for the murder of Mary Cormack, and convicted of manslaughter, and received the benefit of clergy. The deaths of both proceeded from the same act; but Mary Anne Condon was not dead at the time of the first trial. Yet held, that the first allowance of clergy protected the prisoner against the second trial. (*Rex v. Jennings*, Russ. & Ry. 388.) In *Rex v. Smith*, (3 Carr. & Payne, 412,) two indictments for the same offence having been found, one charging it capitally and the other as a misdemeanor, the prosecution was put to elect which it would go upon; and an acquittal was directed as to the other. "Under the numerous British statutes, imposing severe penalties, and even taking away the benefit of clergy from larcenies perpetrated under certain specified circumstances, it is the practice to indict the crime, with all its aggravations under the statute; and if the aggravating circumstances are not proved, to convict of the simple larceny only. I have met with no instance of an attempt on the part of the crown, after indicting for a simple

larceny, and establishing that, to proceed by another indictment to establish the higher offence." (Per Drake, J. in *State v. Cooper*, 1 Green's Rep. 375.) A man was convicted of arson, in burning S.'s dwelling house. In doing so, he caused the death of H. who was burned in the house; for which murder he was indicted; but being arraigned, he pleaded *autre fois acquit*, or rather the whole matter specially, which was allowed as a good plea in bar of the indictment for the higher crime. Drake J. said, the proper course would have been to have indicted him for the murder, laying the means to have been by the arson, in which case he might have been acquitted of the former and convicted of the latter, and so the whole offence have been expressly covered. But he should not be deprived of his plea, because the state chose to indict and convict him for the inferior offence, the evidence as to both being identical. He likens the case to burglary and stealing, and a conviction of the latter, which he says shall bar an indictment for the former. (*State v. Cooper*, 1 Green's Rep. 361, 372, 374.)

In New York there are some statute provisions allowing conviction of an inferior degree of the offence indicted; but forbidding the conviction of an assault with intent to commit the crime, or of an attempt, when it shall appear that the crime was actually perpetrated. (2 R. S. 702, §§ 26, 27.) The 28th section (p. 702,) declares the conviction or acquittal on a charge of one degree of crime, a bar to prosecutions for any other degree, and for any attempt to commit the same or any other degree.

There are certain decisions which it is difficult to reconcile with the above doctrine. Such seems to be the case of *Bailey v. Taylor*, (2 Bail. Rep. 49, stated ante, p. 956 of this note,) where it was held that if one act comprise the requisite ingredients of two offences, the defendant may be prosecuted successively for each. And see the *State v. Yancey*, 1 N. Car. Law Repos. 519, stated ante, p. 959. So also with respect to the case of the *Commonwealth v. Roby*, (12 Pick. 496,) where it was held that a conviction for an assault with intent to murder, could in no case be pleaded in bar to an indictment for the murder itself. (See this case cited and commented upon ante, p. 958.)

Other cases come in as exceptions to the rule. Thus, if A. steal the goods of B., and on the next day steal the goods of C.; and D. becomes the receiver of all, at the same time and by one act; a conviction for receiving the goods stolen from A. is no bar to another indictment for receiving the goods stolen from C. For the guilt of the accessory has relation to the crime of the principal, and as the latter has committed two offences, so has the former. (*Commonwealth v. Andrews*, 2 Mass. Rep. 409.)

The admissibility of a former judgment or proceeding will depend on its relevancy. This is implied in all the cases showing how far and for what purposes a former suit shall bar or preclude. The point has been more obviously involved in certain cases where the former suit was offered as a link in a chain of proofs, or as a circumstance from which to infer particular facts; and in this light, the decisions we shall notice are somewhat allied to those where judgments &c., inter alios, have been offered to prove *rem ipsam*, for which see our next succeeding note.

The record of a judgment confessed by a tenant to his landlord for rent, was admitted in favour of the latter to show that the former had recognized the relation of landlord and tenant. (*Weidner v. Foster*, 2 Pennsylv. Rep. 25.) The record in a suit may also be received as a circumstance that the plaintiff intended to appropriate certain payments to other demands against the defendant. (*Peters v. Anderson*, 5

Taunt. 596.) The record of a former suit in a \$100 court, shewing a suit brought and discontinued by the plaintiff, will not be received against him, from which to infer that his demand does not exceed that sum. (*Sweigart v. Berk's adm'r*, 8 Serg & Rawle, 299.) Nor is a judgment obtained by the plaintiff's assignee for interest on a bond, relevant to show payment of interest in fact; or as conducive to prove such payment. (*id.*) So a judgment by default in an inferior court, in a cause removed by habeas corpus, and tried in a superior, is no evidence whatever against the defendant. (*Bottings v. Firby*, 4 Man. & Ryl. 567.)

It has before been shown that the case of *Vooght v. Winch*, stated by our author at p. 322 of the text, was erroneous in assuming that the defendant there, could, under the circumstances, have availed himself of the former verdict by pleading it as an estoppel. (Ante, note 558, p. 804.) To this extent, Mr. Starkie also, in the later editions of his treatise, pronounces the opinion in that case an *obiter dictum*, and doubts its soundness. (2 Stark. Ev. 706, note (c) 6th Am. ed.)

In our note above referred to, we ventured to say that a former verdict and judgment when properly admissible under general pleadings, will be equally conclusive as if specially pleaded. The supreme court of Vermont (Williams, J. delivering the opinion,) have recently laid down the same doctrine. Speaking with respect to a justice's judgment of a neighboring state, they say: "A judgment duly rendered, is conclusive between the parties, upon the subject in controversy. Whether it is plead in bar, or given in evidence, where it is proper to be given in evidence, its effect is the same. The merits of a regular judgment cannot be enquired into, where it is given in evidence under an improper plea, any more than when it is plead as a bar." (*Blodget v. Jordan*, 6 Verm. Rep. 590, 585.) See also *Starkweather v. Loomis*, 2 Verm. Rep. 573.

But in a case at *nisi prius* in England, to false imprisonment for arresting the plaintiff, the defendant plead, 1. That it was to bring the plaintiff to trial before a court martial; 2. That it was under the orders of a superior officer; and offered the conviction by the court martial as evidence to conclude. Abbott, C. J. held that to make it conclusive even as to the truth of the charges and grounds of arrest, the proceedings and sentence should have been pleaded as an estoppel. Not being so pleaded, he allowed an inquiry into that. (*Hannaford v. Hunn*, 2 Carr. & Payne, 108.) *Quere.* And see ante, note 558, p. 804; et seq. and the cases there cited.

We also examined the question ante, note 594, p. 844, et seq. whether a judgment will conclude, where no issue was taken in the suit in which it was rendered upon a "precise point." In addition to the cases there cited as maintaining the affirmative of the proposition, it has been directly held in Georgia, that it is not necessary that the fact to be proved by a former record should have been solely and specifically put in issue, in the first suit, but it is sufficient if it was a fact *essential to the finding of the verdict*. (*Crockett v. Routon*, *Dudley's Rep.* 254, 256.)

It was observed ante, note 590, p. 838, that when a question is made respecting the identity of matters sought to be barred by a former suit, parol evidence is admissible in aid of the record or proceeding. Additional illustrations of the same doctrine occur. In *Ruggles v. Alexander*, (2 Rawle, 236, 7,) it is said "that whether a former suit was for the same cause of action, is often, too often, the subject of parol proof; and to be proved in no other way. In all actions of assumpsit, and in all actions of ejectment, no

other proof can be adduced." Parol evidence is admissible to show the fact and reason why a demand, though presented, was shut out in a former action, as a ground for a recovery in the present; e. g. that it was not then due. (*M'Laughlin v. Hill*, 6 Vermont Rep. 20.) The account in evidence on the former trial may be resorted to. (*id.*) The pleading in the former suit covering the present claim, it was *prima facie* tried, and the *onus probandi* of the contrary, lies with the party now claiming against such presumption. (*M'Laughlin v. Hill*, 6 Vermont Rep. 20, 25. *Bridge v. Gray*, 14 Pick. 55. *Badger v. Titcomb*, 15 *id.* 409, 416.) Parol evidence from the justice himself, that he decided against the plaintiff in the former suit, on the ground that the rent now claimed was not due, was received, and held well in answer to the bar, in *Estill v. Taul*, 2 Yerg. 467, 471. So you may, where it is material, inquire of the justice or any other, whether the merits were gone into. (*Ferrell v. Underwood*, 2 Dev. 111, 114.) But you shall not be allowed to inquire what a particular judgment means; e. g. where the entry by a justice was that "in this case plaintiff pay costs;" held, that the justice could not be asked whether he considered it more than a nonsuit. (*id.*) A bill of particulars in the former suit was held admissible to show the matter which was in fact tried in the former action. (*Marsh v. Pier*, 4 Rawle, 273, 282.) In *Smith v. Kelly*, (2 Hall's Rep. N. Y. C. P. 217,) not only a bill of particulars was received, but the counsel sworn as to the grounds taken in defence and the judge's charge on the former trial, &c. in order to see whether the point now on trial came to the jury upon the first trial. As to parol evidence to identify the parties, see post, note 693, p. 975, 6, and *Lyon v. Chalker*, 2 Watts' Rep. 14, *Sadler v. Slabaugh*, *id.* 73, there cited.

The rule allowing parol evidence in order to identify the subject matter, merely extends to *explanation*; you shall never *contradict* the record. (Ante, note 590, p. 839, 840.) Accordingly, where the record distinctly shows the offence charged in a former indictment to be different from that charged in a subsequent one, the prisoner, for the purpose of establishing a bar, shall not be permitted to allege their identity. (*Rex v. Smith*, 3 Barn. & Cress. 502.) Further as to this distinction between contradicting and explaining a judicial proceeding, see *Yard v. Crammond*, (5 Rawle, 18,) where it was recognized as to the decision of commissioners under an American treaty with Spain.

NOTE 693—p. 380.

The same distinctions between parties, privies, and strangers, which are noticed in the text, p. 320 et seq. to p. 333, and in the notes connected therewith, are equally applicable in determining the admissibility and effect of former judicial proceedings of inferior courts. (See *Galbraith's leasee v. M'Gaw*, Addis. Rep. 305, 308.) We shall therefore here resume and pursue the subject of "verdicts and judgments with reference to the parties," irrespective of the dignity of the forum before which the former proceeding was had.

The general rule, that a judicial proceeding, ascertaining particular facts between two persons, is not to be used *against* strangers is sustained by the cases cited ante, note 557, p. 803, and also by the following cases: *Burnside v. Miskelly*, 5 Watts, 506.

Morgan v. Livingston, 6 Mart. Lou. Rep. 227. *Hyde v. Henry*, 4 id. N. S. 51. *Yard v. Hammond*, 5 Rawle, 44. *Williams v. Trepaignier*, 1 Mart. Lou. Rep. N. S. 271, 274. *Broussard v. Bernard*, 7 Lou. Rep. by Curry, 216, 223, 4. E. brought an action before a justice of the peace against *William Johnson and son*, for a penalty in selling liquor without licence, in which the jury found no cause of action; and held, that this was no bar to an action by the same plaintiff, before a justice, for the same penalty, against *William Johnson, son of William*: and the same was held of a previous judgment for the penalty before another justice, confessed in favor of P. by *William Johnson and son*, and paid: for, say the court, "the one judgment set up as a former acquittal, and the other as a former recovery, were not in the same right." (*Johnson v. Emmons*, 2 Penningt. Rep. 747.) A record is not evidence of the facts it contains, against the attorney on the record. He is not party nor privy for that purpose. (*Breedlove v. Turner*, 9 Mart. Lou. Rep. 353, 375 et seq.) A corporation is not bound by judgment or decree in a suit between its treasurer and others, the treasurer being named as party, unless he was by law authorized to represent the interests of the corporation in such suit. (*Hellain v. Maurin*, 8 Lou. Rep. by Curry, 111, 113.) A judgment in admiralty by privilege creditors against a steam boat, in which three fourths of the owners are parties, is not binding on the interest of the other owner, which is attached at the suit of his creditor. (*Hart v. Lodwick*, 8 Lou. Rep. by Curry, 164, 167.) T., the holder of a lease, drew an order on the lessee in favor of S. for the rent arrear which might be found due. The lessee having accepted the order, held, that a subsequent award and judgment between T. and the lessee, liquidating the amount, should not be received to affect S. (*Smith v. Hall*, 8 Greenl. 348.) A judgment was obtained at law against three out of four sureties. On a bill filed for contribution by the former against the latter, held, that he was not concluded by the judgment. (*Thompson v. Young*, 2 Ham. Rep. 334.) The grantee of land is not bound by a judgment in a suit commenced after such grant by his own grantor against the person from whom he derived title upon the covenants in his deed. Thus in entry sur disseisin, it appeared that the demandant being possessed, conveyed to F. with covenant of seisin, from whom the land came through mesne conveyances to the tenant. After F. had conveyed, he sued the demandant and recovered on the covenant of seisin, on the ground of course, that the demandant was not seized; and now the demandant relied on that judgment as against F.'s grantee, to show that not being seized, nothing passed by his deed to F., and so that nothing passed to the tenant. The court said, the tenant being neither party nor privy, was not to be affected by the action. (*Winslow v. Grindal*, 2 Greenl. 64.) See *James' lessee v. Stookey*, 1 Wash. C. C. Rep. 330. A verdict in ejectment rendered against one under whom the lessor of the plaintiff claimed, in favor of the now defendant, was held to be admissible in evidence against the plaintiff and received accordingly; but not as conclusive. (*Fellows' lessee v. Pedrick*, 4 Wash. C. C. Rep. 477, 8.) See ante, note 567, p. 813, 814. Though an absolute judgment against an executor or administrator concludes him as to a sufficiency of assets, yet the creditor is not concluded on that point in a suit against the heir; and even though such creditor be the executor or administrator himself, he may show a deficiency to pay all the creditors, in order to subject the real estate as against the heirs. (*Gaither v. Welch*, 3 Gill & John. 259.) Such judgment is no evidence against the heir of the original debt. (ib.) See on this subject the cases cited

ante, note 639, p. 921. An attorney and administrator sold slaves of the testatrix to H., and received the money, but never paid it over to the executrices. Afterwards, by a decree in favor of the heirs of the testatrix, against H. the purchaser, the sale was declared void, and the slaves decreed to the heirs. H. now sued the executrices for the consideration money. Held, that the decree was not evidence against them, farther than to prove the fact of its existence; not to establish the invalidity of the sale, which must be shown by evidence *aliunde*. (*Owings v. Hull*, 9 Pet. 607.) A. B. and C. were partners; and after the death of A., his survivors' B. & C., recovered judgment against D. A creditor of B. & C. then brought foreign attachment to recover the debt of D. Held, that the judgment did not preclude A.'s representatives from showing that B. & C. were debtors to the firm of A. B. & C., and had no interest in the debt against D., but that in truth it belonged to A. alone. (*Barber v. Hartford Bank*, 9 Conn. Rep. 407.) The judgment obtained by a minor against his tutor is evidence of his claim on the tutor's property sold to a third person. (*Bernard v. Vignaud*, 8 Mart. Lou. Rep. 442.) A judgment that a slave is free is evidence only against the defendant and those claiming under him posterior to the judgment. (*Kitty v. Fitzhugh*, 4 Rand. 600; and ante, note 566, p. 813.) See *Vaughan v. Phebe*, Mart. & Yerg. 1, contra, where it was held evidence of reputation in favor of the slave. But this depends on the question whether reputation be admissible on such an issue. In some states it is not, and in others it is. See our note on hearsay, ante, note 432, p. 558, 9; also, *Ulzere v. Poeyfarre*, 8 Mart. Lou. Rep. 155, 159; and ante, note 578, p. 820. A judgment that the mother was a slave, does not conclude the child against asserting her freedom. (*Toogood v. Scott*, 2 Har. & M'Henry, 26.) An indictment was against twelve defendants for an assault. Several had pleaded guilty, and the plea was entered on the indictment over their names. This was the only proof of an assault; and it was insisted that as the other defendants were participating in a riotous assembly, to which the assault was imputed by the indictment, they were also guilty; but Park, J., held the conviction of the other defendants, though in the same indictment, no evidence against these defendants. As the indictment did not conclude *in terrorem populi*, it came short of charging a riot; and inasmuch as the defendants could not therefore be convicted of that, a general verdict of not guilty was directed. (*Rex v. Hughes*, 4 Carr. & Payne, 373.)

But a judgment is evidence against parties and privies; and in general, courts will look and ascertain who are the *real* parties, and give effect to the former suit accordingly. (See ante, p. 324 of the text.) An adjudication on the title to slaves, or personal property, in a suit between the administrator and another, concludes the distributee. (*Head v. Perry*, 1 Monroe, 253.) So, in general, a recovery by one person against a trustee, after a *bona fide* defence, shall protect him against liability for the fund recovered to his *cestui que trust*, especially where notice of the suit was given to the *cestui que trust*. (*State, use of the President and Trustees of Charlotte Hall School, v. Greenwell*, 4 Gill & John. 407.) In *Mayer v. Foulkrod*, (4 Wash. C. C. Rep. 503,) a bill was filed to compel the defendants to pay to the plaintiffs a sum of money, which the defendants' intestate had been compelled by judgment to pay to another. It did not appear that the now plaintiffs were parties, or in any way participated, directly, by themselves or others, in the former suit; and yet Washington, J., held that the first suit having been defended in good faith before a court of competent jurisdiction, was

a bar to the second. This was certainly going beyond the general rule. How far it may have been justified will be collected from the reasoning of the learned judge, (*id.* 505 to 511.) Perhaps, after all, the case must depend for its support upon some express or implied countenance to the first suit having been given by the plaintiffs in the second. Where a vendor of goods brings trespass for taking them while in his possession, for the benefit of the vendee, the vendee, if the former action was by his consent, is barred of an action for the same goods. (*Boynton v. Willard*, 10 Pick. Rep. 166, 169.) And where a suit is brought against the vendor and tried, his vendee may avail himself of it. Thus, the plaintiff brought *assumpsit*, wherein his right to the goods was tried. Held, that he was barred by this of his action of *replevin* for the same goods against the vendee of the defendant in the first suit. (*Marsh v. Pier*, 4 Rawle, 273.) See *ante*, note 568, p. 814. Minors properly represented are bound by a judgment equally with persons of full age. (*Martin v. Martin's heirs*, 5 Mart. Lou. Rep. N. S. 165. *Brousseau v. Bernard*, 7 Lou. Rep. by Curry, 216, 223, 4.) So of a *feme covert*. (*Bradstreet v. Clarke*, 12 Wend. 602, 670, 1.) See *ante*, p. 323 of the text. In an action by the principal, for a false representation made to the agent, who did not disclose the name of his principal, and it was therefore objected that the action lay in the name of the latter only, per *Savage, C. J.*: "The defendant is liable but once. If the principal recovers, that recovery limits the extent of the defendant's liability; for if the agent should afterwards prosecute, the former recovery would be a bar." (*Raymon v. Howland*, 12 Wend. 178.)

If the parties were really different, though nominally the same, the judgment is not evidence. Accordingly, a former recovery and satisfaction in the name of an assignor of a note not negotiable, obtained without the privity of the assignee, after the assignment and notice thereof given to the debtor, was held no bar, to a subsequent suit in the name of the assignor, brought for the benefit of the assignee; especially as there was reason for believing that the former proceeding was collusive and in fraud of the rights of the assignee. (*Dawson v. Cole*, 16 John. Rep. 51. And see *Southgate v. Montgomery*, 1 Paige, 41.) "In civil actions the idea would not be endured that the rights of a nominal plaintiff, who had neither notice nor agency in relation to a suit, should be bound by a judgment. Much less would these rights be bound when the suit was instituted by the defendant himself with a view to defraud the plaintiff, and that view accomplished." (*The State v. Little*, 1 N. H. Rep. 257, 259, per *Woodbury, J.*) And this doctrine, in the case last cited, was directly applied to a former recovery before a justice of the peace, procured by the fraud of the defendant in order to bar a subsequent prosecution by indictment. Though the state was a party to both suits, it was only *nominally* so as to the first; and therefore held, that the latter might proceed. And see the next preceding note, p. 959. A verdict for the defendant, the maker of a note, in a suit by the payee in his own right, is no bar to a subsequent suit in the same name, brought for the benefit of the assignee of the note, who became such before the first suit was instituted. (*Burton v. Dees*, 4 Yerg. 4.)

This doctrine that courts will always take notice who are the real parties to a former suit, has been applied with increased liberality to inferior courts, not of record. Thus in Pennsylvania, where a party sold a note not negotiable, upon which the assignee sued in his own name; no objection on this ground was taken, and the assignee

failed on the merits : held, that this barred a suit in the right name. (*Lyon v. Chalker*, 2 Watts' Rep. 14. See ante, notes 562, 563, p. 812.) And the court say, "the only question is whether the name of the actual party before a justice can be shown by averment and evidence. In regard to the proceedings of a court of record, perhaps it could not, as regards the legal party who must be disclosed by the record ; but it is essential that there should be a different rule for proceedings before justices of the peace, from whom no more can be required than substantial justice, without respect for technical forms ; and as they are not judges of a court of record, the truth of the case in respect to their proceedings may be shown by parol, without any great violence to the principles of law." (id. 15, 16.) So on the other hand, where a justice entered judgment against two obligors in a joint and several bond, on the voluntary confession of one of them ; held, that this should be no bar to a suit on the same bond, against the non-appearing obligor. The action as to the latter was a nullity for want of jurisdiction, and therefore he could not avail himself of it. (*Saddler v. Slabaugh*, 2 Watts' Rep. 73.)

One rule, as we saw in the text, ante, 326, 7, is, that a stranger to a verdict or judgment cannot use it in his favor. (See also ante, note 571, and the cases there cited.) The general doctrine was recognized in *Fairchild v. Holly*, 10 Conn. Rep. 474, 478, stated *infra*. In an action by the covenantee on a covenant of seisin, a judgment in ejectment against the covenantor, by a third person, is not evidence of a title out of him. Had he succeeded, it would not be evidence for him. The right to use it must be reciprocal to warrant its introduction by either. (*Fitzhugh v. Croghan*, 2 J. J. Marsh. 442.) The record merely proves the fact that there was a judgment. (id. 440, 441.) See ante, note 561, p. 811.

The doctrine as laid down in *Baring v. Fanning*, stated ante, note 571, p. 818, seems to demand strict identity of parties. It must, however, admit of exceptions ; as, if a suit be brought and recovery had against one of several joint debtors, in which case it seems that, in Massachusetts, such recovery may be used by all, if sued afterward by the same plaintiff. (*Ward v. Johnson*, 13 Mass. Rep. 148.) See this last case cited ante, note 583, p. 823. And see also other cases following it there, for several instances where a former judgment has been used by one not a party to it. A conviction against one under an indictment for an assault and battery on H., may be used by him, in bar of an indictment against him and two others, for a riot and beating H., the assault and battery being the same in both cases. (*Commonwealth v. Kinney*, 2 Virg. Cas. 139.) See *S. P. State v. Ingles*, 2 Hayw. 4, 5. A party indicted for compounding a larceny and agreeing to withhold evidence, cannot use the acquittal of the person charged with the larceny, in bar of his own conviction. It is at most but *prima facie* evidence in his favor, and if he was a witness on the prosecution of the principal offender, it seems not to be evidence at all. (*People v. Buckland*, 13 Wend. 592.)

The rule as to identity of parties or privies does not universally apply to a court of exclusive jurisdiction. This will be seen by the cases cited in the text, ante, 340, et seq. and the notes. And we ventured, ante, note 609, p. 853, to make the rule itself broader than it stands in the text, by omitting the qualification that the parties must be the same.

It is we conceive on this principle that the adjudication of the fact of a pauper's settlement made by the general sessions, concludes against the town where the settlement is fixed by the decision, not only in favor of the opposite town, but any other town may come in and take equal advantage of the adjudication. Like an order of removal unappealed from, the sentence is conclusive against all the world. (*Dorset v. Manchester*, 3 Verm. Rep. 370, 371, and the cases there cited. And see *Gibson, v. Nicholson*, 2 Serg. & Rawle, 422) The reversal of an order of justices because the settlement of the pauper was in Clifford, was held to conclude a town afterwards set off from Clifford. (*Id.*)

The distinction between the case of judicial proceedings introduced as a medium of proving facts found by them, and the case where they are brought forward merely to establish the fact of their own existence, and those legal consequences which result from their existence, was noticed in respect to courts generally, ante, notes 582 and 583, p. 820, 821. It is scarcely necessary to observe that this doctrine is as applicable to the proceedings of inferior jurisdictions, as to other courts; and we shall therefore proceed to give additional illustrations drawn from both classes of decisions. See *Newport v. Cooper*, (10 Lou. Rep. by Curry, 155, 159,) where this distinction was recognized in respect to the adjudication of the board of land commissioners in Louisiana. The order of the court of probate, appointing a curator, is evidence to prove the fact of appointment, though the proceedings were *res inter alios acta*. (*Thompson v. Chauveau*, 6 Mart. Lou. Rep. N. S. 458, 461.) The proceedings of bankrupt commissioners may be received to shew the fact that the man was declared bankrupt, though not to show his act of bankruptcy. (Conceded, in *Wood v. Grundy*, 3 Harris & John. 13, 18, 19. And see *Hunter v. Jones*, 6 Rand. 541; *Barney v. Patterson's lessee*, 6 Har. & John. 182.) The doctrine is more frequently adverted to and more amply illustrated in the cases relating to proceedings of courts of record. A former judgment is always admissible to prove *rem ipsam*, i. e. that such a suit was brought and prosecuted to judgment. Its relevancy and effect are another matter. (*Prall v. Peet's curator*, 3 Mill. Lou. Rep. 274, 283. *Thompson v. Chauveau*, 6 Mart. Lou. Rep. N. S. 461, 2.) A recovery in ejectment against an alienee in the most remote degree, or against the tenant under him, is evidence against the first warrantor to prove the fact that such eviction had been, but not that it was by title paramount, (*Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 440, 441, S. P.;) that must be made out by evidence *aliunde*. (See *Booker's adm'r's v. Bell's exr's*, 3 Bibb, 174; *Devour v. Johnson*, 3 Bibb, 409, 410; *Cox v. Strode*, 4 Bibb, 4; and *Gaither v. Brooks*, 1 Marsh, 409.) See also ante, note 570, p. 817. "The rule of evidence adjudged in these cases is in principle applicable to all cases of record between others, where upon the fact of the former trial and recovery, the interests of others hang as incidents or consequences. And this seems to have been the view taken in the cases of *Lewis v. Knox*, 2 Bibb, 454, and *Barr v. Gratz*, 4 Wheat. 213, 220. That such suit was brought and such recovery had, are facts to be proved by the record. The consequences to others, resulting from those facts, apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defence." (Per Bibb, C. J. in *Head's rep's v. M'Donald*, 7 Monroe, 206, 7.)

We saw ante, note 583, p. 823, that a judgment *inter alios*, is sometimes admissible to show an election. Accordingly, where the property of a stranger is wrongfully levied on by a sheriff and sold, and the vendee sells to another, and the stranger sues and recovers satisfaction of the last vendee; this bars all recourse by the stranger to the sheriff and the intermediate vendee; the latter is liable over to his vendee; and in such a suit, also, the record is evidence. (Head's rep's v. M'Donald, 7 Monroe, 203.) The election concludes the stranger in such case, and determines the order of recourse among the other persons concerned. It is not evidence as to the want of title between the vendor and vendee; but that question is still open for the jury. (id. 206, 7.) Under a statute of South Carolina giving a slave owner an election to indict or bring an action against the harbourer of his slave, it was held that an indictment barred a civil suit by determining the plaintiff's election. (Johnson v. Lemons, 2 Bail. 392.)

A former record and proceedings are always admissible even against strangers, in the deraignment of title. The plaintiff claims through a judgment, decree, and sale thereon, by execution or otherwise. The defendant claims by title paramount. Yet the plaintiff may and must, in deducing his title, use the records, executions, or orders and deeds of sale; and it is not for the defendant to gainsay these because of error, irregularity, &c. (Barney v. Patterson's lessee, 6 Har. & John. 182. Sinclair v. Jackson, ex dem. Field, 8 Cowen, 543, 578. Koogler v. Huffman, 1 M'Cord, 495. Hall v. Carruth, 1 M'Cord, 507. Thompson v. Chauveau, 6 Mart. Lou. Rep. N. S. 462.) See also ante, note 583, p. 822, 3.

The conclusive character of a conviction of the principal, as evidence against the accessory, to establish the *rem ipsam*, which we noticed ante, note 582, p. 820, was extended as against a free white man, to the summary conviction of a slave before a court of magistrates and freeholders. As to the actual guilt of the principal, it was, according to the general rule, deemed only *prima facie* evidence. (State v. Sims, 2 Bail. 29, 34, 5. Per Nott, J. in State v. Wright, 4 M'Cord, 362, 3.) It was deemed safe in these cases to apply the rule thus qualified, although the court which tried the slaves had no jurisdiction over a white man concerned either as principal or accessory in the commission of the crime. And see State v. Crank, 2 Bail. 66. The general doctrine contained in the note above referred to, was recognized by the supreme court of New-York in The People v. Buckland, 13 Wend. Rep. 592, 594, 5.

In speaking as to this rule of judgments, &c. to prove *rem ipsam*, ante, note 583, we observed that a judgment rendered by a person having authority is admissible to protect him against actions for things done within the scope of that authority. (Id. p. 822.) In such cases, as we there saw, though the judgment is entirely *res inter alios acta*, as to the judge himself, yet it may be used by him; not for the purpose of showing the facts upon which it is founded, but in order to prove the fact of its own rendition, and thus establish the immunity of the judge, which is a legal consequence of the judgment. (Id.)

The principle of this doctrine has more frequently been invoked for the protection of inferior magistrates, and other persons clothed for the time being, with special and limited judicial powers, than in other cases. The authorities agree that if the tribunal hath jurisdiction, however erroneous or irregular the proceedings may be, the persons constituting it shall be protected by, and may avail themselves of such pro-

ceedings, until directly reversed on appeal, error, certiorari or otherwise. This was fully shown by Baron Powell, in *Gwinne v. Poole*, (2 Lutw. 1561, 2. See ante, p. 357 of the text.) And accordingly, where a commissioner for discharging insolvents acquired jurisdiction by a proper petition and other papers; though his proceedings were quite irregular, and in disregard of substantial forms, he was held not liable. (*Cunningham v. Bucklin*, 8 Cowen's Rep. 178.) In this case too, the statute declaring the discharge conclusive, he was held not liable even for fraud and corruption. We saw the general notion applied to probate proceedings, ante, note 620, p. 863. It has been applied to a justice's conviction of a contempt, which was held to protect him against an action; (*Lining v. Bentham*, 2 Bay. 1; *State v. Johnson*, id. 385;) though agreed that a judge is always liable for wilful misconduct, fraud or corruption, even where he has jurisdiction. This doctrine of judicial power, and of inviolability for honest error, is recognized by all the cases. We shall refer to but few for the general rule. (*Ely v. Thompson*, 3 Marsh. 76. *Kempe's lessee v. Kennedy*, 5 Cranch, 173. *Cottom v. Cottom*, 4 Rand. 192. Per Parsons, C. J. in *Dillingham v. Snow*, 5 Mass. Rep. 558, 9. Per Trimble, J. in *Elliott v. Piersol*, 1 Pet. S. C. Rep. 340. *Simms v. Slacum*, 3 Cranch, 300, 306, 7. *Macon v. Cook*, 2 Nott & M'Cord, 379. *Farwell's petition*, 2 N. H. Rep. 123. *Blanchard v. Goss*, 2 N. H. Rep. 491, 493. *Hines v. Oldham*, 3 Monroe, 266, 7. *Starr v. Starr*, 1 Hamm. 321, 326. Per Holt, C. J. in *Groenvelt v. Burrell*, Salk. 396. *Fuller v. Hotch*, Holt, 287, 8, 7 W. 3. *Haskell v. Sumner*, 1 Pick. 459. *Moor v. Ames*, 3 Cain. Rep. 170. *Hogan v. Mahon*, Hud. & Brooke, 284.) The decision of a militia court martial was held conclusive as a protection to the officers composing it, though the notice to the delinquent to appear was merely by a general proclamation on muster day. (*Macon v. Cook*, 2 Nott & M'Cord, 379, 380. *State v. Wakeley*, id. 412.) Trespass was brought against a coroner, for turning the plaintiff out of the room where the former was engaged in taking an inquisition. The court held that the action did not lie; that the coroner having jurisdiction and being a judge of record, his decision, and the consequent expulsion could not be questioned in that form. The coroner might very properly desire to proceed in secret. (*Garnett v. Ferrand*, 6 Barn. & Cress. 611.) And per Lord Tenterden, C. J. "Even inferior justices, and those not of record, cannot be called in question for an error of judgment, so long as they act within the bounds of their jurisdiction." (Id.)

So, in various other instances where similar proceedings become necessary as a defence to third persons; and in general they are not only admissible, but when thus introduced, are unimpeachable for mere error or irregularity. This doctrine was well considered and illustrated upon objections to proceedings in a justice's court, in Vermont. The proceedings were in a wrong name, and conducted upon process of such form as the statute declared to be void; or at least this was conceded. Yet, held, that they were a protection to the persons acting under them. (*Allen v. Huntington*, 2 Aik. 249.) An inquisition appraising damages, made by two out of three commissioners under a turnpike act, is conclusive as to all their proceedings. And if jurisdiction appear, irregularities, as that one of the appraisers was not qualified to act, he not being a freeholder as required by the statute, cannot be shown collaterally, in an action against the turnpike company or their agent. The only remedy is by certiorari. (*Van Steenbergh v. Bigelow*, 3 Wend. 42.) Where trustees of a school

district apportioned the tax including the collector's per centage, though otherwise directed by statute, this was held mere error, not excess of jurisdiction; and that they would not therefore be liable as trespassers. (*Easton v. Calendar*, 11 Wend. 90.) But see *Libby v. Burnham*, 15 Mass. Rep. 144, 147. A sentence of sub-commissioners of excise condemning excisable goods as forfeited, was held conclusive in favor of the revenue officer, in trespass against him for seizing the goods; (*Maingay v. Gahan*, 1 Irish T. R. 1 to 80;) and it was held *prima facie* evidence of probable cause in an action for malicious prosecution against the revenue officer. (*Hall v. Graham*, 1 Irish T. R. 469.) For the great body of the English cases on this head, see ante 357 of the text, and *post*, vol. 2, p. 415 to 419. The same protection was yielded in favor of a collector of militia fines: and held, that the delinquent in an action against such collector cannot allege, after having been convicted of delinquency, that he is exempt from military duty. The liability to do military duty is the foundation of the fine; and the adjudication upon this, as upon every other fact necessary to be made out by the prosecution, is conclusive where the same fact comes in controversy. (*Fox v. Wood*, 1 Rawle, 143, 145, 6.) The decision of road commissioners, that one is not exempt, who in fact is so, is conclusive. (*Harrington v. Commissioners, &c. of Newberry Dist.* 2 M'Cord, 400.) So of the decision of the managers (canvassers) of a county election, that a sheriff is duly elected; and consequently this cannot be questioned by *quo warranto*; but only by *certiorari*. (*State v. Delieesseline*, 1 M'Cord, 52, 64. *Grier v. Shackelford*, cited and stated by Nott, J. at the latter page, S. P.) And where an overseer of highways adjudged one in default for not working, and obtained a warrant of distress from a magistrate; held, that the overseer was not liable, though there had been no default. (*Freeman v. Cornwall*, 10 John. Rep. 470.) The sheriff was protected by an erroneous discharge of a prisoner by a judge on *habeas corpus*, the judge having jurisdiction. (*Bender v. Graham*, 1 Alab. Rep. 269.) So a party is protected in taking out a search warrant from a justice, on a mere oath of suspicion that the property was stolen and concealed near the plaintiff's premises, without any direct allegation, or showing particulars. (*Elsee v. Smith*, 1 Dowl. & Ry. 97.)

Even where a judgment is declared void by statute, because the proceedings are not conducted in a particular manner, or the like, yet the court will look to the object of the declaration, and in whose favor it was intended to operate; and will by no means give such effect to the statute as shall subject persons acting under it as trespassers. This has been repeatedly held. (*Griffin v. Mitchell*, 2 Cowen's Rep. 543. *Prigg v. Adams*, 2 Salk. 674, admitted as law in *Butler v. Potter*, 17 Johns. Rep. 145. *Colvin v. Luther*, 9 Cowen's Rep. 61, 64.) Thus, in New York, an act (sess. 41, ch. 94, § 6 and 7,) empowered a justice of the peace to render judgment on a confession for 100 dollars, and if the judgment exceeded 50 dollars, the defendant was required to set forth in writing the items of the plaintiff's demand, and make oath, &c., and if these requisites were not complied with, the judgment was declared void. Yet held, that where the items and oath were omitted, the judgment was sufficient to protect the attorney for the plaintiff from an action for false imprisonment, who caused execution to be issued on it; for the legislature intended that the judgment should be void as against creditors only. (*Griffin v. Mitchell*, *supra*.) See also *Germon v. Swartwout*, 9 Wend. 282; *Case v. Redfield*, 7 id. 398.

For further illustration of the same general doctrine, and as against whom and upon what grounds the former proceeding shall be held void, &c., see our next note, post.

The former proceeding, whether produced to prove *rem ipsam* merely, or for other purposes, must be relevant. We saw ante, note 583, p. 824, that a judgment *inter alios* is sometimes admitted to prove that a particular person has abandoned his title, suffered it to be barred, or revoked a deed. And in our next previous note, p. 970, 1, when speaking to the point of relevancy, we saw also that a former suit may be received as a link in a chain of proofs, or as a circumstance upon which to found some pertinent inference. The same is true in respect to judgments *inter alios*, as is obvious from many of the authorities cited supra in illustration of the doctrine of former proceedings to prove *rem ipsam*. The consideration of relevancy seems to have been yet more distinctly involved in some other cases of a kindred though peculiar character. Thus in an action for the price of land bargained, where the defendant has proved a judgment evicting him, the plaintiff may shew the recorded renunciation of that judgment by the one who recovered it, in order to establish fraud in the proceeding or otherwise destroy its effect. (*Melancon's heirs v. Duhamel*, 4 Mill. Lou. Rep. 362.) Where the defendant being now sued for money which he had collected as attorney for the plaintiff, offered in evidence the record of a former suit in favor of the now defendant against the plaintiff's brother and agent, wherein the now defendant (then plaintiff) had credited the brother with the monies sued for: this was clearly *inter alios acta*, and so held by the court; yet they allowed the jury to infer from the relation between the now plaintiff and his brother, who was his agent, and the conduct and long silence of the former, that the credit had been acquiesced in and approved by him, even if not made originally with his consent. Such assent would be equivalent to an original authority. (*Kemper v. Turner*, 2 Mill. Lou. Rep. 149, 150.) In an action brought on a guaranty by the defendant for advances made by the plaintiff to B., the defendant, to shew payment in part, proved a judgment by the plaintiff against B., and an extent of land. In answer, the plaintiff offered to show a second judgment, recovered by him against B. in debt on the first, on the ground that the title to the land extended on the first had failed. Held admissible, to disprove the part satisfaction. (*De Forest v. Strong*, 8 Conn. Rep. 513, 521.) The guarantor was denied the right to impeach the second judgment for error, although he was a stranger. (*id.*) Where an action was entirely of a possessory character, and it became material for the defendant to show acts of ownership and possession on his part, a summary statute proceeding by the defendant as landlord, before a justice of the peace, to obtain possession from his tenant who had no connection with the plaintiff, was held admissible against the latter, so far as they went to establish the *rem ipsam*. (*Richardson v. Scott*, 6 Lou. Rep. by Curry, 54, 56, 58.) In ejectment by a sheriff's vendee, a judgment in his favor against the defendant whose land was sold, was received as pertinent, along with other circumstances, to show how the former paid the sheriff for the land. (*Hartman v. Stahl*, 2 Pennsylv. Rep. 223.) So a judgment is evidence in favor of a creditor seeking to avoid a sale by his judgment debtor as fraudulent. While it concludes the debtor, as to the indebtedness, it is *prima facie* evidence against the alleged fraudulent vendee, who may in turn impeach the judgment as collusive in respect to himself. (*Garland v. Rives*, 4 Rand. 282. *Serapurn v. La Croix*, 1 Mill. Lou. Rep. 373, 379, 80.) If the judgment was obtained before the alleged fraudulent conveyance or assignment, it is conclusive against the

assignee. (*Rogers v. Rogers*, 3 Paige, 379.) In debt for tolls claimed by the plaintiff as lessee, under the mayor and burgesses of Northampton, for carriages passing through a certain street in Northampton, and for cattle sold in the market there, an exemplification sealed of a judgment in the king's bench, in the case of *The Mayor of Northampton v. Ward*, 2 Stra. 1238, was produced from the muniments of the corporation. The record was read, and stated that the declaration was in trespass for putting up a stall in the market. Sir J. Scarlett objected—"It is not relevant. The true nature of it is to show a right of soil; and that, as against an individual, has nothing to do with a right to take toll." Tindall, C. J.: "I cannot say that it may not connect itself with the issue as the cause proceeds. The justification is of a right to set up a stall without paying toll. I cannot say that it may not be evidence to affect the question in issue." (*Lancom v. Lovell*, 6 Carr. & Payne, 437.) But an information against the corporation, in the nature of a quo warranto, by the attorney general, in the reign of Elizabeth, was held inadmissible in any view to lay the foundation of showing a new charter, nothing having been done thereon. (*id.*) Though a judgment against administrators will not be evidence of the debt against the heirs, yet it is material to show that, and the execution returned *nulla bona* against the former, as the condition on which to charge the heirs, and for this purpose the record shall conclude. (See per Walworth, Ch., in *Scott v. Young*, 4 Paige, 546.) In an action of trespass against grand jurors in Connecticut, for taking and detaining the plaintiff's horse and gig, the defendants justified, alleging that the plaintiffs were unlawfully travelling upon Sunday; that the defendants seeing them in the act, stopped the horse for the purpose of arresting the plaintiffs, who thereupon fled, leaving the horse and gig in the defendants' possession. The defendants claimed to have made out these facts on the trial; and for the purpose of showing the fact that an arrest was afterward made and duly followed up, they were allowed to introduce the record of a justice, before whom the plaintiffs were brought the next day and convicted of the offence imputed. It seems, however, not to have been held evidence of the plaintiffs' actual guilt. (*Ward v. Green*, 11 Conn. Rep. 455.) Where the record is not relevant, it is to be rejected on that ground; as where a suit by the defendants against the plaintiff was sought to be proved, from which to infer that the defendants' testator had accepted the covenant on which the present suit was brought. The record in the first suit not showing any connection of that suit with the covenant now in question, it was rejected as irrelevant. (*Bate v. Lewis' ex'rs*, 1 J. J. Marsh. 313, 315, 16.)

We had occasion, ante, note 570, p. 817, to notice the effect of a judgment against vendees, warrantees, persons indemnified, &c. as evidence against their vendors, warrantors, indemnitors, &c.; as to which we shall here set down some additional cases. The rule, it will be recollected, was, that the person answerable over having no notice of the suit, the record shall merely be evidence of the fact of the recovery; but notice being given or a chance to defend being otherwise afforded, that makes him a privy to the suit, and concludes him. The former was held of a judgment against the sheriff for the default of his deputy, when offered as evidence in a suit by the sheriff against the deputy and his sureties to recover over. (*Lewis v. Knox*, 2 Bibb, 453. *Johnson v. Thompson*, 4 id. 294.) So in an action on a covenant of warranty, though the judgment of eviction against the warrantor be material to show the breach of the covenant, yet the farther effect of the record depends on the fact whether the warrantor had

notice of the suit and an opportunity to defend it. (*Key v. Walker*, 7 Lou. Rep. by Curry, 297, 300.) And see *Boorman v. Johnston*, 12 Wend. 567, 570, 572. And though judgment against an attaching officer, in trover for the property by a third person, be evidence against the attaching creditor, it is not conclusive upon him, unless he have had due notice of the suit. (*Peaslee v. Staniford*, Brayt. 140.) So of a recovery against a purchaser of personal property, in a suit by him against his warrantor. (*Stephens v. Jack*, 3 Yerg. 403.)

Several cases of this class were also considered *supra*, while speaking of records as evidential of themselves, the fact of their existence, and their legal effect. It is in this view that they are received to fix the amount of damages which the party seeks to recover over, or to shew the breach of some covenant, as of warranty against eviction, &c. (See *ante*, note 583, p. 821, 2.) The record and judgment in a suit by another party against the defendants, condemning them to pay damages occasioned by the plaintiff's misconduct while in their employ, was held admissible to prove *rem ipsam*, i. e. that the money was recovered. And as the plaintiff against whom it was sought to be used in this case, had notice, and appeared to have felt that he had some interest to prevent the decision which took place, and exerted himself accordingly, held that it must exculpate the defendants from the charge of collusion; though it seems not to have been held to conclude the plaintiff on the point of his misconduct. (*Davis v. Louisiana Tow-Boat Co.*, 9 Lou. Rep. by Curry, 575.)

The effect of notice we saw *ante*, note 570, p. 816, et seq. One instance there given p. 817, is of a warrantor of title with notice of a suit against his vendee upon the point of title. This doctrine was applied in its full extent to a suit in a justice's court in *Brewster v. Countryman*, (12 Wend. 446.) An assignee who is bound to indemnify his assignor, and appears and defends a suit against him, is concluded by the record. (*Curtis v. Ciska's adm'rs*, 1 Hamm. Rep. 436 to 438.) So the vendor of a note, with warranty or fraudulent representation that the maker had no set off, was held concluded by the record allowing a set off, the vendor having been present at the trial and assisted in resisting the set off. (*Walker v. Ferrin*, 4 Verm. Rep. 523, 529, 530.) So as to indemnitors. Thus, where the defendants gave a bond to the plaintiff to indemnify him as special bail for P: being sued as bail, he gave notice of the suit to the defendants. There was a good defence in behalf of the bail, but neither he nor the defendants availed themselves of it: and held, that the duty of defence lay on the defendants exclusively, and that in an action against them, the record of judgment against the bail was conclusive. (*Beers v. Pinney*, 12 Wend. 309.) The mode of proceeding in Connecticut to give notice to a warrantor of land, by the warrantee, of a suit by ejectment against him to recover the land, and the effect of such notice, or his defending the cause without notice, will appear by *Belden v. Seymour*, 8 Conn. Rep. 304, 308. If he do not defend, the judgment fixes the amount of damages; if he do, it is strong, if not conclusive evidence on the title. (*Per Daggett, J. id.* 308.) It is the same, if the recovery is against the tenant of the warrantee, as where it is against himself. (*id.* 304, 309, and the cases there cited.) In Pennsylvania, a similar doctrine prevails, (*Collingwood v. Irwin*, 3 Watts' Rep. 306;) and where notice does not appear on the record, the question whether it was actually given is matter *in pais*, to be decided by the jury. (*id.*) As to what shall be sufficient evidence of notice, see *id.* In that state parties claiming adversely, though not originally on the record, are al-

lowed in certain cases to come in even in courts of law, and interplead, by which they are concluded. (*Coates v. Roberts*, 4 Rawle, 100, 109 to 111.) Accordingly, a recovery in scire facias on a judgment in foreign attachment against the garnishee, was held to conclude and bar another creditor's right to come in by action against the same garnishee, and contest the bona fides of the first recovery, he, the creditor, having interpleaded or taken defence in the scire facias. Yet it was conceded that he might even then shew fraudulent collusion between the original parties; such as to obstruct the fair litigation of his own claim; and so be let in to try his action. (*id.* 111.) A mortgagor having been sued in ejectment, gave notice to his mortgagee, who declined defending, and the former then gave a cognovit, and came in under the plaintiff in ejectment. In ejectment by the mortgagee, held, a conclusive defence for the mortgagor. (*Jackson ex dem. Vredenburg v. Marsh*, 5 Wend. 44, 46.)

But a stranger to the suit, is in no way affected by these notices; nor by aiding in the defence. (*See Burnside v. Miskelly*, 5 Watts, 506, 7, 8.) Thus a master being notified and attending to defend his slave against the charge of stealing, the conviction was holden not admissible in an action of slander by way of fixing the charge upon the former. (*Nelson v. Evans*, 1 Dev. 9.) See ante, note 569, p. 816, 817, as to the relation in which one, not a party, must stand to a cause in order to be bound by the judgment. If one having no right to interpose in a suit, do yet actually come in, and contest his right, the decision it seems will bind him. (*Burnside v. Miskelly*, 5 Watts, 506, 508, per Sergeant, J.)

We noticed ante, note 569, p. 816, several authorities as to the effect of a verdict or judgment, &c. against the principal when given in evidence to charge the surety. We shall here introduce some additional cases on that head, premising that it may be advantageously studied in connexion with the text ante, 258, 9, and the note to that page (ante, note 485, p. 669, et seq.) in respect to the effect of confessions, entries, and other acts of the principal, as against his surety.

The question on the effect of a decree, in a court of probate or chancery, made against an administrator and introduced to charge the surety, was considered to some extent ante, note 620, p. 866, 7, while treating of the decrees of those courts as evidence generally. The cases of *Simkins v. Cobb*, 2 Bail. 60, *Lyles v. Caldwell*, 3 M'Cord, 225, 6, *Ordinary v. Robinson*, 1 Bail. 25, 27, *Shelton ads. Cureton*, 3 M'Cord, 412, *Lucas v. Curry's ex'rs*, 2 Bail. 403, 406, and *Lyles v. Brown*, 1 Harp. Rep. 31, were there stated, and their bearing on the surety briefly noticed. The result seems to be that the decree is, at least, prima facie evidence against the sureties, in a suit upon the bond, though they were not made parties in the court of probate or chancery. This conclusion seems to rest on the condition in the bond that the administrator shall render an account, which means, before the proper court. The surety binding himself to this, it is considered a stipulation that he shall abide the accounting of the principal alone. This act of accounting, and the decree which follows, thus becomes a part of the *res gestae* within the terms of the condition.

To proceed, however, with some other cases: a judgment in favor of a creditor against the administrator, was held conclusive against the sureties as to the nature of the debt, viz. that it was not the debt of the administrator personally; but was due from the intestate. The court say, "The responsibility of securities being incidental and collateral to that of the principal, the judgment concluded as to the existence and character of the debt." (*Hobbs v. Middleton*, 1 J. J. Marsh. 176, 179.)

A judgment against the principal, of course concludes the special bail. (Lewis v. Brackenridge, 1 Blackf. 112, 116, and the authorities there cited.) But where a surety bond was for the faithful performance of Owen's duty as deputy sheriff and collector, and a judgment was obtained against Owen for his official default; held, that the record was not admissible in evidence against the surety. (Beall v. Beck, 3 Har. & M'Henry, 242.) In Lartigue v. Baldwin, (7 Mart. Lou. Rep. 193,) A. had executed a bond to C. as surety for B. conditioned to indemnify C. against any loss he might suffer in consequence of an attachment sued out against him by B. in case the attachment should not be prosecuted to effect; B. having failed in the suit, C. sued him for damages and recovered judgment; but being unable to collect them by execution against B., C. now prosecuted A. on his bond. The district court received the record in the suit against B. as, per se, sufficient evidence against A. On appeal, the evidence was disallowed; and per Derbigny, J. "There is no rule in our laws better understood, than that which allows the surety the right of availing himself of the same means of defence (save those that are merely personal,) which the principal debtor could resort to. That principle is founded on the sacred maxim, that no one ought to be condemned without being heard; and that consequently no person shall be bound by a judgment to which he is not a party."

A judgment against an administrator, suggesting a devastavit, is not conclusive in a subsequent action against his sureties in his fiduciary bond. (Fountleroy v. Lyle, 5 Monroe, 266, 267.) Reliance was placed in this case on the words of the Kentucky statute, which authorized a plea of plene administravit in an action suggesting a devastavit, even by the administrator after a general judgment against him. It was concluded that the sureties ought of course to have the same right, though not named in the statute. (id. 267, 8.)

In New-York, where an action is brought against the sheriff for an escape of a prisoner from the prison bounds, and the prisoner and his sureties have due notice of the suit, the judgment against the sheriff will be conclusive evidence of his right to recover, on the bond for the jail liberties, against the prisoner and his sureties, as to all matters which were or might have been controverted in the action against the sheriff. (2 R. S. 435, § 49.)

A former judgment against the principal and satisfaction, is a bar to a suit against the sureties; but a simple judgment without satisfaction is no bar. This was held of a former judgment against the principal, maker of a promissory note, pleaded in bar to a subsequent action against his surety. (M'Donald's adm'rs v. Pickett, 2 Bail. 617.) So a judgment in assumpsit against the sheriff for money collected by him, as such, is no bar to an action on his surety bond against the sureties. (State Treasurer v. Oswald's sureties, 2 Bail. 214.) Where there was judgment against the principal, execution, default to return it, and judgment for that cause against the officer who had collected the money; yet held, no bar to an action against the original debtor's sureties, there being no actual satisfaction by the suit against the officer. (Rutland Bank v. Thrall, 6 Verm. Rep. 237.) *A fortiori* a judgment against a debtor shall not bar a suit against his sureties in a collateral covenant to pay the debt. (Commissioners v. Canan, 2 Watts, 107.)

And we saw, ante, note 262, p. 266, 7, and note 593, p. 823, that where one of two joint debtors or wrong doers have been sued and a trial had, the record as to the case of the debtors, is a bar in favor of the one not sued; and may, in the case of wrong doers, become material as a medium of proof to show payment, or satisfaction, or election, especially when connected with the execution. This doctrine, as it respects joint debtors, was held in *Wilson v. Hirst*, 4 Barn. & Adolph. 156, on the question whether a release by a partner sued, to his partner not sued, would make him competent as a witness for the defendant. That a judgment against one of two joint debtors bars all remedy against the other, was also held in *Beltzhoover v. The Commonwealth*, 1 Watts, 126; *Williams v. M'Fall*, 2 Serg. & Rawle, 280; *Downey v. The Mechanics' and Farmers' Bank*, 19 id. 288; and *Bedell's adm'r v. Keethley*, 5 Monroe, 601. See also *Vaneman v. Herdman*, 3 Watts, 202. The rule that a judgment obtained against one of two or more joint debtors, bars a suit against all, applies only where the judgment is based upon the *same matter, cause and thing*, for which the second suit is brought. Hence several persons being jointly indebted on book to A.; B., one of the debtors, gave his separate note for such indebtedness, which, though received by A., was not accepted in satisfaction of his claim; and A. afterward recovered judgment on the note; held, that the judgment, as such, was no bar to a suit by A. on the original demand against all the debtors. (*Fairchild v. Holley*, 10 Conn. Rep. 474.) Otherwise, if the judgment had been satisfied. (*Id.* And see *S. P. Drake v. Mitchell*, 3 East, 351.) Where one of two joint promissors resides in a foreign state, and is sued to judgment there, this will not bar a domestic suit against the other without actual satisfaction; for the separate residence severs the remedy; and each may be proceeded against severally. (*Dennett v. Chick*, 2 Greenl. 191. And see *Tappan v. Bruen*, 5 Mass. Rep. 193, *Russell v. Allen*, 8 Mass. Rep. 424 note, and *Ward v. Johnson*, 13 Mass. Rep. 148, all of which are cited and considered by Mellen, C. J. in *Dennett v. Chick*, together with *Sheehy v. Mandeville*, 6 Cranch, 253.) A recovery, without satisfaction, against one of two obligors in a *joint and several* bond is no bar to an action against the others; (said in *State Treasurer v. Oswald's sureties*, supra; *Braman v. Howk*, 1 Blackf. 392, S. P.) So in Pennsylvania, as to a former recovery against both, had on the confession of one; this will not bar a suit against the other, it being a nullity as to the latter. (*Sadler v. Slabaugh*, 2 Watts, 72.) A sheriff and his deputy being jointly and severally liable for money collected by the latter, a recovery against the latter is no bar to a suit against the former. (*Christian v. Hoover*, 6 Yerg. 505.)

If a plea be of a former recovery against a joint wrongdoer, it should show actual satisfaction. (*Park v. Hopkins*, 2 Bail. 411.)

We also saw, ante, note 593, p. 823, that a record may be evidence for or against strangers where it operates to convert the property in things, or in other words to change or create a title. This is so whenever the value of goods has been recovered of one person by another. So too in trespass against an officer for taking the plaintiff's goods, wherein the value of the goods was recovered; the property in the goods was held to vest in the party who had, pursuant to an agreement, indemnified the officer against the taking, and who had defended the action and satisfied the judgment; and he recovered accordingly in an action against the original owner. In such a case, the record and proceedings in the former suit are evidence in connection

with the agreement of indemnity, notice, defence, payment of the judgment, &c. to establish the permutation of the property. (*Howard v. Smith*, 12 Pick. 202.) But these cases of permutation generally arise between the immediate parties. Thus, Lord Ellenborough held that an action for goods bargained and sold would lie by the vendor against the vendee, though the former had parted with the goods and could not deliver them; and in this action the full price might be recovered; for then the property would be changed, and the vendee might recover an equivalent in trover for the goods against the vendor. (*Martens v. Adcock*, 4 Esp. N. P. C. 251.)

We partially noticed ante, note 574, p. 819, how far a conviction in a criminal, shall be evidence in a civil cause. It was lately held, that where a person was convicted of a trespass under the game act 1 & 2 Will. 4 c. 32, underwent the sentence of imprisonment, and did not appeal, this conviction was an answer to an action for malicious prosecution brought against the informer. Park, J. asks, "Can a party in the face of a conviction bring an action?" (*Mellor v. Baddeley*, 6 Carr. & Payne, 374. See ante, note 603, p. 852.)

The rule, however, in general is, that verdicts and judgments in criminal cases are not evidence in civil actions. (See ante, note 599, p. 850, and the subsequent notes there, relating to this subject.)

The record of conviction of the defendant's slave, of assaulting and killing the plaintiff's slave, was held inadmissible against the defendant in action for the value of the slave killed. (*Steel v. Cazeaux*, 8 Mart. Lou. Rep. 318, 321, 2.)

NOTE 694—p. 380.

The proceedings of inferior, as well as superior courts, may be assailed in various ways, for want of jurisdiction. When the question is raised in one form, they may be held valid; whereas in another, they would be adjudged voidable or void. On error or appeal, for instance, they may be voidable; but valid to protect a person acting under them, while unreversed, to secure him a right, or fix his title. They may save him as a defence against an action, while they would be inefficient by way of securing a claim under them. They may protect some persons acting under them; but be void as to others. The rules which govern their effect as evidence depend upon a cautious attention to these and the like distinctions.

They are the most broadly assailable on certiorari, or other proceedings in nature of a writ of error or appeal. In such cases they are to shew, through the whole range of the suit or proceeding, a strict conformity to the powers of the court. Jurisdiction must appear affirmatively, and at all events; and after this is shown, it must be followed with the requisite conformity in all the subsequent stages, unless waived by the party entitled to object, after his appearance in the matter. These inferior jurisdictions not proceeding according to the course of the common law, are confined strictly to the authority given. They can take nothing by implication; but must shew the power expressly given them in every instance. (*Jones v. Crawford*, 1 John. Cas. 20. 1 Cain. Rep. 594, note, S. C. 1 Johns. Cas. 225. 1 Cain. Rep. 191. *Powers v. The People*, 4 John. Rep. 292. *People v. Miller*, 14 John. Rep. 371.)

Where an attachment was given to the citizens of the *state*; and the record said, citizen of the *United States*; held voidable. (*Shivers v. Wilson*, 5 Har. & John. 130.)

The general doctrine of the above New-York² cases from *Johnson & Caines*, has been ably reviewed, explained, and illustrated, in *M'Kenzie v. Ramsey*, (1 Bail. Rep. 457, 459, South Carolina.) The recorder of Charleston took cognizance of an action against an administrator, under a statute which gave him concurrent jurisdiction with the court of common pleas, in which court executors might be sued to a limited amount, on all contracts, except against non residents. On motion to reverse the recorder's decision, which overruled a plea to his jurisdiction, the court (by Richardson, J.) said, "The question now is whether administrators and executors shall be also exempt." "It is urged, that they are not named in the act; but the same may be said of any other class of litigants, for none are expressly named, while the contracts of all are embraced within the jurisdiction. If we exempt one class, we may, for the same reason, exempt all, and destroy the city jurisdiction by successive exemptions, which brings the position taken to an absurdity. With great plausibility it is urged, that the defendant might, by his rightful plea of *plene administravit*, bring into controversy an amount greater than is within the limited jurisdiction. Assuredly this may occur, but it must first occur, before we need decide such a case; and whenever there is found necessarily involved in a case, *prima facie* within the jurisdiction, matter which is without the power of the court to decide, the particular case may very possibly be excepted from the jurisdiction. But there is nothing in the constitution of the court which necessarily disables it from deciding upon any plea which an administrator may put in; and long practice proves that it may safely adjudge the issue made upon the plea of *plene administravit*.

"The New-York cases from 1 *Caines*, 191, and 1 *Johns. Ca.* 228, evidently turned upon the construction of a particular statute, and do not reach the case, or act, before us. They show however, the wholesome vigilance, with which inferior courts are kept within their delegated jurisdiction. I will take the occasion of noticing in what this vigilance, which is often urged to extravagance, really consists.

"It is true that courts of limited jurisdiction are like particular agents; we must see their authority before we regard their decisions as lawful; but seeing it, we are to respect it, and their authority is not the less certain because specified and confined. The supreme court of the United States, is one of particular and limited jurisdiction; and yet although expressly bound down by the constitution to powers strictly delegated; although very confined in its objects, how sovereign and unrestrained is that court within its limits. It is even so with every court of particular and limited jurisdiction, and we require to see the evidence of its authority, as much in the instance of the supreme court of the United States, as in any other. The difference between these and courts of common law and general jurisdiction, is, that the latter as a general rule, have their judicial authority proven *prima facie* by the judicial act itself, which is *ipso facto* binding, until it appears negatively, that the court has not the power.

"This is indeed no more, in principle, than the distinction between all general and particular agents. The constitution affords an example of each. The general powers of the state legislature afford a striking illustration. Its legislative acts are *ipso facto* binding, unless we can find in the constitution a direct negative, and unavoidable estoppel. And why is this the case? Because it has the legislative power, with only

a few particular restrictions. At the same time another great department of the government, the executive, created too by the constitution, is no more than a particular agent, under a delegation of limited powers, to which the governor must always look before he acts; not to see if the executive power has been taken away, but if any power has been given in the particular case, to enable him to act at all. And why this distinction between these great departments? Because the framers of the constitution saw fit to delegate to the executive particular powers only, and not general powers, with restrictions.

"It is the same with all courts of limited and particular jurisdiction. They are strictly confined to the powers given: but we are not therefore to seek to curtail their powers. Such courts must not assume constructive powers, *i. e.* powers not literally given, or necessarily consequent upon those so given: but, on the other hand, we are not ourselves to practice the rule denied to them, and by construction, to deprive them of powers specifically, generally, or necessarily given. To do either, would be to abuse rules most salutary, whenever, by the usurpation of power, there is room for their application. On the contrary, I hold that the true measure of judicial vigilance, in this regard, is to maintain limited courts, in perfect independence, within the entire circle of their defined authority. Otherwise such courts cannot be the independent agents of law and justice; and the superior courts, instead of being judges to restrain other tribunals from usurpation, would themselves usurp authority, by taking power from hands, to which it has been confided; and where we ought to deem it safest, because it is so confided."

It will do, as a general rule, to regard a decision on certiorari or the like, holding a case to exhibit a want of jurisdiction, as evidence that the same or a like case would be assailable collaterally. But this mode of relief ordinarily presupposes that the proceeding below is merely irregular or erroneous, and therefore valid until reversed: Yet such is not always the fact; indeed, a certiorari is often allowed and the judgment reversed where the proceeding below is an absolute nullity. (*Starr v. Trustees of Rochester*, 6 Wend. 564, 567.) See also *M'Faddin v. Gill*, 1 Blackf. 309. This teaches us by no means to treat a matter as error only, in these inferior jurisdictions, because it has been thus directly avoided.

The mere abstract mode of pleading jurisdictional facts, is so like returning them in answer to a writ of certiorari, that the decisions under each head of pleading and return, will reflect light on each other. We have an instance of this in the argument of C. J. Savage, in the above cause of *Starr v. The Trustees of Rochester*. (p. 566.)

See *infra*, for a more particular consideration of the cases as to evidence, and some cases as to pleading, where they are thought to bear on questions of evidence.

But in these and the like cases, if there was original or acquired jurisdiction in the course of the proceeding, though it may be reversible directly, (by which is meant on error, appeal, &c.) yet for all other purposes, it shall be valid till reversed, in respect to every body. And even after it is reversed, persons not parties or agents in carrying forward the erroneous proceedings, shall be protected by way of defence from prosecution, and often in the titles which they may have acquired. (See *Voorhees v. The Bank of the United States*, 10 Peters, 449. See *ante*, note 693, p. 978.) 'This is what the cases mean, when they say that such proceedings shall not be questioned collaterally or indirectly.

While unreversed, we partially saw their conclusive effect, ante, note 620, p. 861, et seq.

That acts and titles shall not be subverted by a direct reversal; and sometimes not as to the party, see ante, note 617, p. 859.

But the proceedings of all courts, and especially of limited jurisdictions, may, in certain cases be questioned collaterally, where they have exceeded their powers. (See the cases cited ante, note 551, p. 801, and note 586, p. 926, for the general rule on this subject.) "All jurisdictions," says Holt, C. J. in *Annesly v. Dixon*, (Rep. Temp. Q. Ann. 104, 105,) "are limited as to place, persons and things." The court must also have jurisdiction of the process. And these rules are particularly applicable to all inferior jurisdictions. (Per Spencer, C. J. in *Bigelow v. Stearns*, 19 John. Rep. 40.)

Courts, however, have been a long time in settling, if they can yet be said to have settled, the collateral bearings and consequences of the above rules, in respect to the various persons who may be connected with a proceeding, which is to be deemed *coram non iudice* and void, for want of any or all of these ingredients. So late as 1818, a justice having tried an assault and battery, (a matter confessedly and plainly beyond his jurisdiction,) both himself and the constable were made liable as trespassers for goods seized under the execution, upon the ground, as the judge charged, that the *judgment* being void, *all* acting under it were trespassers. (*Woodard v. Paine*, 15 John. Rep. 493.) The court did not stop to inquire whether the process in the constable's hands was valid on its face; (doubtless it was in the ordinary form;) but an innocent officer was thrown in damages, for executing a command apparently legal, and whose secret vice lay beyond the reach of any scrutiny which the law had authorized him to institute. Surely, the jury who tried the cause might also have been sued as joint trespassers, though attending under a venire valid on its face: for they could much better learn their want of jurisdiction in the course of the evidence. The same severe rule would reach a constable who should serve the original process or venire, no matter how fair and legal in its language. It is certainly much more consistent with the dictates of sound policy, as well as natural justice, that these judgments, sentences, and all the proceedings of inferior courts, should in general be holden conclusive for the protection of innocent persons; and that the remedy should lie against those only who must, in the exercise of ordinary vigilance, necessarily be aware of their defects. And however severe some of the cases may be, this distinction is not unknown either to the ancient or modern decisions. Knowledge and participation are fairly imputable to the *party*, in almost, (you cannot say quite,) all cases; generally to the court or magistrate, though there are exceptions; and rarely to those indifferent persons who act under the process and orders of the court or magistrate. (Per Marcy, J. in *Savacool v. Boughton*, 5 Wend. 180. See also *The King v. Danser*, 6 T. R. 245. *Watson v. Watson*, 9 Conn. Rep. 140, 1, et seq.)

In *Hodson v. Cooke*, (1 Ventr. 369,) an action on the case at the suit of the party aggrieved, was holden to lie against one who commenced an action in an inferior court, for a cause arising out of its territorial jurisdiction. And it is said in 10 Co. Rep. 75, that one may have an action on the statute against a party who sues against the statute. The above case of *Hodson v. Cooke*, is mentioned as having been moved and decided, in *Skin*. 191, where two other like cases are mentioned and agreed to as having been before decided. But the court held that no action would lie, in such a case,

against the officer who arrests, it being for a *cause* (subject matter) of which the court had jurisdiction; nor would a writ of error lie; for it is to go against the record, which lays it *infra jurisdictionem*. (Hodson v. Cooke, *supra*.) Powell, J. in Gwinne v. Poole, (2 Lutw. 1568,) says of Hodson v. Cooke, that he knows of no authority against the protection of the officer in such a case, except Martin v. Marshall, 2 Rol. Rep. 109, 116, which is a misreport; for Lord Hobart, who was C. J. when that judgment was given, reports it otherwise. (Martin v. Marshall & Kêy, Hob. 63, pl. 64) The above case of Gwinne v. Poole, 2 Lutw. 935, (the opinion at large being reported in an appendix to 2 Lutw. 1560 to 1572,) is remarkable as protecting the party, magistrate, and officer. The action was false imprisonment against all three, for arresting the plaintiff by a *capias* issued out of an inferior court. They justified under a *capias* ad respond. in debt, at the suit of the plaintiff in that court, who sued there as administrator. The replication was that the cause of action arose out of the territorial jurisdiction of the inferior court; to which there was a general demurrer and joinder. Sir John Powell, B. (the case being in the court of Exch.) concedes the general rule, that where the court hath jurisdiction, no action lieth against the judge or officer; but where there is a want of jurisdiction, both are liable. To the first branch of the rule he shows that the cases are uniform. To the second, he is well pleased that some seeming difference of opinion of the court, founded on some cases and resolutions, had occasioned so solemn a debate of the matter, which so highly concerns all superior and inferior jurisdictions; for if this action should be adjudged to lie it would put an end to all inferior jurisdictions; and on the other side, the ill practice of those inferior courts have sometimes provoked the superior to some opinions and resolutions which seem to give encouragement to this action, and for that reason, it was necessary to have a solemn resolution to settle these matters. He had therefore conferred with both the Ch. Justices of the K. B. and C. B., who agreed with him.

He then inquires whether the action will lie against the judge and officer. The process was on its face returnable *ad proximam curiam* generally, and not at a day certain; and it was a *capias* issued without a previous summons; but these defects he holds to be *error* only; and that the process is not therefore void. And he denies the law of Read v. Wilmot, (1 Vent. 220,) which held, that where the *capias* issued without previous summons, even the officer serving it could not justify under it. He denies also what was there said by Hale, that process without a previous plaint will not protect the officer. That this and the like constitute mere error, he cites several cases; and says, that Hale, C. J. decided hastily, on a displeasure conceived against the ill practices of inferior magistrates.

As to want of territorial jurisdiction, which was admitted, he said, that of these inferior jurisdictions, some were limited as to subject matter; e. g. the commissioners of excise were limited to impositions on *strong waters*; and for assessing *low wines*, an action lay against them. (Huntington's case, Hard. 480.) So the action lay against the party, judge and officer, in the case of Marshalsea, for a suit by bill and *capias*, in *assumpsit*, whereas the court had jurisdiction of debt and covenant merely. (10 Rep. 76.) So where a visitor is limited by statutes and rules which he exceeds, he shall be liable. (Exeter College, cited by him at p. 1566.) Some jurisdictions, said he, are limited as to persons, as in the case of the Marshalsea, *ut supra*. Others in respect to place, as justices in relation to the poor, in making rates and granting relief;

they are liable to an action if they tax the parish of S. for relief of poor in the parish of D. Both justice and officer are liable; for the excess is apparent; and that is the reason of *Nichols v. Walker*, Cro. Car. 394. "And of that sort also are inferior courts in corporations, where the judge and officer are liable or not, with this difference; where it appears, or may reasonably appear to them, that the cause arose out of their jurisdiction, and yet notwithstanding, they proceed, they are both liable to an action; but it is otherwise where it doth not appear, or cannot reasonably appear, whether the cause arose out of their jurisdiction or not; for there, I am of opinion, that no action will lie against them, unless they proceed after they are informed, or know that the cause of action arose out of their jurisdiction. Herein [the inferior corporate courts] it appears [to them] that the subject is out of their jurisdiction; or they may know it, if it be not their own fault; as in the case of the Marshalsea, which was a court of the King's household; the servants of the King's household are all enrolled, and if the judges and officers have not copies of them, it is their own fault. But in the case in question, the court hath jurisdiction of the action, inasmuch as it is an action of debt; and that action being transitory in its nature, arises in point of law in all places, because it is a debt in every place. It is true that it arose not, in fact, within the jurisdiction of the court, which it ought to do, to entitle the court to hold plea thereof; but the judge and officer could not know it, unless by the plaintiff or defendant in the action; and till they know it, the rule shall be in this case, as well as in others, *Ignorantia facti excusat*."

He proceeds to give instances of such knowledge being the ground of action. (*Richardson and Barnard*, 1 Rol. Abr. 545; March. 8, where the declaration stated the bond to have been made out of the county.) If not in the declaration, he insists it should be made known by plea, when all the after proceedings will be void. He states and relies upon *Ollyet and Bessie's case*, T. Jones, 214, where the under sheriff unwarrantably arrested the plaintiff out of the franchise, and delivered him to the goaler within the franchise. The plaintiff sued the latter, in false imprisonment, for detaining him. Held not to lie; for the jailor could not know that the arrest was tortious, he not being privy to it.

He next denies that the plaintiff in the inferior court was liable. The action being in its nature transitory, the plaintiff himself might not know where his cause of action did arise. The learned Baron shows how this may be, even if the action had been in his own right; and the mere presumption that he knew, ought not to be indulged to make him a *tort feasor*. He distinguishes it from the case where a man is bound to notice *bona notabilia*; for his taking out administration in the inferior diocese, doth not make him liable to an action. Another reason is, because the plaintiff, it may be, knows not the extent of the inferior jurisdiction. "This is not like the case where a man complains of robbery, or any other felony, in the Star-Chamber; for that is *ignorantia juris*, which will not excuse; but the limit as to the place, is matter of fact, known only to the officers of the court, and strangers are not obliged to take notice thereof under the hazard of being liable to actions." He then goes on to question whether in this matter of mere place, an action will lie for suing out of the jurisdiction; whether it is not like suing a privileged person, who must be put to plead his privilege; but he admits throughout that if the proceeding be for the purposes of vexation,

as to obtain bail, where none would otherwise be due, an action on the case would lie, as it will in all the like cases whether there be jurisdiction or not.

This case was decided 4 W. & M. (A. D. 1693.) It was certainly not without struggling through a maze of distinctions between apparently conflicting cases, that the court reached the above conclusions. And it should by no means form a subject of surprise, that among the multitude of cases arising since, especially those relating to our hundreds of inferior jurisdictions, these distinctions may not, however safe and reasonable, have been uniformly followed in their practical application, or even in their principles. Baron Powell's opinion is questioned by Willes, C. J. in *Moravia v. Sloper*, (Willes, 35,) so far as it goes to exempt the plaintiff in the inferior court; though the learned C. J. agrees with his argument in the main, and pronounces him a very learned judge. And see ante, note 692, p. 948, 9, where we have stated and considered the case of *Herbert v. Cook*, 3 Doug. 101.

This opinion in *Gwinne v. Poole*, may not be sustainable in all its dicta. It, however, stands in much the same relation to questions of inferior jurisdiction, that Holt's opinion in *Coggs v. Bernard* was said to hold in respect to bailments. It furnishes us with a line of categories almost complete, for the kind of defect which we are considering, and traces to a very considerable extent the various consequences. We shall follow his divisions, with some additions, noticing occasionally as we go along in whose favor (as holden by several courts) the proceedings of inferior jurisdictions shall be said to conclude, when there is a want of jurisdiction.

1. *Jurisdiction with respect to the subject matter.* All courts are limited to certain subjects of cognizance. Some, to actions and prosecutions civil and criminal, and to appellate and supervisory proceedings. Some to only one of these branches; as, to criminal matters, civil actions, or to certain particulars of each. Some to matters in equity, or of an admiralty or ecclesiastical nature: and others to a few matters of small consequence.

To determine the abstract question of subject matter, we have only to look to the court or officer, and the matters general or specific covered by his powers. (Per Clinton, Senator in *Yates v. Lansing*, 9 Johns. Rep. 440.)

A court holding jurisdiction of all criminal cases shall be protected, though it adjudge a matter to be criminal which is not so, and proceed to punish it. (2 Lutw. 1561, 2. *Bushell's case*, Vaugh. 135. *Kempe's lessee v. Kennedy*, 1 Peters' C. C. Rep. 30, 38, 9. 5 Cranch, 173, S. C. *Ex parte Tobias Watkins*, 3 Pet. 193, 202 to 209, and the cases there cited by Marshall, C. J. See also per Parker, C. J. in *Stetson v. Kempton*, 13 Mass. Rep. 282, 3.)

The above idea, that jurisdiction of the crime in the abstract, is enough to make the proceeding valid, though very fully illustrated by several of the above cases in respect to other courts, and especially by the above cases from the United States reports, is better exemplified in relation to inferior courts by the case of *Buquet v. Watkins*, 1 Mill. Lou. Rep. 131. By the 1154 Art. of the Code of Pract., a justice of the peace may punish for a contempt of his authority, by imprisonment for 24 hours. The plaintiff was convicted and imprisoned by the defendant, a justice, under that article; and in an action against the justice, the plaintiff was allowed to give proof contradicting the adjudication of the justice that his conduct in court was disorderly. Held, on appeal, that the judge *a quo* erred, and per Porter, J. delivering the opinion of the court,

“Whether there was a contempt or not, is a question of which the law makes the justice of the peace the judge; as much so, as whether or not a plaintiff proves the debt in which the justice condemns the defendant; and the correctness of his decision cannot be examined collaterally, in a civil suit. That he had jurisdiction in relation to contempts, is not denied. (*id.* 135, 6.) See also *Lining v. Bentham*, 2 Bay, 1. *State v. Johnson*, *id.* 385, S. P.

So where a court has jurisdiction of riots on view, its record shall conclude though no riot was committed. (*Mackaboy v. The Commonwealth*, 2 Virg. Cas. 268, 271, stated *infra*; and see *Mather v. Hood*, with other cases *infra*, of the like import.)

So, though a plaintiff insisted on and obtained a general judgment against a defendant before a justice, and imprisoned the defendant, after he had been discharged in his person as an insolvent; yet, even the plaintiff was protected; for the justice had jurisdiction of the person and matter, and any judgment he gave was holden conclusive till reversed directly. (*Brown v. Crowl*, 5 Wend. 298.)

Where a justice has jurisdiction to give costs, and gives more in amount than the statute authorizes, it is mere error, and his judgment, while unreversed, protects him for acts done in the way of collecting it. (*Butler v. Potter*, 17 Johns. Rep. 145; and see *Prigg v. Adams*, 2 Salk. 674.)

So, where tax-assessors are right in the property and person, if they exceed the aggregate amount of their warrant, this is but mere error, and not want of jurisdiction. (*Coleman v. Anderson*, 10 Mass. Rep. 105, 117 to 120.) So, if one liable to taxation be over-taxed, though the excess be caused by the valuation of property not taxable to him. (*Osborn v. The Inh. of Danvers*, 6 Pick. 98.) And though assessors omit particular persons or property liable to taxation, yet they shall not be made liable as trespassers, it being error only. (*Easton v. Calender*, 11 Wend. 90. *Dillingham v. Snow*, 5 Mass. Rep. 547, 558, 9. *Inglee v. Bosworth*, 5 Pick. 498, 501.) And where property, taxable by one name, was put up by the assessors in a tax list under another and wrong name; e. g. where they assessed the *new theatre* in New-York as a dwelling house; held, that it was error of judgment in the lawful exercise of jurisdiction, and therefore the collector was protected. (*Henderson v. Brown*, 1 Cain. Rep. 72; 11 Wend. 95, S. C. cited and approved.)

But it is otherwise, where there is no jurisdiction in respect to the subject matter. Thus, where assessors lay a tax on property not taxable, as a house within the limits of an hospital, which is exempt from the English land tax; (*Robinson v. Bullock*, 1 H. Bl. 68;) or a new built house not inhabited, exempt by a paving act; (*Mayor v. Knowler*, 4 Taunt. 634;) or land of a non-resident of the town, for the support of common schools; (*Snydam v. Keys*, 13 John. Rep. 444;) or for a town tax on land of a non-resident of the town. (*Agry v. Young*, 11 Mass. Rep. 220.) Note; in the two last cases, the land lay within the town where the tax was laid, but the statutes did not authorize the tax unless the owner also resided there. So where lands possessed by the crown were rated for relief of the poor. (*Ld. Amherst v. Ld. Somers*, 2 T. R. 372.) Where the inhabitants at a town meeting unanimously voted a tax for additional wages to the drafted state militia, in time of war, and when the town was in imminent danger, the plaintiff himself not being present, nor participating in the vote, and there being of course no legal power in the meeting to do this; all the proceedings in assessing and collecting were adjudged void, and the assessors of the tax liable in

trespass. (*Stetson v. Kempton*, 13 Mass. Rep. 272.) And it was also held, to furnish no protection, that part of the tax included in the warrant was legal. (*id.* 272, 283.) The general power in the statute, to levy taxes for defraying "other necessary charges," was likewise holden no protection, as that must be confined to expenses connected with the execution of specific powers enumerated in the statute, or at least, to such powers and objects as came within the scope of the corporation. (*id.* 278) These points had also been resolved by a previous case in the same court. Thus, where a town incorporated with the general and proper tax, an assessment of the expense of procuring an act of incorporation; and though the object was not expressed in the corporate records, yet the plaintiff was allowed to show the object by parol. (*Bangs v. Snow*, 1 Mass. Rep. 188, 9.) So, where a highway-tax is assessed as a money-tax, or the assessors add more than 5 per cent. to the sums voted by the town, though both be mixed with legal taxes. (*Libby v. Burnham*, 15 Mass. Rep. 144, 147.) Though it was said, if the warrant had been levied for that only which was legal, the action would not have lain. (*id.* 147.) So the common council of a city, having power by charter to make side walks, have not therefore power to make a railing on the inner side of it; and a tax for that purpose is void, and the mayor who signs the warrant a trespasser. (*Williams v. Brace*, 5 Conn. Rep. 190.) So of a city assessment on a husband, to pay the whole assessment for an improvement in front of his wife's land. (*id.*) So, if property be without the territorial jurisdiction of the assessors; as if the justices of A. make a rate on land in B. owned by an inhabitant of B. (*Nichols v. Walker*, Cro. Car. 394, S. C. cited and approved, 2 Wils. 384, in *Perkin v. Proctor*.)

If a *formedon* commence originally in the King's bench, which hath no original jurisdiction of real actions; or an appeal be brought in the C. B. which hath no jurisdiction of such causes, all is void. This was said by *Dodderidge, J.* in *Weaver & Clifford*, (2 Bulstr. 64,) and *Flemming, C. J.* agreed to it. See also as to the *formedon*, *Annesly v. Dixon*, (Rep. Temp. Q. Ann. 104.) And this, even though the tenant admits and pleads. The same illustration is given in the case of the *Marshalsea*, (10 Rep. 76,) with the observation, that in the case between *Bowser & Collins*, in 22 E. 4. 33, b., *Pigot* says, "if the court has not power and authority, then their proceeding is *coram non judice*. As, if the court of common pleas holds plea of an appeal of death or robbery, or any other appeal, and the defendant is attainted, it is *coram non judice*; *quod omnes consenserunt*." And it is also observed there to be the same case, if justices should inquire of treason, which is out of their commission. So, where a New-York justice (not being authorized by statute) tried an assault and battery; all was held void. (*Woodard v. Paine*, 15 John. Rep. 493. *Blin v. Campbell*, 14 John. Rep. 432, S. P.)

So, if a man, though under martial law, be arrested, tried or punished, by a court martial for not contributing to or attending a writing school established. (*Warden v. Bailey*, 4 Taunt. 66.) If one be discharged from execution in a civil action, by *habeas corpus*, the discharge is void, for the commissioner hath no right to act in such a case. (*Cable v. Cooper*, 15 John. Rep. 152.) The sheriff was held liable for the escape, notwithstanding the order of discharge. (*Id.* add see *Harvey v. Huggins*, 2 Bail. 252, S. P.) An authority to the C. P. is, to foreclose a mortgage, the mortgagor being in possession. If he be not in possession, the foreclosure is void, though all parties ap-

pear. (South Car. Law Journ. 195.) If the sessions lay a road across a navigable river, the act may be treated as a nullity; for they have no statute authority to do this. (Arundel v. M'Culloch, 10 Mass. Rep. 70. Commonwealth v. Combs, 2 id. 489, 492. Commonwealth v. Charleston, 1 Pick. 180.)

We have seen in *Gwinne v. Poole*, ut supra., the effect of disregarding the place in which the subject matter arose, where it relates to the cause of action. The criminal courts are here more especially confined; and because it did not appear on the record that the crime arose within the county where the special sessions sat, their conviction was reversed. (*Miller v. The People*, 14 John. Rep. 371.)

Where a justice renders judgment for a sum exceeding his jurisdiction, it is void, and no action lies upon it. (*Jones v. Jones*, 3 Dev. 360. *Hind v. Willis*, 13 Ser. & Rawle. 213, 214. See *Comfort v. Gillespie*, 13 Wend. 404. But see *Littlejohn v. Underhill's ex'r*, 2 N. Car. Law Repos. 574, 578, 9.) In Pennsylvania, where the common pleas, on appeal from a justice, renders a judgment for a sum beyond what the justice had jurisdiction of, although this is erroneous, it is not void, for the court of common pleas is one of general jurisdiction, proceeding according to the course of common law. (*Hinds v. Willis*, 13 Ser. & Rawle, 216.)

Various statutes of the United States require that certain amounts should be in dispute, &c., in order to give the U. States courts jurisdiction. And though the averments, shewing jurisdiction in this and the like respects as to those courts, be omitted, the cases ante, note 691, p. 945, 6, show, that their proceeding cannot be impeached collaterally. But where a state statute required that at least \$50 should be demanded to give the superior court jurisdiction, held, that such sum must be demanded in the writ, or the whole proceeding will be *coram non judice*, and void; and the court will not amend even after verdict. (*Hoit v. Molony*, 2 N. Hamp. Rep. 322.) Woodbury J., in this case, draws a distinction, as to the question of amount, between the U. States and N. Hamp. court. In the former, it is the amount *in dispute* which determines the jurisdiction; in the latter, the amount *demanded*. (*Id.* 324, and the cases there cited.) In either case, the mode of determining the amount which gives jurisdiction, so far as the face of the proceedings is concerned, is generally the amount demanded by the bill, writ, or declaration. (*Hulsecamp v. Teel*, 2 Dall. 358, 9.) This point was, however, much examined in *Wilson v. Daniel*, (3 Dallas, 401, 404 to 408.) The question as to the true test seems there to be exhausted, by those who were able and competent to speak. Farther authorities are, *Martin v. Taylor*, 1 Wash. C. C. Rep. 1; *Lewis v. Clark*, 2 Mill. Lou. Rep. 438, 9; *Gordon v. Ogden*, 3 Pet. 33. The last case qualifies the rule that the sum demanded shall be the test. A somewhat similar statute exists in New-York, fixing the minimum of chancery jurisdiction, in respect to which the United States cases have been followed. (*Smets v. Williams*, 4 Paige, 364.)

In a record of conviction of petit larceny, had before a court confined to the trial of petit larcenies, the value of the articles stolen should appear, or the conviction will be reversed for want of jurisdiction. (*Powers v. The People*, 4 Johns. Rep. 292.)

In New-York, trustees of a village were empowered to lay out streets, but forbidden to lay them over ground where a building stood, the removal whereof would cost more than \$100. They did so, however, and assessed and allowed damages to C. for certain land of his taken for the street. In an action by him to recover the

assessment, held, that the whole proceeding was a nullity, and that he should not recover. The court would not allow that the city was estopped to allege the excess of jurisdiction on the point of expense adjudged by its own officers. (*Cuyler v. The Trustees of the village of Rochester*, 12 Wend. 165; and see *Starr v. The same*, 6 Wend. 564.)

2. *Jurisdiction with respect to the person.* Several instances are given under this head in our extracts from *Gwinne v. Pool*. See the case of the *Marshalsea*, (10 Rep. 76,) which also furnishes some illustrations; also *Rex v. Danser*, 6 T. R. 242. In certain cases, the person proceeded against is absolutely exempt from the jurisdiction, and the proceeding void for that reason. Where jurisdiction is given of *miners*, to justify, the plea must shew the defendant a *miner* at the commencement of the suit. (*Morse v. James Willes*, 122.) A commission of bankruptcy, issued against one (e.g. a victualler,) not within the bankrupt act, is void. (*Perkin v. Proctor*, 2 Wils. 382.) So, a justices' warrant for travelling on Sunday is void, if it issue against one not inhabiting his county; such residence being required by statute. (*Pearce v. Atwood*, 13 Mass. Rep. 324, 342.) If a justice issue execution against one who is exempt from such process, he is a trespasser. (*Percival v. Jones*, 2 John. Cas. 49.) And where a statute gave magistrates a right to proceed by warrant against the property of an absconding husband, for the benefit of the town, and to support his family; held, that they must act at their peril; and if in truth the husband had not absconded leaving his family a charge, the overseers were liable, this not being a point on which the adjudication should conclude, but a description of the person; and unless it was answered in fact, all was void. (*Bowman v. Russ*, 6 Cowen's Rep. 234, 237.) So, where the residence of an insolvent in the county, is made necessary, by statute, to authorize a discharge, the fact is issuable on pleading the discharge, although the commissioner may have adjudicated upon it. (*Wyman v. Mitchell*, 1 Cowen's Rep. 316; and see *Betta v. Bagley*, 12 Pick. 581, 2.) Where a magistrate had power, on complaint, to imprison an apprentice, and he did so as to one not an apprentice. Held void, by Sewell, J. (*Williams v. Blunt*, 2 Mass. Rep. 207.) Parker, J. thought the justice had power to adjudge that he was an apprentice. Sewell, J. contra; and that it was a point of jurisdiction on which he could not judge. (*Id.* 212, 213.) A justice's attachment, in New-York, can only go against an absconding resident of the county; not a sojourner or traveller; for the statute did not intend the latter; (adjudged on certiorari.) (*Dudley v. Staples*, 15 Johns. Rep. 196.) Where a justice has power, by statute, to issue an attachment against a person absconding or removing from his own state; if issued against the resident of a foreign state, a judgment thereon is void; and so is a sale under the judgment. (*Den. lessee of Hodges v. Deaderick's heirs*, 1 Yerg. 125.) And if the process be authorized to go against goods only, and it go and be served on real estate, all is void. (*Id.*)

So, if the justices of A. make a rate on an inhabitant of B. (*Nichols v. Walker*, Cro. Car. 394; S. C. cited and approved, 2 Wils. 384, in *Perkins v. Proctor*;) or the trustees tax a non-resident of their town. (*Suydam v. Keys*, 13 John. Rep. 444.) So, where a statute imposed taxes on residents of the town only, the assessors were held liable in trespass for levying a tax on land lying in the town, their owner residing in another. (*Agry v. Young*, 11 Mass. Rep. 220; *Thurston v. Martin*, 5 Mason, 497.) Case was held to be a wrong action, all being void, and the injury immediate. (*Id.*)

So, where a religious society voting a tax to be levied the 1st May, assessed one who had withdrawn from the society before that day. (*Inglee v. Bosworth*, 5 Pick. 498. And see *Sumner v. 1st Parish*, in *Dorchester*, 4 Pick. 361; and *Gage v. Currier*, id. 399.) So, where a tax was assessed as a school district tax, the district never having been properly laid out, having, instead of being defined by geographical limits, been laid out by recording that certain persons, (naming them) should compose it. (*Witherington v. Eveleth*, 7 Pick. 106.)

So, a justice being exempt from militia duty, a court martial hath no jurisdiction of his person, on charge of a default in not performing duty. (*Wise v. Withers*, 3 Cranch, 331.) And a citizen of the United States, not in the military service, being arrested, though on military process valid upon its face, even the ministerial officer who detained him, was held liable in false imprisonment. (*Smith v. Shaw*, 12 Johns. Rep. 257.) So, if a U. S. court-martial condemn a militia-man not in actual service, but who has been only summoned to go into service. (*Mills v. Martin*, 19 John. Rep. 7. *Rathbun v. Martin*, 20 John. Rep. 343.) It is otherwise, however, in respect to a person who, to exempt himself, is to do certain acts and give notice. (*Vanderbilt v. Downing*, 11 Johns. Rep. 83.)

The individual proceeded against must in general be notified in some legal form, in order to give the court or magistrate jurisdiction over him. Accordingly, where a justice had power, by statute, to punish trivial breaches of the peace, by fine; in trespass against him, he pleaded a conviction of the plaintiff under this statute; but did not aver that the plaintiff was brought before him. Held, that the plea was bad on that account. (*Logan v. Siggerton*, 2 Blackf. 266, 7.) If a justice should give judgment without process or appearance, the whole would be void, and might be questioned collaterally. (Per *Spencer, C. J.* in *Bigelow v. Stearns*, 19 John. Rep. 41. *Beach v. Abbott*, 6 Verm. Rep. 586.) So, where one pretended to have authority to confess judgment without process, but had not: (*Hubbard v. Spencer*, 15 John. Rep. 244.) And it was held to make no difference that the defendant had been summoned in a former suit, which had been discontinued by the non-appearance of the plaintiff at the time; (*id.*) and the judgment confessed was held void in an action of debt upon it. (*Id.* See also *Cone v. Cotton*, 2 Blackf. Rep. 82.) A judgment in a justice's court cannot legally be entered on confession, unless the defendant is brought in by process, or voluntarily appears in court, and confesses judgment; authority given to the justice, at an accidental meeting in the street, to enter judgment, is not sufficient. And where judgment was thus entered, execution issued, and property sold in virtue of it, held, in an action by the purchaser to recover the property, that the whole was a nullity; and that no title could be made under the judgment. (*Tenny v. Filer*, 8 Wend. 569. See *Bromaghin v. Thorp*, 15 Johns. Rep. 476; *Martin v. Moss*, 6 id. 126. 1 Pennsylv. Rep. 15.) In a suit against two joint debtors, service of process on one did not authorize judgment against the other, by a justice, (*Jones v. Crawford*, 1 Johns. Cas. 20, 1 Cain. Rep. 594, note, S. C.) till the right was given by statute. (See statutes of N. Y. on this head subsequent to the decision in that case.) The judgment of a justice against two persons, on the voluntary confession of one, without process, was held to protect the justice, being a mere error, and not want of jurisdiction, as to the one not appearing. (*Little v. Moore*, 1 South. 74.) Quere.

Personal notice is not always necessary. The legislature may prescribe what notice shall be sufficient. This was incidentally remarked, ante, note 637, p. 910, and is sustained by some cases there cited; and where private property is taken for public use, under an act of the legislature, it was conceded by Savage, C. J. that notice was necessary before it could be so taken, but he added, that the legislature might prescribe the mode of giving notice, and that a newspaper advertisement might thus be made valid. (*Owners, &c. v. The Mayor, &c. of Albany*, 15 Wend. 374.) Notice by advertisement in a newspaper was held valid, in a proceeding by petition for partition, as against owners unknown, so far as to sever the possession; the statute reserving the right of the owner not actually notified to question the title only. (*Sharp v. Pratt*, 15 Wend. 610, 613.) To give the supreme court jurisdiction in such case, an affidavit must be made that such owners are unknown, and notice must be published pursuant to statute, or the proceeding is a nullity for want of jurisdiction. (*Denning v. Corwin*, 11 Wend. 652. See *Hines v. Oldham*, 3 Monroe, 266, 7, contra, and that this is mere error.

The process must be properly served. If process be executed by a constable, not having authority, this gives the magistrate no jurisdiction of the person; and if he proceed, he is liable. (*Reynolds v. Orvis*, 7 Cowen's Rep. 269.) See also *Gallatin v. Cunningham*, 8 Cowen's Rep. 361. A discharge on taking the poor debtors' oath, was held void, and no protection to the sureties in the gaol-bond, the notice of the order to shew cause not having been regularly served on the creditor. (*Flanders v. Thompson*, 2 N. H. Rep. 421.) So, if the oath be not in the form prescribed by the statute. (*Little v. Hasey*, 12 Mass. Rep. 319.) In neither case is the certificate of the justices conclusive on these points. (*Id.*) A president of a court martial was, in an action, held liable to refund a fine levied without personal notice to the party. (*Capron v. Austin*, 7 John. Rep. 96.) The statute upon which this case was decided, forbade the levying of a fine until the delinquent should be summoned; and the service of the summons was by leaving a copy at his place of residence, he being absent. (*Id.* 98.) In Ohio, resident freeholders can only be sued before a justice of the town where they reside, except in special cases. The process may be served personally, or by leaving a copy at the defendant's *dwelling-house, or place of abode*. Where the return to the process stated the service to have been by leaving a copy at the defendant's *last place of residence in town*; held, that such return conferred no jurisdiction, and was notice to the justice and the party of the defect, so as to deprive them of protection for acts done under the judgment. Otherwise, however, as to the constable serving the execution, which was regular on its face. (*Harmon v. Watrous*, 1 Wright's Rep. 709.

Service of notice on the person, in a foreign state, is a nullity. (See ante, note 637, p. 908.) An attachment, however, served on property within the jurisdiction of the officer issuing it, shall bind that, though it do not the person. (*Id.* p. 907, 8, and cases there cited.) But a citation, or something equivalent in law, is in general necessary to the validity of every judgment. Accordingly in Louisiana, where in proceedings by insolvents against their creditors, those creditors not cited to attend the *concurso* of creditors shall not be affected; the judgment rendered in such a case shall not have the force of the thing adjudged, (*rei judicata*.) (*Thomas v. Breedlove*, 6 Lou. Rep. by Curry, 573, 578. And see *Bainbridge v. Clay*, 3 Mart. Lou. Rep. N. S. 535, and *Herring v. Levy*, 4 id. 483; also *Bernard v. Vignaud*, 1 Mart. Lou. Rep. N. S. 1.)

The Trustees of the Theological institution at Andover, after having made an *ex parte* report against M., one of the professors, voted that the interests of the Seminary required that his connexion therewith should be dissolved. They then gave him a general notice, with liberty, in a qualified way, and with limited opportunity, to be heard, which he declined to avail himself of. They then by vote removed him from office. Held that the vote was void, though the trustees had jurisdiction of the subject matter. The main ground taken by the court was, that M. had not had the substantial benefit of a trial. (*Murdock v. Phillips Academy*, 12 Pick. 244. See pp. 262 to 268.) Where the visitors and feoffees of a school, dismissed the master for misconduct, but omitted to summon the master before them, previous to such dismissal; it was held, that they were not entitled to maintain an ejectment against him. (*Doe, ex dem. Earl Thanet v. Gartham*, 1 Bingh. 357.) In some cases, a formal technical notice, is dispensed with; and if the party has had substantial notice and an opportunity of being heard, or has been actually heard, the adjudication shall bind him. (*Van Wormer v. The Mayor, &c. of Albany*, 15 Wend. 262.) See ante, note 637, p. 908, 9.

3. *Jurisdiction with respect to the process.* There must also be jurisdiction of the process. An early case on this subject is that of *Martin v. Marshall and Key*, (Hob. 63,) where it was held, that a prescription to direct precepts for appearance, must be understood as authorizing a *precept in writing* only, and not one by *parol*; and because the process there, was of the latter kind, the judge issuing it, as well as the officer executing it were held liable. See S. C. stated 3 Wils. 380, and recognized as good law; also, *Grummon v. Raymond*, 1 Conn. Rep. 44. In such cases the jurisdiction of the magistrate or court, so far as it depends on the process or notice to the defendant, is the same as if there had been no process or notification. No valid judgment can be rendered. The same is true in all instances where an inferior court has acted upon process unknown to the law, or which the particular tribunal could in no case use. (See *Grummon v. Raymond*, 1 Conn. Rep. 44; *Allen v. Gray*, 11 id. 102; *Savacool v. Boughton*, 5 Wend. Rep. 174.)

The like may be the result, in instances where the court has general jurisdiction over the process, and yet jurisdiction in the particular case is wanting; in other words, where the process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. This is illustrated by those cases where the right of issuing process depends upon certain proof being given, in order to lay the foundation of it, or certain other preliminary and indispensable requisites being complied with, the want of which renders the whole void. Thus, a warrant has been held void where it was issued against a man of a family, without the requisite proof required by the statute; and the persons at whose suit it issued were adjudged liable for false imprisonment. (*Curry v. Pringle*, 11 Johns. Rep. 444. *Gold v. Bissell*, 1 Wend. 210.) Where, however, a justice has authority in certain cases to issue a warrant without oath, and he does so in a wrong case, on account of his ignorance of the facts, he will not be held responsible if he acts in good faith. (*Rogers v. Mulliner*, 6 Wend. 597.) Where the foundation of the warrant, is a previous summons returned served by copy; unless the warrant is issued within a reasonable time after the return of the summons, it will be held void. (*Gold v. Bissell*, 1 Wend. 210.) "In cases where summons is the regular process, a warrant without oath is irregular and void. Without the oath, the justice has no jurisdiction over the person of the defendant."

(Id. p. 213.) So, if the affidavit upon which the process issues is entirely insufficient; as where an affidavit stating "the facts and circumstances" is required, and the party states his *belief* merely. (Loder v. Phelps, 13 Wend. 46. See Comfort v. Gillespie, id. 404; Tallman v. Bigelow, 10 id. 420.) The like has been adjudged, in Connecticut, where a magistrate issued a warrant upon the complaint of a grand-juror who, as such, had no authority to prefer the complaint. (Allen v. Gray, 11 Conn. Rep. 95.) The justice and party were held liable in trespass for proceeding by attachment, without the requisite bond being executed. (Adkins v. Brewer, 3 Cowen's Rep. 206.) Where a justice issued an attachment, without swearing a witness, (the statute requiring proof of absence or concealment,) he and the party were held liable in trespass. (Vosburgh v. Welch, 11 Johns. Rep. 175. Adkins v. Brewer, 3 Cowen's Rep. 206.) And see Collins v. Ferris, 14 Johns. Rep. 246. So, if a tax warrant be enforced, issued on an abstract of the assessment list not filed in time, the assessors are liable. (Thames Manufacturing Co. v. Lathrop, 7 Conn. Rep. 550.) In like manner, on proceeding by attachment in Louisiana, against an absconding debtor, no petition being presented before the affidavit for the attachment, and none being filed presently after the attachment, as required by the code of practice; the court held the whole to be a nullity. (Lacy v. Kenley, 3 Mill. Lou. Rep. 16, 18.) So, if a justice issue a search warrant, without oath that the goods are stolen, or suspicion that they are concealed in the particular place to be searched. (Grummon v. Raymond, 1 Conn. Rep. 40.) But the oath of general suspicion is enough. (Elsee v. Smith, 1 Dowl. & Ryl. 97.) So, where the custom was that the vice-chancellor of Oxford might grant a warrant, on the oath of the plaintiff that he *believes* the defendant will not appear; and the oath was, that he *suspected*. (Smith v. Bouchier, 2 Str. 993. But see Van Steenburgh v. Korts, 10 Johns. Rep. 167, 169.) A plea justifying an arrest for a crime on the defendant's complaint, must show an affidavit and warrant for a crime. A mere civil offence, as a false representation of another's circumstances, called "swindling" in the plea, will not do. (Hall v. Rogers, 2 Blackf. 429.) And a justice was held liable for issuing a warrant against a putative father, without the complaint of the overseers of the poor, and this, though a man imposed a complaint upon him, pretending to be their attorney; and they (one of them having power) afterwards adopted the act. (Wallsworth v. McCullough, 10 Johns. Rep. 93.) But quere, would not the confirmation validate the complaint? (See per Savage, C. J., at the close of Wells v. Porter, 7 Wend. 121.) A statute says a party shall be brought before the justice. He cannot be proceeded against by summons; and even if he appear on a summons and object; and the justice convict him, and cause him to be taken in execution; yet held, that the justice was a trespasser. (Bigelow v. Stearns, 19 Johns. Rep. 39.) See Capron v. Austin, 7 Johns. Rep. 96, supra.

Process has been held void, in several instances, for a defect in its frame. Accordingly, if a justice make an execution returnable in 60, where it should be in 90 days, it is void. (Toof v. Bentley, 5 Wend. 276. See S. P. 9 Wend. 338.) In Massachusetts, a justice's execution misreciting the recognizance as to date and amount, was held void. (Albee v. Ward, 8 Mass. Rep. 79.)

Other irregularities have been held to render process void. A justice issued execution short of 24 hours from the time of giving judgment, the statute requiring he should wait 24 hours. Held, that he was a trespasser. (Briggs v. Wardwell, 10

Mass. Rep. 356.) This was put on the ground of its being a ministerial act in Massachusetts, the justice having no discretion. (Id.) So, where he had a right to issue execution on oath made at the time of judgment, the plaintiff was held a trespasser in obtaining and levying an execution at a subsequent time, though on an oath regular in other respects. (Sellick v. Brown, 19 Johns. Rep. 271.)

4. *Jurisdiction with respect to other prescribed modes of proceeding.* A statute authorizes a court to discharge an insolvent who had surrendered before a certain time. To give jurisdiction, his surrender or imprisonment before that time, must appear. (Ladbroke v. James, Willes, 199; and see Service v. Heermance, 1 John. Rep. 91, 93.) Where a petition of the insolvent and three-fourths of the creditors are necessary, this should appear. So of his residence in the county. (Wyman v. Mitchell, 1 Cowen's Rep. 316. Frary v. Dakin, 7 John. Rep. 75, 79, 80.)

Where a petit larceny had been tried at a court of special sessions in New-York, held, that the fact of the criminal not having given bail within 48 hours, or that he consented to a trial before, should appear on the record in order to show that the justices had jurisdiction. (Powers v. The People, 4 John. R. 292.)

Where town and county taxes were required to be assessed and listed separately, and the valuation lodged in the town clerk's or an assessor's office, the omission of either of these formulæ, each of which was essential to a due search, was holden to render the assessment void, and the assessors liable in trespass. (Thayer v. Stearns, 1 Pick. 482. And see Blossom v. Cannon, 14 Mass. Rep. 177.) So if any tax be assessed without first making a list. (Thurston v. Little, 3 Mass. Rep. 429.) And there must be a new valuation for the year. If the old one be used, all is void, and trespass lies. (Nason v. Whitney, 1 Pick. 140.) So if it were made by the town and not the parish assessors. (Granger v. Parsons, 2 Pick. 392.) So if a tax, once legally laid, be re-assessed. (Inglee v. Bosworth, 5 Pick. 498.) So if, in New-York, the trustees of a school district issue their warrant for a tax based on a town assessment roll not the last, (for the statute fixes it to the last,) they are trespassers; but not the collector. (Alexander v. Hoyt, 7 Wend. 89.) A statute authorizes a justice to take a recognizance; if he take a bond, it is void. (Johnson v. Randall, 7 Mass. Rep. 340. Merrill v. Prince, id. 396.)

If a judge proceed summarily under the landlord and tenant act, without a proper affidavit, he is a trespasser, as well as the party. (M'Coy v. Hyde, 8 Cowen's Rep. 68. Evertson v. Sutton, 5 Wend. 281, 285. And see also Gallatien v. Cunningham, 8 Cowen, 361, and Sheppard v. Sheppard, 5 Halst. 250.) So where the C. P. proceed on an appeal, no regular bond (e. g. in a full penalty) being given in order to institute an appeal from the justice, all is void. (Latham v. Egerton, 9 Cowen's Rep. 227.)

A judgment rendered by a justice of the peace, on a verdict received in the absence of the plaintiff, is not void but voidable only; and its validity is not enquirable into collaterally. (Relyea v. Ramsay, 2 Wend. 602.)

Where an officer's powers are superseded, his subsequent proceedings will be regarded as *coram non jure*, and void. Accordingly, trespass was held to lie against a justice, who proceeded (in forcible entry) after a certiorari served on him. (Case v. Shepherd, 2 John. Cas. 27.) An appeal being regularly entered from a justice's judgment, it then ceases to be a judgment; and no action lies on it. (Marshall v. Lester, 1 N. Car. Law Repos. 100.)

5. *Jurisdiction with respect to the time and place of holding the court or doing the act.* The proceeding may likewise be assailed, and that too collaterally, because the court or magistrates act at a place without their territorial jurisdiction, or at a time not authorized by law. (Said in case of the Marshalsea, 10 Rep. 76, 7. Plat's case, Plowd. Comm. 37, b.) This was held of a justice of Granville county, who rendered a judgment in Franklin county. (Hamilton v. Wright, 4 Hawks, 283.) And where the magistrate is territorially limited, as if he be bound to sit within the verge of the palace, his acts sitting elsewhere are *coram non judice* and void. (Plat's case, Plowd. Comm. 37, b. 10 Rep. 77, and the authorities there cited.)

So as to the time of doing the act. A justice convicted a man for a contempt committed in his presence, and issued a warrant of commitment, which was executed, but the conviction did not take place while the justice was acting officially: held, beyond his jurisdiction, and that he was liable for a false imprisonment. (Fitter v. Probasco, 2 Browne, 137, 142, 3. See also State v. Applegate, 2 M'Cord, 110.) So of a circuit court, which issued an attachment in vacation, for violation of an injunction. And held, that the officer could not justify under it. But it was agreed, that this is so only where chancery powers are merely incidental to a court of law, which has its stated terms; a court of chancery, as such, being always open. (Taylor v. Moffatt, 2 Blackf. 305.) So of a judgment entered in vacation. (Penn v. Meeks, 1 Penningt. 151.) But there, the record was void on its face. (See Den v. Downam, 1 Green, 144.) It would be otherwise, even as to a stranger, were the judgment valid on its face. (id. 143, 4.) A record of conviction, showing that after the court had adjourned to the 2d July, it did not re-assemble till the 4th, and that the prisoner was convicted the 5th, was held void, and the prisoner was re-tried. (Rex v. Bowman, 6 Car. & Payne, 337.)

But provisions in respect to time, are not always to be observed as conditions precedent, and essential to jurisdiction. It depends on the object, and especially the necessity of adhering to the exact time with a view to the action of others. In general, where time is prescribed within which an official act shall be done, this is but directory; as, that a court martial shall be convened on or before the 1st June; it shall not be holden void or its acts *coram non judice*, though not convened till July. (People v. Allen, 6 Wend. 486.) And in Pond v. Negus, (3 Mass. Rep. 230,) it was held, that assessors, directed to assess a tax in 30 days after they were furnished with a certificate of the vote, were not tied down to that time, but might do it afterwards.

6. *Jurisdiction with respect to the constitution of the court.* A member of an inferior court, who justifies as such, may also be called on to show that it was regularly constituted. (See ante, note 637, p. 903.) This was held, in Pennsylvania, of a militia court of three commissioned officers appointed by the commanding officer of the regiment; and it was adjudged that the defendant, who was a member of the court and sought to justify under the proceedings, must show, not only that the members of the court were officers, by producing their commissions, and that they took the oath prescribed, but that he must also by the same measure of evidence, show that the commanding officer was qualified. (Wilson v. John, 2 Binn. 209.) The like doctrine was subsequently held as against the collector of military fines who sought to justify under similar proceedings. (Fox v. Wood, 1 Rawle, 143.) See also Moore v. Houston, 3 Serg. & Rawle, 291. Quere, however; for as we have before seen, such matters relating to official rank, may be proved by acts and reputation. (Ante, note 427,

p. 554, 5; also ante, note 475, p. 626, 7. And see *S. P. Jacob v. The United States*, 1 Brockenb. 520; *Burchfield v. M'Cauley*, 3 Watts' Rep. 9; *Neale v. The Overseers*, 5 id. 538; *Murrell v. Smith*, 3 Dana, 462.) The decision of commissioners to settle the boundaries of land between parties, (a court of singularly extraordinary powers in Maryland,) was declared void, because the statute was not fairly and honestly fulfilled in their selection by the parties. (*Wickes v. Caulk*, 5 Harr. & John. 36, 43, 4.)

In Massachusetts, in an action brought for a military fine, the proceedings of the court which imposed the fine were adjudged void, because they proceeded without a judge advocate legally appointed. The acting judge advocate was appointed *pro tem.*, there being a vacancy in that office at the time; and held, that the court had no power to make such appointment, and therefore the court was irregularly organized. (*Brooks v. Adams*, 11 Pick. 441.)

In New-York, if a justice who is a tavern-keeper (*Schermerhorn v. Tripp*, 2 Cain. Rep. 108, *Clayton v. Per Dun*, 13 John. Rep. 218,) or living in a house where a tavern is kept, (*Low v. Price*, 8 John. Rep. 409,) try a cause, all is void; for the statute (1 N. Y. R. Laws, 397,) provides that a justice so situated shall not try civil causes.

In Massachusetts, if a justice be interested he cannot try, though he may issue his warrant against one travelling on Sunday. This is by statute. (*Pearce v. Atwood*, 13 Mass. R. 324, 340.) If he try, and issue execution, he is a trespasser. (*id.*)

In Vermont, by statute, a justice related to the party within the 4th degree, or interested, shall not take cognizance of the cause. Within this statute the confession of a judgment, in favor of a creditor so related, is *coram non judice*, and void. (*Hill v. Wait*, 5 Verm. Rep. 124.) So, if the justice enter up judgment by confession on his own demand. (*Bates v. Thompson*, 2 Chip. Rep. 96.)

In like manner, under the Virginia statute, an insolvent discharge granted by justices, one of whom was interested, was held void. (*Slacum v. Simms*, 5 Cranch, 363.)

As to the consequences of this want of jurisdiction, they have in several instances been noticed as we passed over the cases. One of the most obvious of them is, that if the former court had no jurisdiction, the trial will not bar a second suit; as if it had no jurisdiction of the subject matter or offence. (*Per Shaw, Ch. J., in Commonwealth v. Roby*, 12 Pick. 502.) Accordingly, where assault and battery was brought in a justice's court, for negligently firing a pistol, and judgment was rendered against the plaintiff on the merits, this was held no bar to a subsequent action on the case for the same offence; because the justice's court had no jurisdiction of an action of assault and battery. (*Blin v. Campbell*, 14 John. Rep. 432.) We have given a variety of cases shewing such result from a want of jurisdiction, *supra*. So where a justice in Kentucky tried and decided an action on a note payable in specific articles, (the statute not authorizing this,) and the same cause, on appeal, was reviewed and decided in the circuit court, all was held a nullity, and no bar to a second suit. (*Reading v. Price*, 3 J. J. Marsh. 61, 2.)

The general doctrine is sustained in the most striking point of view, on the question so much agitated in exclusive jurisdictions, *e. g.* a decree for or against a will of personality in the ecclesiastical court, which must be entirely disregarded as to the very point decided, on the same question arising as to a devise in the same will; and so vice versa, as to a decree or judgment upon the realty, when invoked as to the personality. The cases on this head are collected, ante, note 620, p. 861, 2, et seq. The

reason, says Baron Yelverton, in *Hume v. Burton*, 1 Ridgw. Irish P. C. 277, is evidently because the validity of the two testamentary dispositions is *triable by different jurisdictions*.

The decisions of a court having no jurisdiction, will not be regarded as evidence of the facts adjudged. This was noticed, ante, note 586, p. 826; and the cases there cited will be found equally pertinent to our present subject. The doctrine will be found recognized in most of the authorities *supra*.

Irregularities in respect to acquiring jurisdiction, (as if in a case of attachment, in Louisiana, the court omit to appoint a curator *ad hoc*, under circumstances in which the code of practice requires this,) have been held to render the proceeding a mere nullity; and a third party, or stranger, being proceeded against in virtue of any pretended right or title derived from a judgment in such a matter, may avail himself of its nullity. (*Collins v. Batterson*, 3 Mill. Lou. Rep. 242, 245.)

With regard, however, to the relative protection afforded by certain sentences, judgments, process, &c. there is a very unpleasant appearance of contrariety, especially among the older cases. The English books exhibit several startling anomalies, some of which it must be confessed are more likely to serve as matters of mere curiosity, than as a medium of instruction. Such we deem the following: By the game laws, to kill a hare, &c. without being qualified, subjected to £5 for each offence. The plaintiff killed five hares the same day, which in law would be but one offence; for such acts on the same day shall not be severable. The justice considered them five separate offences, and imposed £25 penalty; and the constable who distrained, was held liable in replevin for this mistake of jurisdiction by the justice. (*Marriott v. Shaw*, Com. Rep. 273.) So, where four several penalties were imposed, for four several acts of selling bread on Sunday, by four several convictions of 5s. each, and distress warrants were issued as for separate offences, both the justice and constables were held liable in trespass. Lord Mansfield said, that the justice had no jurisdiction after he convicted the plaintiff in the first penalty; and no distinction was sought to be made in favor of the constables, though their warrants were valid on their face. Aston, J. inquires, suppose no offence at all had been committed? and he insists that the justice, &c. would in that case be liable. (*Crepps v. Durden*, Cowp. Rep. 640.) This certainly looks much like convicting a judge in trespass for overruling a legal bar to the action, or for finding one guilty, where there happens not to be guilt; and at any rate it is dealing with the constable most unmercifully. Surely this must rank as one of Lord Mansfield's hasty decisions. The great case of *Gwinne v. Poole* was not cited. In *The Queen v. Mathews*, (10 Mod. 26,) there was a motion to quash such a conviction, which seems to have been a more legal remedy; and in *Brooke v. Milliken*, (3 T. R. 509,) the K. B. seem to have agreed with the justice whom Lord Mansfield punished. Would Lord Mansfield have sustained an action against Lord Kenyon, who delivered the opinion in the last cause?

In *Wise v. Withers*, (3 Cranch, 331,) it was held, that there being a want of jurisdiction of the person, the process would not protect the collector, though fair on its face; and that the court and officer were all trespassers; and such is said to be the general rule, where the court lacks jurisdiction. (3 Cranch, 337.) This case is cited and approved in *Mills v. Martin*, (19 John. Rep. 35.) In *Smith v. Shaw*, *supra*, (12

Johns. Rep. 257,) the liability of the ministerial officer was put, in one part of the court's opinion, on the ground that the officer was not subordinate and bound to obey the process; conceding that had he been provost marshal, he might have been protected, (*id.* 266, 7;) and the court hesitate to go the length of *Wise v. Withers*, *supra*. And see the dissenting argument of Spencer, J. *id.* 268 to 273; and per Marcy, J. in *Savacool v. Boughton*, 5 Wend. 176, 7. In *Pearce v. Atwood*, *supra*, the reason given against the officer is, that the non-residence of the person in the justice's county appeared on the face of the warrant. (13 Mass. Rep. 344.) Otherwise, *semb.* he would not have been liable. (*Id.* 341, 2.)

It was said by Reeve, C. J., in *Grumon v. Raymond*, (1 Conn. Rep. 46,) that where the forms conferring jurisdiction are not complied with by the court or magistrate, the officer serving the process is liable. But *Smith v. Bouchier*, (2 Str. 993,) relied on by the C. J. is surely not in point. That was a case of *ignorantia facti*, within *Gwinne v. Poole*; so the court distinctly said; and they agree that the officer should not be liable, but only the judge who knew of the defect. The reason, in *Strange*, is, that the officer had joined the magistrate in the plea of justification. It turned purely on the form of pleading. And this is still more plain by *Philips v. Biron*, (1 Str. 509,) to which they refer. Yet this reason is put with a quere in *Perkin v. Proctor*, by the court, (2 Wils. 385,) who incline that the officer would be liable. See a farther history of *Smith v. Bouchier*, by Marcy, J., in *Savacool v. Boughton*, 5 Wend. 173. And it was agreed, in *Albee v. Ward*, *supra*, that though the execution was void for the misrecital of the recognizance, yet it should protect the officer; but the plaintiff and justice should be liable. (8 Mass. Rep. 84, 5.) So the party shall be protected if he apply, regularly and generally on a proper oath, for an execution; though the justice (without the party's direction) issue it against the body, when it should have gone against the property only. (*Taylor v. Trask*, 7 Cowen's Rep. 249.) In *Toof v. Bently*, *supra*, *Savage, C. J.*, says the constable was liable, because the execution was on its face, such an one as should have run 90 instead of 60 days. (5 Wend. 277.) See a broad and unqualified remark, that without jurisdiction in the court or magistrate, no one shall be protected, per *Trimble, J.*, in *Elliott v. Peirsol*, (1 Pet. S. C. Rep. 340.) But see per Marcy, J., in *Savacool v. Boughton*, (5 Wend. 179.) In *Gold v. Bissell*, *supra*, (1 Wend. 210,) the general expression of the C. J., at p. 212, is equally broad with that of *Trimble, J.*, *supra*, but is qualified in the same way, by Marcy, J., in *Savacool v. Boughton*, and by the C. J. himself, in *Rogers v. Mulliner*, 6 Wend. 602. It has indeed been said and held in several cases, that the court wanting jurisdiction, its process shall not protect the officer, (*Woodard v. Paine*, 15 Johns. Rep. 493;) as where a justice, in New-York, took cognizance of an action of assault and battery. (S. C. also stated, *supra*.) And so, where a court having jurisdiction of covenant and debt only, took cognizance of assumpsit, (case of the *Marshalsea*, 10 Rep. 76.) Though *Powell, B.*, said, in *Gwinne v. Poole*, *supra*, the liability of the officer was, in that case, because he ought to have known that the party was not enrolled of the king's household. It was agreed in the above tax assessment cases that the collectors were liable, without always giving the *scienter* as a reason; but that reason may be gathered from *Gwinne v. Poole*, *supra*, especially where the restriction is territorial. The collector, a corporate officer, is bound to notice it; and where the assessment is on property not assessable by law, this might perhaps appear on his

warrant, and his want of knowledge would then be *ignorantia legis*. And where he does not know it, as where the cause of action is transitory, Willes, C. J., in *Moravia v. Sloper*, (Wilkes, 34,) follows Powell B., in *Gwinne v. Poole*, that he is not liable; and he cites many cases to that distinction; though he insists that the plaintiff and his attorney shall always be liable. It will be seen by one of the cases cited by him, that this want of jurisdiction shall no more affect the officer, than the common case of an irregular proceeding in a court of record, on which his process is founded, and where he, though not the party or attorney, shall always be protected even after the proceeding is set aside. The case he cites to this effect is *Turner v. Felgate*, 1 Lev. 95. Another case (*Cotes v. Mitchell*, 3 Lev. 20,) is, that process shall protect the sheriff, even though there be no judgment. (Per Holt, C. J., Carth. 443, S. P.) Other cases cited by him, viz. *Hodson v. Cooke*, 1 Ventr. 369, and *Higginson v. Martin*, 2 Mod. 195, and especially as this last case stands reported in 1 Freem. 322, are in point, that the officer shall be protected by the process of an inferior court, though the cause of action arose without its territorial jurisdiction. And where a town meeting ordered and caused to be levied a tax for support of the national defence; though the assessors were holden liable in trespass, yet Parker, C. J. concedes that the collectors should not be; for they act under a warrant from a power over the subject matter in the abstract; an authority to assess a tax, though not *the tax*; and it would be dangerous to allow mere ministerial officers to exercise their judgment upon the proceedings of their masters. Quere; if the want of power appears on the face of their warrant. A pound keeper is not liable, though he receive and detain cattle taken by the distrainer, without any pretence of right; "for he takes the cattle, as he is obliged to do, at the peril of the person who brings them; and there is no judgment, no direction, no written warrant or examination to be had by him." (*Badkin v. Powell*, Cowp. 476, 478. See 7 Conn. Rep. 557.) In the above case of *Pearce v. Atwood*, (13 Mass. Rep. 324,) it was allowed, that the constable executing the warrant should be protected, though the justice was interested; for he might issue a warrant, though he could not try. Stress is laid on the distinction that the jurisdiction does or does not appear on the face of the warrant. (Id. 341, 2.) In *Hill v. Wait*, supra, it was agreed, that the execution appearing fair, the officer could not be made liable as a trespasser. (5 Verm. Rep. 125.) In Tennessee, an execution against persons becoming surety by parol to pay a judgment is a nullity; and where an execution is founded on the mere return of the constable to a previous execution, he is not protected in executing the last. (*Martin v. England*, 5 Yerg. §13, §18.)

All the cases agree, that process *void on its face* shall not protect the officer. As to process void for want of jurisdiction, and that appearing, see *Morse v. James*, Wilkes, 122. There, the warrant appeared to have issued out of a court not in session; and at p. 128, an instance is put of an English justice issuing a *capias* in debt, whereof the constable is bound to know that he has no jurisdiction. And it is so in general, where the magistrate has no jurisdiction of the process; as where a warrant is to search all suspected places. The ignorance of the officer, if it exist, is of law, which shall not excuse. (*Grumon v. Raymond*, 1 Conn. Rep. 40, 43, 4, and the cases cited at the latter page, especially *Martin v. Marshall*, Hob. 63.) So, where the warrant shows a case in which a summons only could issue, it will not protect either the magistrate or officer. (*Shergold v. Holloway*, 2 Str. 1002.) And this rule is expressly laid down

by Marcy, J. in *Savacool v. Boughton*, (5 Wend. 181,) as to a case where there is, apparent on the process, a want of jurisdiction over either the subject matter or person. If the officer throws himself on the process standing alone without the judgment, he must shew enough of the process to make it good on its face. (*Cleveland v. Rogers*, 6 Wend. 438, in connexion with what was said of this case in *Coon v. Ogden*, 12 Wend. 499.) A constable was held a trespasser in executing a general search warrant, not specifying place nor goods. (*Sandford v. Nichols*, 13 Mass. Rep. 286, 288, 9.) So, where the warrant of arrest for a crime stated only report and common rumor of a party's guilt. (*Connor v. Commonwealth*, 3 Binn. 38, 44.) So of a warrant not directed to any officer competent to execute it. (*Hall v. Moore*, Addis. Rep. 376.) The direction was in blank, "To any constable of ———." (id.) So of an execution issued and purporting to be renewed by a justice, the renewal not being signed by him, as required by 2 R. S. N. Y. 251, §145; which was construed to mean the actual affixing of his name. (*Barhydt v. Valk*, 12 Wend. 145, 146, 7.) A mittimus should always recite the cause of commitment, to inform the judge on habeas corpus. If it does not, the prisoner will be discharged. If on complaint, it should recite the complaint. (*Commonwealth v. Ward*, 4 Mass. Rep. 497.) Where it is apparent on the face of a certificate of discharge of an insolvent, that a citation was not properly served on the insolvent's creditor to shew cause against the discharge, the certificate will not protect the jailer against an action for the escape. (*Adams v. Matlocks*, Brayt. 199.) And see *Taylor v. Moffatt*, 2 Blackf. 305, 308. Where the captain of a military company issued a warrant, which stated it to be for the collection of "a fine legally imposed," without showing *by whom* the fine was imposed, held, that the warrant afforded no protection to the officer executing it, or the captain who issued it. The warrant, say the court, must show jurisdiction upon its face, or it is void. (*Hall v. Howd*, 10 Conn. Rep. 514. See 10 Wend. 62, 3, 4.)

Where the want of jurisdiction is not known to the officer, he shall be protected, though the magistrate party and attorney are liable; as if an inferior court, in England, issue an attachment without a previous summons. (*Moravia v. Sloper*, 30; and see the authorities cited at p. 34, by Willes, C. J.) And where a warrant should have issued, but the justice proceeded by summons, and issued execution, he was holden liable. (*Bigelow v. Stearns*, 19 John. Rep. 39.)

We have thus gone through, as we proposed, with various questions upon the conclusiveness as evidence, of the proceedings, judgments, sentences, &c., and process of inferior jurisdictions. If there be numerous discrepancies in the cases, the remark is certainly not confined to the American courts. They are traceable to the common source of juridical dissonance, the difficulty of applying principles, in which the courts all agree, to cases of almost every variety in the combination of their circumstances.

In respect to several broken lines or classes of cases, hardly any attempt has yet been made to reduce them back to a uniform rank. In the main they are consistent, calling merely for the rejection of scattered anomalies.

With regard to the doctrine of protection, above considered, we are happy to see that the authorities are gradually getting back to the sound and broad distinctions drawn by Baron Powell, in *Gwinne v. Pool*. We have already noticed several modern cases, both English and American, looking that way. Yet there were such amentable departures, that when the supreme court of New-York waked entirely, as

it finally did, to the question, it was amid a labyrinth quite as embarrassing, and in the face of an array quite as formidable, as that which the Exchequer was obliged to encounter in *Gwinne v. Poole*. The case upon which the supreme court were called to act, was that of an arrest under execution upon a justice's judgment, void for want of original process appearance or other authority. The action was assault and false imprisonment against the constable. He justified by pleading the judgment and execution, to which the plaintiff replied the above facts going to the jurisdiction; and upon the latter there was a demurrer and joinder. The court held, that the process was, *per se*, a protection to the constable. And Marcy, J., who delivered a learned and able opinion, lays this down as a general rule applicable to all process, *legal on its face*, whether it issue from a court of general or limited jurisdiction. (*Savacool v. Boughton*, 5 Wend. 170, A. D. 1830.) The rule is expressed, perhaps too cautiously, thus,—“If the subject matter of a suit is within the jurisdiction of a court,” the officer who executes the fair process shall be protected; whereas his principle would have fully warranted him in saying with *Gwinne v. Pool*, that to expose the officer, the want of jurisdiction over the subject matter must not only exist, but *appear* on the process, unless he had clear knowledge of the defect in some other way. The learned judge does not go beyond the United States, New-York, and English cases and dicta; of these, most are distinguished, explained, and reconciled, upon the principle of *scienter*. Some furnished a clear and direct support; and others, it was necessary to overrule. Among the cases which supported him, he very justly places *Warner v. Shed*, (10 John. Rep. 138, 140,) and the case there cited of *Hill v. Bateman*, (2 Str. 710.) He reposes upon *Beach v. Furman*, (9 John. Rep. 229,) as a case of still more imposing strength. There can be little doubt, that taking the reasoning of the supreme court in these two cases, they had maintained a principle carrying out most, if not all the consequences, indicated by *Gwinne v. Pool*. Probably, as the judge suggests, the case of *Suydam v. Keys*, (13 Johns. Rep. 444,) would be maintainable on the ground that school district collectors are bound to know, *ex officio*, who are and who are not taxable inhabitants in their districts. Such we have seen is the notion in *Gwinne v. Pool*. This would certainly seem to leave nothing in New-York standing in the way save general dicta. Since the decision in *Savacool v. Boughton*, a party sought to justify under an execution which he had taken out on a satisfied judgment before a justice. Held, he could not; but *Savage, C. J.*, in giving the opinion of the court, admitted that the constable, and even the justice, not knowing the fact, would be justified. (*M'Guinty v. Herrick*, 5 Wend. 240, 246.) But the constable must shew the person named in the process as justice, to have been so, at least, *de facto*. (*Wilcox v. Smith*, 5 Wend. 231; and see *Reynolds v. Moore*, 9 Wend. 35.) In *Rogers v. Mulliner*, 6 Wend. 597, the rule is laid down by *Savage, C. J.*, thus, “that ministerial officers are not responsible for executing any process, regular on its face, so long as the court from which it issues has general jurisdiction to award such process.” (Id. p. 602.) There, a justice was sued along with the party at whose suit the justice had issued a warrant, for the arrest of a person who turned out to be a freeholder. The justice had a statute authority for issuing a warrant in certain cases without oath, but not against a freeholder; and as he had, therefore, what is called general jurisdiction over the process, and had acted in good faith, as the mere agent of

the party, he was held not responsible; but otherwise as to the party. The case goes distinctly on the ground of *scienter*, and the opinion concedes, that if the justice had acted officiously, or with knowledge that the person arrested was a freeholder, he would have been liable. (See also *Curry v. Pringle*, 11 Johns. Rep. 601; *Percival v. Jones*, 2 Johns. Cas. 49; *Taylor v. Trask*, 7 Cowen's Rep. 250.) Where a person was indicted for resisting an officer acting under an attachment, the court held, that the attachment might be given in evidence, without proof of the preliminary proceedings necessary to render it regular. "The magistrate by whom it was issued had general jurisdiction to issue attachments, and the process was regular and unexceptionable upon its face. The officer was not bound to enquire, whether the requisite evidence had been exhibited to the justice to authorize the issuing of the attachment in this particular case." And the court expressly say, upon the authority of *Savacool v. Boughton*, that though there be a want of jurisdiction in such case as to the person or place, the officer who executes the process is not liable, unless the want of jurisdiction appears on its face. (*The People v. Cooper*, 13 Wend. 379.) The party, however, who procured the process, would not be protected, if it issued without compliance with the preliminary requisites. (*Loder v. Phelps*, 13 Wend. 46, 48.) And though a school district tax-warrant be void, as having been issued by the trustees on a wrong assessment roll, the collector is not liable for levying, though the trustees are. (*Alexander v. Hoyt*, 7 Wend. 89, 93.)

It is certainly important to notice that *Story, J.*, in the same year (1830,) in *Thurston v. Martin*, (5 Mason, 497,) and that, too, on a very full review of the English, U. S. court, Massachusetts, and New-York cases, comes to a conclusion diametrically opposite to *Savacool v. Boughton*. He denies that a collector of town taxes is protected by his warrant, though fair on its face, issued against a person residing without the town; and he goes on the broad ground taken in *Wise v. Withers*, requiring the collector to notice at his peril that the court had jurisdiction. The case is certainly maintainable on the exception heretofore noticed, that all officers of corporations should be held bound to know the residence of such, against whom they may have process, founded on corporate authority. Nor is it at all singular, as we have seen, that learned men should clash in the application of principles by which cases of this character have been governed:

We have already incidentally noticed several decisions of neighboring states, going to support the doctrines of the New-York courts. A similar doctrine to that of *Savacool v. Boughton* prevails in Pennsylvania. The warrant of a collector of military fines, protects him, though he can show no proceedings on which it was founded; nor is he bound to notice that the person against whom it issued, is exempt from military duty. "The adjudication of the court on this, as on every other fact necessary to be made out by the prosecutor, is conclusive, where the fact again comes in controversy." (*Fox v. Wood*, 1 Rawle, 143, 145, 6.) So, of a warrant to collect a fine for violating the Sunday law, though jurisdiction be wanting; (*Jones v. Hughes*, 5 Serg. & Rawle, 299, 302, 3;) and also where an execution was issued against two, on a judgment against only one. (*Paul v. Van Kirk*, 6 Binn. 123, 4.) So too it seems in Connecticut. The opinion of *Hosmer, Ch. J.*, with whom a majority of the court concurred, in *Watson v. Watson*, (9 Conn. Rep. 141,) though not in a case involving the question as to a want of jurisdiction, will be found a very able vindication of the policy of protecting the ministerial officer by process fair upon

its face. (Id. 146, 147.) But see the rule as laid down in *Prince v. Thomas*, 11 Conn. Rep. 472, 476, 7; also *Allen v. Gray*, id. 95; *Hall v. Howd*, 10 id. 514; *Grumon v. Raymond*, 1 id. 40; *Tracy v. Williams*, 4 id. 107. In Ohio, where a justice had no jurisdiction of the person of the defendant against whom he had rendered judgment, by reason of a defective return to the process for appearance; and execution was issued to a constable, who levied on the defendant's goods, and by his command the plaintiff in the execution, and one W., a stranger, assisted in the removal of the goods; held, that the justice and plaintiff were both liable, inasmuch as the return was notice to them of the jurisdictional defect; that the latter could not shield himself under the command of the constable, whom he set to work; but as to the constable, and W., both were strangers to the proceedings before the judgment, and the process of execution, valid on its face, was a complete justification. (*Harmon v. Gould* 1 Wright's Rep. 709, 710, per Wood, J., citing 6 Ohio Rep. 147, &c.) The protection of the assistant, a stranger, follows that of the officer; if the latter is justified, the former is also. (*Elder v. Morrison*, 10 Wend. 128. *Oystead v. Shed*, 12 Mass. Rep. 511. As to the party, see *Loder v. Phelps*, 13 Wend. 48, *supra*; *Pukard v. Bliss*, 1 Wright's Rep. 344.)

One exception will be noticed hereafter, that where the process commands a levy, and is used to take the goods of the party against whom it issues, they being claimed by a third person who sues for them, the officer shall not be protected without showing the judgment. The distinction and the reason are given, post, p. 390 & 391 of the text, in this vol., & vol. 2, p. 384, which see with the notes. If the defendant named in the process, be plaintiff, says our author, the writ alone will justify; if the plaintiff, a stranger, claim the goods by a prior sale from the party, which it is sought to impeach as fraudulent within the 13 Eliz., the judgment must be shown to bring the case within that statute. This is saying no more than that a creditor at large, shall not be protected by the statute; a doctrine familiar to the law, however anomalous it may be to take away from the officer, the protection, which one would suppose might fairly be rested on the general principle. The exception proves the rule; but is, in itself, perhaps too well settled to be disturbed. (*High v. Wilson*, 2 Johns. Rep. 46.) It seems, however, to be confined, as our author has put it, to the single case of a contest under the statute of Elizabeth. Such was *High v. Wilson*, *supra*. On the other hand, not only where the execution is against the party shall it stand alone as a defence at his suit, (*Holmes v. Nuncaster*, 12 Johns. Rep. 395,) but where the officer defends against a third person, suing him for taking the party's property out of the officer's hands, after levy, he need not show a judgment. (Per Cur. in *Barker v. Miller*, 6 Johns. Rep. 196; and see *Blackley v. Sheldon*, 7 id. 32.) In *Coon v. Congdon*, (12 Wend. 496, 499,) it is remarkable that the constable had taken the goods from the possession of a third person, not named in the process; and on the latter bringing replevin, it turned out that the judgment was, in truth, a mere nullity. Yet, it not appearing to be a contest under 13 Eliz., the execution alone was held a good justification, the goods belonging to the party against whom it issued.

A sheriff is authorized, in Maine, to grant goal-liberties, on sureties being approved by two justices in a certificate endorsed on the goal-bond. Though the endorsement may have been made while the bond was a blank, and so the justices had no power, yet

the sheriff shall be protected by it, in an action for the escape. (*Fullerton v. Harris*, 8 Greenl. 393, 397.) In such an action, the justices cannot be received against him, to contradict or explain away their certificate. (Id. 398, 9.)

But though the officer may be protected on account of the want of jurisdiction not appearing, and not being known to him, yet, if he will undertake to judge, he may do so at his peril; and if it turn out that there is, in truth, such a want of jurisdiction as will avoid the proceeding as to the party who has obtained the process, the officer shall not be liable to him for neglect to act under it, or for disobeying it; and this, even though he relinquish person or property after taking them under it. (*Albee v. Ward*, 8 Mass. Rep. 79, 86, and the cases cited at the last page; especially *Squibb v. Hole*, from 2 Mod. 29, and 1 Freem. 193. Per Parsons, C. J. in *Dillingham v. Snow*, 5 Mass. Rep. 558. *Hill v. Wait*, 5 Verm. Rep. 124, 127, 8.) Otherwise, as to mere irregularity. (*Harvey v. Huggins*, 2 Bail. 252. See per *Bronson, J.* in *Walden v. Davison*, 15 Wend. 575. *The People v. Dunning*, 1 id. 16.)

While speaking more particularly of the surrogate and probate courts, ante, note 620, p. 869, 870, we extracted remarks as to the form of their records, equally applicable to all inferior or superior jurisdictions, and shall not repeat what we there said. See also *Helvete v. Rapp*, 7 Serg. & Rawle, 306, 308, the case of a very short form, but pronounced by the court to be the substantial entry of a judgment, under the Pennsylvania statute requiring a brief entry on a judgment-bond. In *Ramsay's* appeal, (2 Watts. 231,) the court say of this judgment, that it barely escaped a sentence of nullity, and that such record may be treated as a nullity when it is deficient in an integral part; as, in the *Philadelphia Bank v. Craft*, 16 Serg. & Rawle, 347, where a judgment was confessed for such sum as should be ascertained by the prothonotary. But if on the whole record taken in itself, or by virtual or implied reference to other papers on record, the sum or other matter appear, the judgment or decree is certain enough. (*Melancon's heirs v. Duhamel*, 3 Mart. Lou. Rep. N. S. 7.)

It has been said to be well settled, both by practice and direct adjudication, that "every proceeding of a judicial character must be in writing;" e. g. the decision of the board of health of the city of Albany, pronouncing a building to be a nuisance. (*Meeker v. Van Rensselaer*, 15 Wend. 397, 399. See *Van Wormer v. Mayor, &c. of Albany*, id. 262, 265.) Commissioners were authorized to lay a turnpike over an old road, if the selectmen should be of opinion that the old road was a proper subject to be discontinued. The opinion of the selectmen, orally expressed, was held to be a nullity. A written expression of their judgment was deemed essential; and all evidence short of that, repudiated. (*Fisher v. Beeker*. Brayt. 75, Evidence, No. 2; Post, vol. 2, p. 419, and the cases there cited.) In *Bridget v. Coyney*, (1 Mann. & Ryl. 211, 216,) Lord Tenterden, C. J. remarks, "It is said the plaintiff is convicted," [of a malicious trespass, by the defendant, a justice.] What evidence is there of this conviction? No conviction was produced at the trial, or is laid before us now. Indeed it is admitted that none has ever been drawn up. Then how can we possibly say that the party was convicted?" So where the conviction, drawn up after the warrant of commitment, did not connect with and support the latter, but was for a different offence; it was held, that oral evidence of the true conviction, and such as would support the warrant, was nugatory as a justification to the magistrate. (*Rogers v. Jones*, 5 Dowl. & Ryl. 268, 272, 3 Barn. & Cressw. 409, S. C., 1 Ry. & Mo. 129, S. C.; and see our author, ac-

cordingly, ante, p. 355.) The doctrine was held in relation to a justice's judgment, in *Jones v. Walker*, 5 Yerg. 431. The court say, "a judgment must be in writing in some form;" and they adjudged, that proving the judgment of a justice as he rendered it, by parol, would be no bar to a second action for the same cause. (*Id.*) Quere; see *Felter v. Mulliner*, 2 Johns. Rep. 181, where it was held, that though a justice give no judgment, e. g. on a verdict, yet the proceeding shall be a bar. And in South Carolina, magistrates are not required, it seems, to keep any memorial of their proceedings, and when they do, such memorials are only regarded as private memoranda. Hence, an execution there has been held the best evidence of the judgment. (*Maybin v. Virgin*, 2 Hill's Rep. 420.) See post, as to proof of records, &c.

We remarked, ante, note 550, p. 799, that to entitle a matter to the consideration and respect due to a record of a court of record, it must be enrolled. This was lately held on a plea of autrefois convict at the Clerkenwell sessions, which adjourned without making up a record. The indictment, with the entry of the finding of the jury endorsed, was produced, but held not receivable; and time was given to obtain a mandamus compelling the sessions to make a record. (*Rex v. Bowman*, 6 Carr. & Payne, 101. As to decrees in chancery, see ante, note 639, p. 923.)

The general distinction seems to be fully agreed, that power and authority shall be intended as to courts of general jurisdiction; but as to inferior or limited courts, those who claim any right or exemption under their proceedings, are bound to show affirmatively that they had jurisdiction. (See this doctrine in respect to judgments as among the neighboring states, ante, note 637, p. 905, 6.) The above rule is laid down in *Mills v. Martin*, (19 John. Rep. 33, 4, 5,) but the cases cited as maintaining it are principally, if not all, cases of pleading. See also *Kirby*, 126, where the same thing is said of a declaration on a foreign judgment. And see the general rule just cited also stated by Clinton, Senator, in *Yates v. Lansing*, 9 John. Rep. 437. It has been said, that the preliminary requisites to entitle to naturalization shall be presumed, though they do not appear in the certificate; but held, that proof shall be receivable against the presumption. (*Vaux v. Nesbit*, 1 M'Cord's Ch. Rep. 370, 1. But see *Spratt v. Spratt*, 4 Pet. 393.) In New York, held, that a record, in summary proceedings in the supreme court, was void when collaterally introduced, because an affidavit and advertisement to bring in owners unknown did not appear on the face of the record. (*Denning v. Corwin*, 11 Wend. 647.) So, in Massachusetts, in declaring on a recognizance taken by a justice, jurisdiction must be averred; and it was said, the recognizance ought to recite enough to shew jurisdiction, and that it cannot be intended. (*Bridge v. Ford*, 4 Mass. Rep. 641, 2, 3; 7 id. 209, S. C.) See also *Brooks v. Adams*, 11 Pick. 441; *Hall v. Howd*, 10 Conn. 514. In Tennessee, the jurisdiction of a court to take the acknowledgment or proof of a deed, must appear in the record. (*Lipe v. Mitchell's lessee*, 2 Yerg. 400, 404, 5.) So, of a condemnation of land to be sold for taxes. (*Hamilton v. Burum*, 3 Yerg. 355.) A party convicted of a forcible detainer was discharged on habeas corpus, because it did not appear expressly by the conviction that it was preceded by a forcible entry. The conviction merely stated a previous entry generally, without saying it was forcible. (*Rex v. Oakley*, 4 Barn. & Adolph. 307.) In proceedings for partition, in N. Y., if it do not appear that due proof was made that a partition would be prejudicial, an order for sale is void. (Per Woodworth, J. in *Galatian v. Cunningham*, 8 Cowen, 361, 370.) As to what shall be a suf-

ficient recital to show jurisdiction, in a summary proceeding under a statute, see *Davis v. Nest*, 6 Carr. & Payne, 167.

As to presumptions of regularity, after jurisdiction appears, and the proceeding is under review upon certiorari or appeal, there are many cases; and they generally demand that every favorable intendment should be made. (Case of Schuylkill Falls road, 2 Binn. 250. See *Voorhees v. Bank of the United States*, 10 Peters, 449.) Some cases are more strict in relation to inferior jurisdiction, but more liberal as to superior courts, in this matter of intendment. (See *State v. Kimbrough*, 2 Dev. 431.)

There is some difficulty in ascertaining from the cases the precise effect which is to be awarded to the recital of jurisdictional facts. It has been said, that the recital in an order of magistrates, of a fact necessary to give them jurisdiction, is not evidence. (*Rex v. Gilkes*, 2 Mann. & Ryl. 454.) The case was an indictment for not obeying an order of magistrates, made upon the stewards of a friendly society, &c., for re-admitting a member. The indictment set out the warrant, the recital wherein was, that the rules of the society had been approved and filed &c., so as to make it a body over which (by statute) the two justices could exercise such summary control. But the indictment made no such averments independent of the recital; so that the real question arose on the sufficiency of the indictment. But a previous case in the C. B. seems to hold the contrary, and that such recital shall conclude. A statute authorized justices summarily to examine a laboring servant in husbandry on oath, settle the amount due from the master, and issue a distress warrant for its collection. On replevin by the master against the constable, the latter made cognizance, setting forth the proceedings adjudication and warrant, which stated, among other things, that the oath was duly made. Plea, denying that the oath was made. Demurrer. The court held, that the proceeding could not be thus questioned, even on a fact necessary to confer jurisdiction. (*Wilson v. Weller*, 3 Moore, 294; 1 B. & B. 57, S. C.)

Such recitals are conclusive evidence of every thing recited, which is pertinent to the adjudication, except facts constituting jurisdiction, even in favor of the acting magistrate or court, and the party; and this, though drawn up long after conviction, and after suit brought. (See ante, note 165, pp. 155, 157, 8. *Gray v. Cookson*, 16 East. 13, 14. *Rogers v. Jones*, 5 Dowl. & Ryl. 268. *Fuller v. Fotch*. Holt, 287, 8, tit. Ev. case 10. *Strickland v. Ward*, 7, T. R. 633, and see the cases cited Post Vol. 2, p. 415 et seq. *Brittain v. Kinnaird*, 1 Brod. & Bing. 432. 4 Moore, 50, S. C.) Even the return of a ministerial officer is prima facie evidence, in his own favor, according to the balance of authority. (Ante, note 165, p. 155, 157, 8.) That these records of summary conviction, and even the warrant of the magistrate, magistrates or court, valid on their face, are conclusive, in all respects, in favor of the officer who acts under their authority, we have abundantly seen. On the question how far they shall be received in favor of the party, or magistrate, to evince a fact conferring jurisdiction, the cases fluctuate from absolute verity to mere nullity. In *Fawcett v. Fowles*, (as reported in 1 Mann. & Ryl. 102, 108; ante, 157, of notes, S. C. cited from 7 Barn. & Cress. 394,) Brougham, *arg.* said, "the justices cannot by a mere statement, give themselves jurisdiction." Bayley, J. "of that there is no doubt. You might have pleaded before the magistrates that they had no jurisdiction." (1 Mann. & Ryl. 108.) In *Fuller v. Fotch*, *sup.*, Holt said, the conviction, drawn up by the magistrates, proved itself and the truth

of the matter of fact upon which they grounded their judgment; though if they intermeddled in a matter not within their jurisdiction, that might be shown. (Holt, 288. This is Holt, 7 W. 3.) See farther on this head, Post Vol. 2. 415, 416.

The English cases still leave the question in doubt, whether a conviction, or other judicial act, however formally asserting jurisdictional facts, shall be any evidence of them. (See *Rex v. All Saints*, 1 Mann. & Ryl. 663, 667, 8, and the cases there cited.) Our author hazzards a semble (Vol. 2. p. 416,) that such recitals would conclude. He gives no case directly adjudging this, but several which hold the contrary. The dictum in *Rex v. Gilkes*, (2 Mann. & Ryl. 454,) related to an order made, after notice, upon the very persons who were indicted for disobeying it. Yet such a recital, though full and specific, is said by Lord Tenterden, C. J. not to be legal evidence against the defendants. — *Rex v. All Saints*, was cited in the cause by counsel. The verdict (which was guilty,) was taken before Lord Tenterden, who reserved the point as one of evidence. On moving to enter a verdict of acquittal, and in arrest, his Lordship uses the expression we have cited. Bayley, J. does say, however, (contrary to what he had hinted in *Rex v. All Saints*,) that the prosecutor had proved every thing contained in the indictment; but that would not answer, as it merely averred the recitals in the order; and such was not proper pleading; the indictment should have directly averred the jurisdictional fact; and this seems to be the view which governed a majority of the judges.

The language of Holroyd, J. in *Rex v. All Saints*, (1 Mann. & Ryl. 668,) is as follows: "The rule *omnia presumuntur rite esse acta*, does not apply to the facts which constitute the jurisdiction. In a plea of justification, *all the facts which shew the jurisdiction must be stated, and they also must be proved.*" Bayley, J., in S. C.—"Here the facts constituting the jurisdiction, namely, that the examinant is a soldier, and quartered within the jurisdiction, must be shewn, either *aliunde* or *ex visceribus*. I think it should have been made out *aliunde*." (Id.) Holroyd, J. did not pronounce upon that, saying it was unnecessary, as the jurisdictional facts were not recited, (id. 668, 9.) To sustain his view, that the proof can not be made *ex visceribus*, Bayley, J. is made by the reporter to cite Lord Kenyon, C. J., in *Rex v. Hullcott*, the case of an order of discharge of a servant in husbandry, (6 T. R. 583); according to the statement of which, he certainly makes his Lordship come to the same conclusion with himself. But an argument is imputed to Lord Kenyon, which we have not been able to find in the case. Bayley, J. begins by quoting correctly the conclusion of his Lordship: "As it does not appear on the face of this order, that the justice had jurisdiction, the pauper was not legally discharged," &c. The case was much argued; an array of strong authorities for presuming in favor of these and the like orders, on general words, were cited by counsel in favor of this order being admissible in evidence, although the jurisdictional fact was equivocally stated or recited in it;—as "servant," instead of "servant in husbandry;" the kind of service being what gave jurisdiction. Lord Kenyon said of the argument, that many cases were cited; some one way and some the other; but the last decision, he said, required that jurisdiction should appear on the face of the order. He adopted that; and held the order inadmissible as evidence for default of reciting that fact; and the decision of the sessions who received it in evidence was quashed on this sole point. Surely, this is an authority in point, that such recitals are pertinent to maintain the order, to some extent, at least; if not to

prove the jurisdictional facts, at any rate, to prevent an overthrow, like the *allegata* in a suit. The service was shown on the trial, *aliunde*, to have been in husbandry. In truth, there was jurisdiction. Holroyd, J. as well as Bayley, J. expressly approved the authority of *Rex v. Hullcott*. Several dicta in *Gray v. Cookson*, (18 East. 18,) give countenance to the idea, that the record of conviction shall conclude in favor of the magistrate, if good on its face, even as to facts giving jurisdiction; or that, at least, it shall be some sort of evidence.

In New-York, we may safely consider these jurisdictional recitals as *prima facie* evidence. The defendant gave an insolvent discharge in evidence, under the general issue, relying upon the recitals in that discharge as evidence of the usual jurisdictional fact, the presentation of the petition. An objection was made, that this should be proved by evidence *aliunde*. The justice (before whom the cause was tried) allowed the objection. On certiorari to the common pleas his judgment was affirmed; but on error to the supreme court, the judgment of the common pleas was reversed. Nelson, J. in delivering the opinion of the court, admitted that the question depended upon the general rule, as to the effect of such recitals in the record of any court of special or limited jurisdiction. Such recitals, he said, are *prima facie* evidence, and such is the well settled rule. (*Barber v. Winslow*, 12 Wend. 102.) He relies on *Jenks v. Stebbins*, 11 John. Rep. 224, as fully sustaining his view in the particular case. That was also the case of an insolvent discharge. It has been said, that in the supreme court of New-York, when the proceeding is summary, by declaration without writ, under the statute, the record should contain sufficient to show a compliance with the statute in the commencement of the suit; in other words, the record must shew jurisdiction. (*Smith v. Fowle*, 12 Wend. 9, 11.) An inquisition made by turnpike appraisers, on their assessment of damages done to land, is conclusive against the owner, as to every fact recited in it concerning their proceedings, after their jurisdiction has been proved. (*Van Steenburgh v. Bigelow*, 3 Wend. 42.)

The force of these recitals in Tennessee, seems the same as in New-York. (See *Garner v. Carroll*, 7 Yerg. 365; *Ferrel v. Finch*, 8 id. 432; *M'Carroll v. Weaks*, 2 Tenn. Rep. 215, 217, et seq.; *Hamilton v. Burum*, 3 Yerg. 355, 361, 363.)

It has been held that a record stating that the party appeared, shall conclude as to that fact, though on a point of jurisdiction. (*Selin v. Snyder*, 7 Serg. & Rawle, 166. 11 id. 436, S. P. *Raborg v. Hammond*, 2 Harr. & Gill, 42, 50. See S. C. and others of a like import, ante, note 620, p. 876; also *Rust v. Frothingham*, 1 Breese, 258.) The doctrine in New-York is doubtless otherwise, especially as to the judgment of a neighboring state. (See *Bigelow v. Stearns*, 19 John. Rep. 41; also ante, note 551, p. 799, 800, and the opinion of Marcy, J., in *Starbuck v. Murray*, there quoted.) Further on this subject see several other cases from various courts, cited ante, note 637, p. 909.

Where the jurisdiction of an inferior court, depends upon a fact which such court is required to ascertain and settle by its decision, such decision has been held to conclude. In *Brittain v. Kinnaird*, (1 Brod. & Bing. 432, S. C. 4 Moore, 50,) trespass was brought for seizing and taking possession of a vessel, with the masts, &c. and 590 lbs. weight of gunpowder. It appeared that the seizure took place by the defendant, as a magistrate, under the Bum-boat act, (2 Geo. 3, c. 28.) The conviction was put in, and being fair upon its face, it was held by Dallas, C. J., who presided at the trial, to

be a conclusive defence to the action. He accordingly directed a nonsuit, reserving the point. Vaughan, sergeant, obtained a rule *nisi* for a new trial, on the ground that the magistrate had, by the statute, no power to take any thing but a boat; that he had assumed to himself jurisdiction by calling that a *boat*, which was in truth a *vessel*, and that he could not thus conclude a party. Cause being shown against the rule, Dallas, C. J., said: "The general principle applicable to cases of this description, is perfectly clear; it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject matter in the present case were a boat, it is agreed that the boat would be forfeited, and the conviction stated it to be a boat. But, it is said, that in order to give the magistrate jurisdiction, the subject matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction, by showing that this was not a boat. I agree, that, if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel; still it was matter of fact to be made out before the magistrate, and on which he has to draw his own conclusion. But, it is said, that a jurisdiction limited as to person, place, and subject matter, is stinted in its nature, and cannot be lawfully exceeded. I agree; but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? does not the place, does not the subject matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide, but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and, when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally, and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly, the rule was to intend every thing against a stinted jurisdiction; that is not the rule now; and nothing is to be intended, but what is fair and reasonable, and it is reasonable to intend, that magistrates will do what is right. But cases have been cited, and first, a case in *Hardress*; *Terry v. Huntington*, (*Hardress*, 480;) what is the principle there? That an action will lie against an officer for executing the process of a limited jurisdiction in cases to which such jurisdiction does not extend; it is admitted, however, in that case, that if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small beer to be strong, their judgment could not have been examined in an action. What is said by the different judges, and especially by Baron Rains-

ford? 'That the defendants might well enough have justified by virtue of an authority from the commissioners of excise, who are judges of the fact, and that their authority is not traversable by the plaintiff.' Now, apply that case. If it had appeared upon the face of the conviction here, as it did there, upon the special case, that the magistrates had no jurisdiction, the judgment of the court might have been different. But the magistrates have jurisdiction here: they have jurisdiction over gunpowder found in a boat, as in the other case, the commissioners had over the beer. The decision in *Crepps v. Durden*, (Cowp. 640,) turned expressly on the ground that the magistrate had no jurisdiction, and that the justification set up was illegal on the face of it; that case, therefore, and *Gray v. Cookson*, (1 East. 13,) are clear authorities to show, that a conviction like this must be conclusive. *Welsh v. Nash*, was no sooner cited in *Gray v. Cookson*, than Bayley, J. distinguished it as turning only on an *ex parte* order of justices; a proceeding in no way resembling a conviction, where the matter is investigated on oath in the presence of both parties. I am, therefore, most clearly of opinion, that this rule ought to be discharged.

Park, J. All the cases from *Hardress* downward, concur in one uniform principle, that where a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction. In *Dr. Groenvelt's case*, (1 Lord Raymond, 471,) Holt, C. J. expressly says, 'That if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, their judgment could not have been examined in an action.' My brother, Lawes, has said much about the commissioners of bankrupts; the same topic was urged before Lord Holt, but the reply was, that they are not judges. In *Gray v. Cookson*, Lord Ellenborough says, 'The justices had, by law, the authority which they in fact exercised in this case, by a commitment under this conviction; and that they were, therefore, entitled to have been acquitted under the general issue pleaded by them.' *Ackerley v. Parkinson*, (3 M. & S. 411,) is a remarkably strong case; there, the defendant, a vicar general of the bishop, had excommunicated the plaintiff for not taking administration of an intestate's effects; and though the citation, by which the plaintiff was cited, was void, still, the subject matter of the judgment being a thing within the defendant's jurisdiction, the court held that the action did not lie. In *Strickland v. Ward*, (7 T. R. 634, *notis*,) Yates, J. says, 'The conviction cannot be controverted in evidence. The justice having a competent jurisdiction of the matter, his judgment is conclusive till reversed or quashed.' In the present case the whole argument has turned on that, which, under the circumstances, it was impossible to give in evidence, namely, that the vessel in question was not a boat; but supposing that this point might have been entered into at the trial, has any thing been stated to show that the vessel was not a boat? Upon such point as this, dictionaries are certainly good authority, and Dr. Johnson calls a boat, 'a ship of small size, as a passage boat, advice boat, fly boat.' Falconer's marine dictionary says, 'a boat is open or decked, according to the purpose for which it is intended.' On every ground, therefore, the rule for a new trial in this case must be discharged.

Burrough, J. Since I have been in Westminster Hall, it has never been doubted, that, where a magistrate has jurisdiction, a conviction, having no defects on the face of it, is conclusive evidence of the facts which it alleges. In the present case, by act of parliament, the magistrate has jurisdiction over bum-boats and other boats; but, in the very exercise of that jurisdiction, he must make inquiry as to fact, and decide on

all the evidence which comes before him; when he has done this, the conviction is conclusive as to the facts stated. Two cases have been much pressed on us, *Welch v. Nash*, and the bankruptcy case. I am astonished that any one, who has looked into the 13 G. 3. should press upon us *Welch v. Nash*. That was a case upon an order of justices touching the diverting a way; there was no litigant party, and the order was made upon hearing the evidence of one side only. The order was not like a conviction, a proceeding *in invitum*, and was at all events bad upon the face of it. With respect to the bankruptcy case, (*Perkin v. Proctor*, 2 Wils. 382,) a commission of bankrupt is, in its commencement, altogether an *ex parte* proceeding behind the back of the party; and, therefore, has no application to a case, where the party brings forward his evidence and disputes before a magistrate, that which is urged against him. As to the hardship of there being no appeal in this case, if the legislature takes away appeal and *certiorari*, how can we interfere? It has often been said, that these summary jurisdictions should not be given without appeal, and the legislature have answered that an appeal is inconvenient in cases of such immediate urgency. Of the propriety of that, parliament is to judge, and not this court. I have not the least doubt on this case. *Henshaw v. Pleasance*, turned on the particular ground of a proceeding before the commissioners of excise.

Richardson, J. I am of the same opinion; whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming, that the fact which the magistrate has to decide, is that which constitutes his jurisdiction. If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession: could the magistrate, in an action of trespass, be called on to show, that the bird in question was really a partridge? and yet it might as well be urged in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case, that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so: after the conviction had found that the offender kept a dog of that description, could he, in a civil action be allowed to dispute the truth of the conviction? In a question like the present, we are not to look to the inconvenience, but the law: but, surely, if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact, according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." Rule discharged accordingly.

Where Irish trustees were authorized to sell the forfeited estate of King James, held, they had no power to adjudge what estates were forfeited; but only to sell estates in fact so. (*Annesly v. Dixon*, Rep. Temp. Q. Ann. 104.)

Where the court is authorized to record the proceeding, and the record expressly shews jurisdiction, this is conclusive; as where a justice, on complaint of a forcible entry, is empowered to go and view, and record the force. In such case, his power cannot be questioned collaterally. (See the record, 8 John. Rep. 46, 7.) The suit was against the justice for fining and imprisoning the plaintiff. The plaintiff offered to

show that the justice did not go, and had no view; that there was no force, and that the case was not within the act; but this was not allowed. (*Mather v. Hood*, 8 John. Rep. 44, 50, 51.) In *Bigelow v. Stearns*, (19 John. Rep. 41,) Spencer, C. J. denies that such record would conclude as to jurisdiction of *the person*. The record of a riot in the view of the justices in Virginia, is conclusive. (*Mackaboy v. The Commonwealth*, 2 Virg. Cas. 268.) No particular point of jurisdiction was in question; but the court lay down the rule as broadly as *Mather v. Hood*, ut supra. They say, no matter whether there was a riot or not. The record shall conclude.

A statute of the U. States authorized the President, whenever the country should be invaded, or in imminent danger of invasion, to call forth the militia. A simple requisition of the President, averred to be in pursuance of that law, was set forth in an avowry, which neither averred the exigency of invasion or danger to have arisen. The requisition recited nothing of it, nor did the avowry aver an adjudication. On demurrer, the requisition, as pleaded, was holden full and sufficient in form; it was also held, that the President was constituted by the act, the exclusive judge of the exigency; that the requisition was not only conclusive evidence that he had passed upon the case; but that a plea of such requisition, implied, and was equivalent to an express averment of adjudication. (*Martin v. Mott*, 12 Wheat. 19.) See also *Stuyvesant v. The Mayor of New-York*, 7 Cowen's Rep. 585, 606, 7, 8.

While considering the doctrine as to jurisdiction of the person, supra, several cases presented themselves, where the magistrate seems to have, necessarily, a judicial discretion on the question, whether the person be such in description, character, or residence, as comes within his cognizance. And a mistake on this and the like heads, would seem, from most of those cases, to render the proceeding *coram non judice* and void. Even where the court has passed on the question, the decision concludes nothing. This has been felt to be a great severity; yet the courts have hitherto, in general, been unable to avoid such a consequence in safety to the rights of the suitor. We have, moreover, stated several cases where certain formal requisites were deemed necessary to confer jurisdiction, in a departure from which the same consequences are involved. So of the concurrence of other circumstances *in pais*. In one of these latter cases, the supreme court of Massachusetts have recently sought out an exception, calculated somewhat to meliorate the harshness of the rule. It arose on the New-York act of insolvency, which gives the commissioner jurisdiction on the petition of the insolvent with two thirds in amount of his creditors. It was proposed to impeach a New-York insolvent discharge, by proving that, in fact, an amount less than the two thirds had been acted upon, although the petition and other papers on their face showed the requisite sum. The court held, that in true construction, jurisdiction was acquired on papers purporting the true sum. "It appears to me," says Shaw, C. J., "that this is all that can be required as preliminary proof, and in order to give jurisdiction; because, whether the debts are really due, and to the amount stated, is one of the questions, and one of the most important questions, to be judicially inquired into and determined, after the court has acquired jurisdiction." The absurdity of questioning the existence of a jurisdictional fact, after the statute had provided that this very fact should be tried by a jury, is asserted by the C. J. with the appearances of very great truth and force. (*Betts v. Bagley*, 12 Pick. 572, 582, 3.) And such indeed is the strength of his position, that it is difficult to imagine why it had not

long ago been chosen, and incorporated into the law. It amounts to this, that wherever the matter constituting jurisdiction is the same with that which is to be judicially heard and determined on a trial of the very issue in the cause; in other words, whenever such matter makes a part of the merits, it is not the subject of collateral objection; but is revisable by direct proceeding only, as on error, certiorari, &c. Such matter in the above case was *res judicata* in the original cause; it was *coram judice*. The court was, by the very act of trying, in the exercise of its jurisdiction.

It is pleasant to witness the dawn of a principle which shall go in any considerable degree to mitigate the harshness with which jurisdictional mistakes are oftentimes visited. The rule laid down by Shaw, C. J., has often been acted upon and sometimes violated, but has never before been so fully and clearly expressed in the American courts, nor elsewhere, if we except some of the opinions in *Brittain v. Kinnaird*, *supra*. The rule of course comprehends jurisdictional questions which are introduced in the court below in any form, whether by issues or questions of law or fact. And we have had occasion to notice several cases in which it has been applied and more perhaps in which it would have been, if fully seen and appreciated. We saw in the case *ex parte Watkins*, cited *supra* from 3 Pet. 202 to 209, to what extent it was applied to the courts of the United States. That case and others which we have noticed *supra*, (p. 993, et seq.) in speaking of jurisdiction with respect to the subject matter, will show the extent to which this doctrine has been recognized, in respect to the adjudications and proceedings of various tribunals.

We must be permitted to suppose with deference, notwithstanding the case of *Walbridge v. Hall*, 3 Verm. Rep. 113, 119, that there is no difference in respect to the effect of jurisdictional mistake, whether it be committed by courts of general or special jurisdiction, except in the *onus probandi*. In the former, as we have already remarked, jurisdiction shall be presumed; in the latter it must be shewn; but when a want of power shall appear in either form, as the fact is the same, the legal consequences must be the same. This abundantly appears from the reasoning of Clinton, senator, and adjudged cases cited by him, in *Yates v. Lansing*, 9 John. Rep. 431 to 437. He concludes, "I can, therefore, never subscribe to the doctrine of unaccountability in the higher courts. The true distinction has been very judiciously pointed out in the course of this discussion. An *inferior court* shall, when questioned, show that it acted within its jurisdiction. Whereas, in courts of *general jurisdiction*, jurisdiction is presumed till the contrary is shown." And see ante, note 586, p. 826. Also, note 541, p. 799, and 800. The rule of Ch. J. Shaw is, therefore, equally illustrated by a defect of jurisdiction apparent, in the superior court, as by want of proving it in an inferior court; and the effect of deciding the point judicially as a part of the merits would be the same in either. The difficulty, therefore, of Ch. J. Marshall, in supporting *Wise v. Withers*, (3 Cranch, 331,) as he strives to do in *ex parte Watkins*, (3 Pet. 209,) on the ground that the jurisdictional question was there decided in the first instance, by an inferior court, is obvious. The question was a part of the merits; and, as remarked by Ch. J. Shaw of the two-thirds' subscription in the insolvent case, it was the most important question which the court had to pass upon, after having acquired jurisdiction. In *Wise v. Withers*, the proceedings of a court martial in fining a man, declared by statute to be exempt from militia duty, was declared void, as acting on a

person beyond the jurisdiction of the court, a person not belonging to the militia. The answer would obviously be, to the plaintiff, that is a question for the inferior court. If you are summoned as a member of the militia, and are silent, you admit that you are not exempt. You should plead the special matter; the court has power to try it and discharge you on the fact appearing. If there be error, bring your certiorari. The same difficulty would seem to arise in respect to *Bowman v. Russ*, (6 Cowen's Rep. 234,) where the question was, whether the party had absconded leaving his family a charge, and so his property might be proceeded against by justices. This was the very question they were to try, and yet it was raised and decided collaterally by action, as a preliminary jurisdictional matter. Indeed, this difficulty will arise in respect to several decisions which we have stated, wherein the article, both of subject matter and person, has been treated as preliminary, and examined in a collateral way. The case of *Mather v. Hood*, *supra*, so far as it regards the question whether force had in truth been committed, may be sustained on the same ground; for that was the question to be tried by the justice. So of *Mackaboy v. The Commonwealth*, *State v. Scott*, *Gwynne v. Pool*, *Fox v. Wood*, and other cases cited *supra*. The case of *Raborg v. Hammond*, *ante*, note 622, p. 876, carries the principle out to its greatest length, contradicting several decisions wherein the principle was not adverted to. Indeed, the cases of *Fox v. Wood*, (1 Rawle, 143,) and *Harrington v. The Commissioners of Roads of Newbury District*, (2 M'Cord, 400,) are diametrically opposed to the case of *Wise v. Withers*, though the latter is not mentioned in the reports. Both were cases of exemptions, the one from militia duty, and the other from highway work; yet held, that a conviction for default in serving as a militia man or on the highway, was conclusive till reversed on error; the exception in both instances being a question on the merits. See these and other cases *ante*, p. 993, 4, of this note. The case *ex parte Kellogg*, (6 Verm. Rep. 509,) was of habeas corpus to discharge from execution in a civil cause; (the writ of habeas corpus in Vermont extending to such process.) The ground was, that the justice who issued the attachment, endorsed a blank deputation of authority to serve the writ, on which he rendered judgment, though the defect in the endorsement, that being a judicial act, and therefore void in this case, was pleaded in abatement. (Id. 510.) Yet the supreme court refused to discharge. Collamer, J. said, "It was pleaded in abatement and adjudged upon by the justice, and is *res adjudicata*. His decision on a question within his jurisdiction is conclusive until appealed from or reversed. (Id. 511.)

Broad and effectual doctrines in favor of the protection of parties and all concerned, have been established in South Carolina. By statute, a court of magistrates and freeholders were to hold plea of criminal offences committed by free persons of color. On the hearing of a charge of negro stealing against the prisoner, he pleaded to the jurisdiction of the court, that he was not a free person of color, but a free white person, and the plea was found against him. On his being brought up for discharge upon habeas corpus, the question was made whether the jurisdiction of the person was now open to be heard collaterally; and the court held that it was not; but was concluded by the plea and finding. Johnson, J. who delivered the opinion of the court, lays down the following rules: "That *prima facie*, every court must possess the power of judging of its own jurisdiction in respect both to persons and subject matter. It follows that, ordinarily, the judgment of an inferior court, on a question of jurisdiction

thus submitted to it, has the same binding efficacy on the parties, as its judgment in any other matter confessedly within its cognizance, and that errors in this respect can only be corrected in the same manner that its other errors are. The only exception is where the want of jurisdiction is apparent on the face of the proceedings themselves. By pleading to the jurisdiction, the party is not obliged to abide by the decision of the inferior tribunal; but may resort to his writ of prohibition." Such are the rules as deduced from the common law by the court of appeals. (*State v. Scott*, 1 Bail. Rep. 294, 295, 6.) It was, however, apparently on a very slight review of the English cases alone. The only authorities cited in the opinion, are, *Bac. Abr. Prohibition H.* and the whole passed on the summary application by habeas corpus.

The cases in that state present a beautiful, if not a practicable system for the protection of inferior tribunals, their suitors and officers, worthy the attention of our legislatures, if beyond the reach of our courts of justice. The great desideratum is to avoid that various complicated and interminable litigation which has grown out of these jurisdictional questions; and which, if not checked, may in time subvert the establishment of subordinate courts. As their powers are sometimes understood, the most innocent mistake of law or fact may prove highly penal. With regard to the case itself of *State v. Scott*, it is not, perhaps, an extravagant one. It may be maintained with- in *Gwinne v. Pool*, *Raborg v. Hammond*, *Mather v. Hood*, *Mackaboy v. The Commonwealth*, *Fox v. Wood*, and several other cases, English and American, which are cited in this note. The argument derived from the remedy by prohibition, sounds less authoritative in states where it is rarely resorted to. Make it (as in South Carolina,) perfectly ready of access and familiar in practice, with the more learned tribunals, and it will be much safer to say, "true, you may have been arbitrarily condemned on the question of jurisdiction, in the court whose power you questioned; but it was your own fault that you did not go, in limine, to the supervising authority." The case of *Lyles v. Robinson*, 1 Bail. Rep. 25, 27, cited ante, note 622, p. 826, goes the same length. Some difficulty in carrying out the above rule, to its full extent, has already occurred to the learned court in which it was advanced; and where two justices discharged a prisoner from custody on civil process, they having no jurisdiction of such a case, the discharge was held void; their own adjudication in favor of their jurisdiction being a nullity; and the sheriff was notwithstanding held liable for the escape. (*Harvey v. Huggins*, 2 Bail. 252, 267.)

The record of a judgment by default, entered at a term subsequent to the defendant's death, though fair on its face, and treating the defendant as still alive, may be avoided, on *scire facias* against the terre-tenant of the defendant, by a plea showing the fact of the previous death. (*Griswold v. Stewart*, 4 Cowen's Rep. 457.) At p. 458, 9, *Sutherland, J.*, cites several like cases from the English books, where the record was allowed to be falsified. He shows that the rule prohibiting the impeachment of a record is confined to parties or privies, who alone can bring error. The plea here was of a matter which showed the judgment to be a nullity, not merely voidable, or erroneous. (*Id.* 459, 460. *Kelley v. Hooper's ex'rs*, 3 Yerg. 395, stated *infra*.) Several authorities cited in *Griswold v. Stewart*, *supra*, at page 458, 9, seem to hold, or at least to imply, that the record may be impeached by a stranger, in the same way, for mere error. And see *Penn v. Meeks*, 1 Penningt. Rep. 151, 153. Yet it was held, that where the land was claimed in ejectment, by judgment, execution and sale

against the lands of the defendant's grantor, the defendant could not impeach the judgment by showing that the original process was not served. And *per curiam*, "the judgment must be considered valid, until set aside by proceedings brought directly on the judgment, and for that purpose." (*Tappan v. Nutting*, *Brayt.* 137, 139.) The doctrine that the record shall conclude as to the facts stated in it even against strangers, so far as it may be material to maintain its own existence and validity, is shown in *Den v. Downam*, 1 *Green*, 143, 4, and the authorities there cited. In this case the court, by *Ewing, C. J.*, say, "the cases referred to in 4 *Cowen*, 458, (*Griswold v. Stewart*), do not serve satisfactorily to show that strangers may and that privies may not contradict a record; nor can I understand the court to have used them for that purpose. To 'impeach,' in the language of the court, means to show that the judgment was erroneous, not to deny its existence. To allow persons, not party or privy, to avoid a judgment by plea, because the original defendant was dead before the judgment was given, is not directly to contradict the record, but to show that the judgment, as is said of the one (*Warter v. Perry*, *Cro. Eliz.* 199,) was erroneous, and as is said of the other, (*Randall & wife*, 2 *Mod.* 308,) was manifestly bad, in the only mode whereby a person who could not bring a writ of error, might avail himself of an error in the judgment. The averment 'stands with the record,' and does not 'impugn any thing apparent within' it. The expression attributed to Lord Holt in 1 *Ld. Raym.* 669, is not inconsistent herewith. When he says the terre-tenants, 'being strangers, may falsify,' he does not, I apprehend, mean to say that a stranger may show against the face of the record that no judgment was rendered." And see *Sawyer's lessee v. Shannon*, 1 *Term Rep.* 465, 468, 469. The case of *De Forest v. Strong*, 8 *Conn. Rep.* 513, 514, 520, 521, is in point that where a judgment and proceedings are given in evidence, though against a stranger, he cannot impeach it for error. It was there given in evidence to prove its own existence as a fact to affect the adverse party in connection with other circumstances.

Mere appearance, especially if it be to oppose, will not confer jurisdiction over the subject matter, however this may be as to the person. Thus an appearance to oppose an insolvent discharge, by a citizen of a neighboring state whose claim it cannot affect, will not give operation to the discharge upon his claim. (*Norton v. Cook*, 9 *Conn. Rep.* 314.) Though he was in one case held estopped to deny such operation, where he had gone so far as to receive a dividend. (*Clay v. Smith*, 3 *Pet.* 411.) But it has been held in several cases, that where there is a want of jurisdiction over the subject matter, the party himself who institutes the proceeding, and has gone through with all the forms incident to a cognizable matter, may, on their being objected against him and sought to be enforced, avail himself of such want of jurisdiction, and they shall be considered a mere nullity. Such are the cases of *Blin v. Campbell*, 14 *John. Rep.* 432; *Cuyler v. Trustees of the Village of Rochester*, 12 *Wend. Rep.* 165; and *Starr v. The Same*, 6 *id.* 564, all stated *supra*. Other cases hold that where jurisdiction is unqualifiedly withheld, even consent or the confession of a judgment will not render the proceedings valid, though they would take away a mere error. One instance is where the statute of New-York forbade a justice to hold plea in cases where executors or administrators were parties on either side. (*Coffin v. Tracy*, 3 *Cain. Rep.* 129.) And so where a justice, by consent, tries the title to land. (*Griffeth's N. J. Treat.* 19, 20. *Cowen's N. Y. Treat.* 11. *Stricker v. Mott*, 6 *Wend.* 465. It has lately

been held in Massachusetts, that where a person is not liable to be taxed in the town, as if he be a non-resident, even his express consent to the tax shall not be deemed to confer power on the taxing officers, nor bar his action to recover the tax he has been compelled to pay. (*Preston v. Boston*, 12 Pick. 7.) See further on this subject as to the effect of appearance, ante, note 637, p. 908, 9. In Ohio, the supreme court has no jurisdiction to try an indictment for murder, found in the common pleas, unless certified under seal according to the statute. Where a person had been tried for such offence in the supreme court and convicted, and the certificate required wanted a seal; held, on motion in arrest of judgment, that though no objection was raised by the prisoner, on the trial, the supreme court had not jurisdiction. And Wright, J., delivering the opinion, said, "We are authorized to proceed against persons so [regularly] brought here, but have no authority to proceed against, try, and sentence to death, an individual who comes here for that purpose by his own agreement, or being here otherwise, waives his right to object. Neither the express consent of the party, nor his waiver of the right to object, can confer such power." (*The State v. Turner*, 1 Wright's Rep. 20, 33.)

As to the forms of process in these inferior jurisdictions, the courts have gone far in overlooking irregularities and mistakes; and wherever the defect would be amendable in a court of record, they will consider it as amended already, on proof of the mistake by parol or otherwise. Thus, where the defendant justified the taking of chattels, by judgment and execution before a justice, though there was a variance in the sums mentioned in the judgment and execution, the supreme court held that they would not for that reason treat it as a case where the execution issued without authority; but they allowed the mistake to be shown by the justice, and then treated the recital as true. (*Borland v. Stewart*, 4 Wend. 568. And see *Jennings v. Carter*, 2 id. 446; and *Jacksoñ, ex dem. Hunter, v. Page*, 4 Wend. 585.) In New-York, justices' courts, it has been said, possess the same power, as to amendments, as courts of record. (*Brace v. Benson*, 10 Wend. 213, 215; 2 R. S. 225, § 1.) And in this case, mesne process, e. g. the summons, was held amendable by altering the name of one of several plaintiffs from *Joseph* to *Jasper*, after the return of the same. (id.) But an execution, after it has been executed, cannot be amended. (*Toof v. Bentley*, 5 Wend. 276.)

NOTE 695—p. 380.

"An award of arbitrators decides the rights of the parties as effectually as a judgment at law or a decree in chancery, and is as binding, until regularly set aside or its validity questioned in a proper manner. When not made under a rule of court, it may be annulled by a decree in chancery, on a bill showing corrupt practices of the arbitrators or parties, or the mistake of the former, or any accident or proper ground for a new trial attending the case of the losing party. But he can never overleap it, treating it as void, and litigate his right anew, by commencing an action as if it had not been made, and in a collateral manner attack its validity." (*Per Cur. Buckley v. Stewart*, 1 Day's Rep. 130, 132, 3.) "That at common law, the award of arbitrators, regularly made, and in relation to a matter which might be submitted, is conclusive

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between the parties in a contest involving the same matter, is a proposition too well settled to need illustration by the citation of authorities." (Shakelford v. Purket, 2 Marsh. Ken. Rep. 434, per Owsley, J.) Awards "are conclusive as the judgment of a court. Choosing arbitrators and they acting within the pale of their authority, the award becomes the act of the parties, and they are estopped by it." (Per Peck, J., Dougherty v. McWhorter, 7 Yerg. 239, 258.)

The above doctrine prevails almost universally. (See ante, note 591, p. 840, 1, and cases there cited; also, Cox v. Jaguer, 2 Cowen's Rep. 652; Park v. Halsey, 2 Root's Rep. 100; Bunnell v. Pinto, 2 Conn. Rep. 431; Curley v. Dean, 4 id. 259; Watson on Arb. and Awards, 145; Nos. 31 and 32 Law Lib. Philadel.; Christian v. Scott, 1 Alab. Rep. 354.) Hence, an action cannot be sustained to recover money paid under an award, on the ground of its having been obtained fraudulently or on false testimony. (Bulkley v. Stewart, 1 Day's Rep. 130.) Nor can a defendant, when a suit is brought to enforce the award, set up any thing as a defence which was a proper answer to the plaintiff's claim before the arbitrators. If such matter of defence exists, it should be urged upon the hearing before the arbitrators; and their award, whether right or wrong, is conclusive, so long as they keep within the scope of the submission. (Waite v. Barry, 12 Wend. 377.)

An award extinguishes the original demand, and is a bar to any action upon such demand. (Curley v. Dean, 4 Conn. Rep. 259. Tevis' ex'r v. Tevis' ex'r, 4 Monroe, 46, 47. Evans v. M'Kinsey, Litt. Sel. 262, 3. Armstrong v. Masten, 11 John. Rep. 189. Bailey v. Lechmere, 1 Esp. Rep. 377. But see Kingston v. Phelps, Peake's N. P. C. 227; Gannon v. Anderson, 2 Bail. Rep. 346; Judd v. Wilson, 6 Verm. Rep. 185.) This is so, even where the award is made pursuant to a parol submission. (Solomon v. Jessiman, 1 N. Hamp. Rep. 63. Lodgson v. Roberts' ex'rs, 3 Monroe, 255, 6, 7. Wells v. Lain, 15 Wend. 99. Armstrong v. Masten, 11 John. Rep. 189, 190, 1. Gannon v. Anderson, supra. See Homes v. Acry, 12 Mass. Rep. 134.) And in New-York, a parol *submission* of a cause depending in court, though no award has been made, will be a bar to the further continuance of the suit, notwithstanding the existence of a rule of such court avoiding all agreements between parties in respect to the proceedings in a cause unless reduced to writing; and notwithstanding also the provisions of 2 R. S. 541, § 1, requiring certain submissions to be in writing. (Wells v. Lain, 15 Wend. 99. See Camp v. Root, 18 John. Rep. 23; Ex parte Wright, 6 Cowen's Rep. 399; Larkin v. Robbins, 2 Wend. 505; Towns v. Wilcox, 12 id. 504.) Chancellor Walworth seems to have entertained the opinion, that the section of the revised statutes above alluded to rendered *parol* submissions invalid. (See Bloomer v. Sherman, 5 Paige's Rep. 575, 578; also Wells v. Lain, 15 Wend. 103.) But this, as will be seen, was denied by the court of errors, in Wells v. Lain. To the rule, however, allowing parol submissions, it is said there are exceptions; as for example, where by law the matter in contest is not arbitrable; or where, from the subject of arbitration, a writing is necessary to pass the right to the thing in demand, or destroy the demand: in such cases the submission and award, to be availing as a bar, must be in writing. (Lodgson v. Roberts' ex'rs, 3 Monroe, 255, 256, 7. Evans v. M'Kinsey, Litt. Sel. Cas. 262, 264.) A parol submission and award, on a sealed promissory note, has been held no bar to an action upon it; for where the matter in contest arises on a

deed, the submission must be by deed. (*Lodgson v. Roberts' ex'rs*, supra. See *Kyd on Awards*, 54, 5, and the authorities there cited.) See as to parol submissions respecting lands, post, note 697.

All the cases, however, as to the conclusiveness of awards as evidence, must be understood with the qualification that the award is a valid and binding one; (*Tevis' ex'r v. Tevis' ex'r*, 4 *Monroe*, 46, 47;) in other words, the arbitrators must have had jurisdiction. These questions in respect to the validity of awards, have generally arisen in actions upon the award or the bond of submission, as to which see post, vol. 2 of the text, ch. 6, p. 79 et seq. and the notes connected with that head. A few illustrations, drawn from cases of that kind and others, will be introduced.

The arbitrators acquire their jurisdiction or power of deciding from the agreement to submit, and the authority conferred by the submission must be observed; (*Jackson v. Hunt*, 6 *John. Rep.* 14;) it is that which gives jurisdiction. (*Harrington v. Rich*, 6 *Verm. Rep.* 666, 672.) If the award be upon something not included in the submission, it is of course so far an award without jurisdiction and void. (*Solomons v. M'Kinstry*, 13 *John. Rep.* 27; *S. C.* 2 *id.* 57. *M'Bride v. Hagan*, 1 *Wend.* 326. *Bean v. Farnam*, 6 *Pick.* 269. *Watson on Arb. and Awards*, 105. See 31st No. *Law Lib. Philadel.*)

But though an award be bad for one thing it may be good for another. Thus, if the submission be of a particular subject, and the award cover that and another subject, yet if there is no connection between the two, and they are in no wise dependant upon each other, it shall be enforced as to the one within the submission, and held void as to the other. (*Bacon v. Miller*, 1 *Cowen's Rep.* 117. *Watson on Arb. and Awards*, 135. No. 31 *Law Lib. Philadel.* *Clement v. Durgin*, 1 *Greenl.* 300. *Jackson, d. Alen, v. Ambler*, 14 *John. Rep.* 96. *Aitcheson v. Cargey*, 2 *Bing.* 199. *S. C.* 2 *Barn. & Cress.* 170. *Peters v. Pierce*, 8 *Mass. Rep.* 398, 9. *Kyd on Awards*, 216. *Cald. on Awards*, 130.) If that which is void affects not the merits of the submission, the residue will be valid. (*McBride v. Hogan*, 1 *Wend.* 326. *Martin v. Williams*, 13 *John. Rep.* 264. *Cox v. Jagger*, 2 *Cowen's Rep.* 638.) An award that one shall pay money *or give security*, is valid for the money though void as to the security, for being uncertain, and not saying what the security shall be. (*Stanley v. Chappell*, 8 *Cowen's Rep.* 235. *Jackson v. Delong*, 9 *John. Rep.* 43. See *Barnet v. Gilson*, 3 *Serg. & Rawle*, 340; *Peck v. Wilson*, 2 *McCord*, 279, 280.) But if that part which is void is so connected with the rest as to affect the justice of the case, the whole will be held void. Thus, where the award was that H. should deliver the said farm to B., &c. and that B. should pay certain moneys; held, that the delivery of the farm was a consideration for the money, and the award being uncertain in not describing the farm by reference or otherwise, the award of the money was also void. (*Brown v. Hankerson*, 3 *Cowen's Rep.* 70. *S. P. Clement v. Durgin*, 1 *Greenl.* 300. See *Schuyler v. Van Der Veer*, 2 *Cain.* 235.) And where it appears that the award was founded in part upon matters not submitted, and the arbitrators have awarded a gross sum, the whole award will be held void. (*Tbrasher v. Haynes*, 2 *N. Hamp. Rep.* 429.)

It will be presumed that arbitrators have acted within the terms of the submission, unless the contrary appear. (*Bacon v. Wilber*, 1 *Cowen's Rep.* 117. *Solomons v. M'Kinstry*, 13 *John. Rep.* 27, 29. 2 *id.* 57, *S. C.* *Ratcliffe v. Bishop*, 1 *Keble*, 865. *Ingram v. Webb*, 1 *Roll. Rep.* 362. *Waite v. Barry*, 12 *Wend.* 377, 379. *Byers v.*

Van Dusen, 5 id. 268.) Indeed the cases are uniform, that every reasonable intentment will be allowed to uphold an award. (Per Trimble, J., *Karthauss v. Ferrer*, 1 Peters' Rep. 228, 229. See *Brown v. Hankerson*, 3 Cowen's Rep. 70. *Munro v. Alaire*, 2 Cain. 320. *Parsons v. Aldrich*, 6 New Hamp. Rep. 264. *Grier v. Grier*, 1 Dall. Rep. 173. *Innes v. Miller*, id. 188. *Kuncle v. Kuncle*, id. 346. *Archer v. Williamson*, 2 Harr. & John. 67. *Dolbier v. Wing*, 3 Greenl. Rep. 421. *Buckland v. Conway*, 16 Mass. Rep. 396. *Gaylord v. Gaylord*, 4 Day's Rep. 422.) Where in the margin of an award were written the words, "*Gilbert Platt* [one of the parties] *is to give up the note which he holds against N. Smith & Co.*" held, that they were to be deemed a part of the award. (*Platt v. Smith*, 14 John. Rep. 368.)

There is a class of cases in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and where, in actions and proceedings to enforce the award, it has been held void because the arbitrators had not awarded upon all the matters submitted. This has been so held in those instances where the authority contained a condition that the arbitrators shall settle the *whole dispute*, or something equivalent to such condition. In *Randall v. Randall*, (7 East, 81, 83,) Lord Ellenborough says: "The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was paid to the defendant, &c.; the third was to ascertain what rent was to be paid by the plaintiff to the defendant for certain land. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters by a certain day. If then they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect; and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award being good in part and bad in part, the good part shall not be vitiated by the arbitrator having also directed something to be done which is superfluous and bad. But here, the very condition on which the parties submitted to the award has failed." Le Blanc, J., in the same case, (id. p. 84,) places the doctrine in a very clear light. "The contract of the parties," he observes, "is in effect this; one says that he will submit to the arbitrators to ascertain what he is to pay, &c., upon condition that it shall also be referred to them to decide what rent is to be paid for certain lands. And he may fairly have said, that unless both those matters of difference were referred, he would not refer either of them singly. If then the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to." An attachment for not performing the award was therefore denied. (See *S. P. Aitcheson v. Cargey*, 2 Bing. 199; 2 Barnw. & Cress. 170, S. C. Also see *Dyer*, 242. *Karthauss v. Ferrer*, 1 Peters' Rep. 222. *Mitchell v. Staveley*, 16 East, 58. *Bradford v. Bryan*, Willes, 268. S. C. 7 Mod. 345. *George v. Lousley*, 8 East, 15. *Lutw. 202*. 6 Ves. 70. *Wright v. Wright*, 5 Cowen's Rep. 197. *Jackson, d. Van Allen*, v. *Ambler*, 14 John. Rep. 96. *Emery v. Hitchcock*, 12 Wend. 156, 159. *Kleine v. Cattara*, 2 Gallis. Rep. 61, 77. *Bean v. Farnam*, 6 Pick. Rep. 269. See *Davy v. Faw*, 7 Cranch, 171.) Where three persons, A., B. and C., on one side, and D. on the other, submit disputes between them to arbitration; an award relating to disputes between A. and B. only, of one part, and D. on the other, is void for not making any award between C. and D. (*Watson on Arb. and Awards*, 115, 116. No. 31. Law Lib. Philadel. See also *Wenter v. White*, 2 J. B. Moore, 723. But the rule must be un-

derstood with this qualification; that in order to impeach an award made in pursuance of a conditional submission, on the ground of only part of the matters having been decided, the party must *distinctly* show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. (Per Trimble, J., *Karthauss v. Ferrer*, 1 Peters' Rep. 227. *Risden v. Inglet*, Cro. Eliz. 838. *Smith v. Johnson*, 15 East, 215. *Kleine v. Catara*, 2 Gallis. 77.) A distinction has long prevailed between an award made under a submission with an "*ita quod*," (so as the award be made, on a certain day, of and upon the premises,) and under a submission without such clause; for when the submission was without an *ita quod*, an award of part of the matters only was always considered good. (Watson on Arb. and Awards, 116, 117. No. 31 Law Lib. Philadel. Cro. Jac. 354. Id. 200. Lutw. 202. *Baspole's case*, 8 Rep. 193. Cro. Eliz. 839. 1 Ca. Ch. 86. Id. 186. 2 Vern. 109. *Dyer*, 216, 242. *Wright v. Wright*, 5 Cowen's Rep. 197.) It has, however, been said that these distinctions are no longer regarded, courts being at present more liberal in the construction of awards than formerly; and therefore if there be a submission of all actions, trespasses, demands, and controversies, and an award of some only, the award is good; for no more shall be presumed to have been made known to the arbitrator. (Watson on Arb. and Awards, 117. No. 31 Law Lib. Philadel. See S. P. *Wright v. Wright*, 5 Cowen's Rep. 199. *Jackson, d. Van Allen, v. Ambler*, 14 John. Rep. 96.) But if in fact other causes of action in being were made known to the arbitrator, and he refused to decide them, then the award will be bad. (1 Saund. Rep. 32, n. l. Willes 269. S. C. 7 Mod. 449. 1 Taunt. 554. 7 East, 83, per Lord Ellenborough. *Wright v. Wright*, 5 Cowen's Rep. 197.) The courts will always intend that arbitrators have pursued the submission in this respect, and decided all matters in difference, until the contrary appears. And it is incumbent on the party who resists the award to show the contrary. (Watson on Arb. and Awards, 117, 118. No. 31 Law Lib. Philadel. *Ingram v. Milnes*, 8 East, 449. *Hopper v. Hackett*, 1 Lev. 132. See also *Cayme v. Watts*, 3 Dowl. & Ryl. 224. *Karthauss v. Ferrer*, 1 Peters' Rep. 222. *Wright v. Wright*, 5 Cowen's Rep. 199. *Jackson, d. Van Allen, v. Ambler*, 14 John. Rep. 96. *Martin v. Hitchcock*, 12 Wend. 156. *Kleine v. Catara*, 2 Gallis. 77.)

The submission must be pursued as to time. (Kyd on Awards, 96.) Where a time is limited within which an award is to be made, it cannot be made afterwards unless the time be prolonged. (Id.) But where it has been extended, an award made within the extended time will be as valid and decisive of the rights of the parties as if made within the time originally specified. (*Bloomer v. Sherman*, 5 Paige's Rep. 575. See Watson on Arb. and Awards, 83 et seq. No. 31 Law Lib. Philadel.) Where no time is limited in the submission, for the arbitrators to make and publish their award, it is their duty, at the request of either party, to proceed within a reasonable time; (Kyd on Awards, 96; *Harrington v. Rich*, 6 Verm. Rep. 666, 672;) or the party, it seems, may lawfully revoke. (Kyd on Awards, 96. *Quin v. Reynolds*, 2 Mauß & Sel. 145.) Where the arbitrators met with the parties, adjourned the matter to a subsequent day, and on the adjourned day one of the parties and neither of the arbitrators appeared; held, that they might afterwards appoint a time and proceed to an award, for they do not lose jurisdiction by their neglect to attend on an adjourned day. (*Harrington v. Rich*, 6 Verm. Rep. 666.) Where the submission requires the award to be made in

writing, under the hands and seals of the arbitrators, ready to be delivered to the parties in difference on or before a specified time, if it was not ready for delivery to the defendant, although it was so as to the plaintiff, it is no award as to the former, and in an action on the bond he may resist a recovery on this ground. (*Pratt v. Hackett*, 6 John. Rep. 14.) But where an award was regularly made and read over to the parties, who expressed themselves satisfied with it, promised to perform it, and one of them actually performed a part of it, and neither of them at the time requested a copy of the award or a duplicate original, held, that both parties were afterwards precluded from alleging non-delivery. (*Perkins v. Wing*, 10 John. Rep. 143.) An acceptance of a sworn copy of an award, without objection, is deemed a waiver of a claim to have the original. (*Sellick v. Adams*, 15 John. Rep. 197.) The cases hold, that the making an award is presumptive evidence that it was ready to be delivered. (See *Munro v. Alaire*, 2 Cain. 320, 326; *Bradsey v. Clyston*, Cro. Car. 541; *Marks v. Marriot*, 1 Ld. Raym. 114.) Yet this presumption, like most others, is liable to be rebutted. (*Munro v. Alaire*, *supra*; *Pratt v. Hackett*, 6 Johns. Rep. 14.)

If, by the submission, the award is required to be in a given form, such form must be observed. Where, in a lease, a provision was contained for submitting the amount of certain rents, after a specified period, to arbitrators, who were to endorse their award upon the lease, held, that an award written upon a separate piece of paper and not connected with the lease, was not good. This was in an action of covenant upon the lease. (*Montague v. Smith*, 13 Mass. Rep. 396.) So, where the submission required the arbitrators to make an award under seal, an award without seal was held not good. (*Stanton v. Henry*, 11 John. Rep. 133. *Sallours v. Guiling*, Cro. Jac. 278, n. a. *Rea v. Gibbons*, 7 Serg. & Rawle, 204. *Kyd on Awards*, 262.) So where the award is required to be attested by a subscribing witness, it is no complete award till this is done, though all other forms are complied with. (*Bloomer v. Sherman*, 5 Paige, 575.)

The award will be void where arbitrators have delegated the power of deciding to others, if no authority of this nature is conferred by the articles of submission; or where less than the number authorized by the submission have acted and awarded. (*Lévezey v. Gorgas*, 4 Dall. 71, 74.) And, unless otherwise provided in the articles of submission, the rule is that all the arbitrators must join in the award. (*Norfleet v. Southall*, 3 Murph. 189. *Welty v. Zentmyer*, 4 Watts, 75. *Bayne v. Gaylord*, 3 id. 301. *Patteson v. Leavitt*, 4 Conn. Rep. 50. *Green v. Miller*, 6 John. Rep. 39. *Town v. Jaquith*, 6 Mass. Rep. 46.) And even where provision is made for a majority to decide, they must all have notice of the time and place of hearing, and an opportunity at least of being present. (*Blin v. Trimble*, 2 Tyl. Rep. 304.) Where the minority, in such cases, have been notified and refuse to attend, the others have power to go on notwithstanding, and their award will be valid. (*Crofoot v. Allen*, 2 Wendell, 494. *Barnes' Notes*, 57. *Green v. Miller*, 6 Johns. Rep. 42. *Wmles*, 215. *Kyd on Awards*, 106, 7.)

Evidence *aliunde* is admissible in aid of the award, where it does not appear on its face that the requisite number were present at the hearing. (*Ackley v. Finch*, 7 Cowen's Rep. 290. See, however, *Blin v. Trimble*, *supra*.)

Awards must be final, certain, and mutual. Where a suit was brought for a conspiracy in burning the plaintiff's barn, and it appeared that another suit had been commenced, in trespass, for the same cause, and referred to arbitrators, who awarded, that

"the said suit shall be no farther prosecuted;" held, that the award was sufficiently final and certain, and a good bar to the second action. (*Purdy v. Delavan*, 1 Cain. 304.) An award that proof had not been produced sufficient to establish a claim against the defendant, is equivalent to saying that the plaintiff had no cause of action, and is final and conclusive. (*McDermott v. The United States' Ins. Co.*, 3 Serg. & Rawle, 604.) The following decisions, in actions brought to enforce awards, and upon motions made to set them aside, may be consulted as showing when they are to be deemed absolutely void, on the ground of a want of either of the above requisites. *Byers v. Van Dusen*, 5 Wend. 268. *Thornton v. Carson*, 7 Cranch, 596. *Gaylord v. Gaylord*, 4 Day's Rep. 422. *Buckland v. Conway*, 16 Mass. Rep. 896. *Sutton v. Horn*, 7 Serg. & Rawle, 223. *Austin v. Suow's lessee*, 2 Dall. 157. *Harvey v. Snow's lessee*, 1 Yeates' Rep. 156. *Kingston v. Kincaid*, 1 Wash. C.C. Rep. 448. *Gonsales v. Deavens*, 2 Yeates' Rep. 539. *Grier v. Grier*, 1 Dall. 173. *Solomons v. M'Kinstry*, 13 Johns. Rep. 27. S. C. 2 id. 57. *Waite v. Barry*, 12 Wend. 377. *Bacon v. Wilber*, 1 Cowen's Rep. 117. *Schuyler v. Dan Der Veer*, 2 Cain. 235. *Young v. Reuben*, 1 Dall. 119. *Traquair v. Redinger*, 4 Yeates' Rep. 292. *Dicas v. Jay*, 5 Bing. 281. *Brown v. Hankerson*, 3 Cowen's Rep. 70. *White v. Jones*, 8 Serg. & Rawle, 349. *Burkholder v. McFerran*, 3 id. 421. *Munro v. Alaire*, 2 Cain. 320. *Knuckle v. Knuckle*, 1 Dall. 364. *Weed v. Ellis*, 3 Cain. 253.

An award is never treated as absolutely void, because the arbitrators admitted improper evidence, or were guilty of partiality, corruption, or the like; or because one of the parties committed a fraud upon them, or procured the award through false or forged evidence. (See *Buckley v. Stewart*, 1 Day's Rep. 130. *Mulder v. Cravat*, 2 Bay's Rep. 370.) Indeed, where it appears that the arbitrators have in all respects pursued, and kept within the authority conferred upon them by the submission, and the award comes in question collaterally, in a court of law, nothing dehors the award itself is in general admissible in evidence for the purpose of impeaching it or avoiding its force and effect. This was noticed ante, note 591, p. 841; and in addition to the cases there cited, the reader is referred to the following as showing the prevailing spirit of the adjudications on this subject. *Elmendorf v. Harris*, 5 Wend. 516, 519, 520. *Braddick v. Thompson*, 8 East, 344. *Cranston v. Kenney's Ex'rs*, 9 Johns. Rep. 212, per Spencer, J. *Mitchell v. Bush*, 7 Cowen's Rep. 185. *Jackson v. Ambler*, 14 Johns. Rep. 105. *Shepherd v. Watrous*, 3 Cain. 166. *Smith v. Cutler*, 10 Wend. 589. *Lowndes v. Campbell*, 1 Hall's Rep. N. Y. C. P. 598. *M'Kinney v. Newcomb*, 5 Cowen's Rep. 425. *Kleine v. Catara*, 2 Gall. Rep. 61. *Whart. Dig.* p. 32, et seq. *Askew v. Kennedy*, 1 Bail. Rep. 46. *Shinnie v. Coil*, 1 M'Cord, 478. *Jocelyn v. Donnel*, Peck's Rep. 274. *Lewis v. Wildman*, 1 Day's Rep. 153. *Perkins v. Wing*, 10 Johns. Rep. 143. *Lucas v. Wilson*, 2 Burr. 701. *Sherron v. Wood*, 5 Halst. 7. *Veale v. Harner*, 1 Saund. Rep. 326; also id. 327, a. n. (5.) *Wooden v. Little*, 3 M'Cord's Rep. 487. *Neal v. Shields*, 2 Pennsylv. Rep. 300. *Smith v. Smith*, 4 Rand. 95. *Finney's Ex'rs v. Miller*, 1 Bail. 81. *Cloud v. Sledge*, id. 106. *Parsons v. Aldrich*, 6 New Hamp. Rep. 264. *Riddell v. Sutton*, 2 Moore & Payne, 345. *Relyea v. Ramsay*, 2 Wend. 602. *Emery v. Hitchcock*, 12 Wend. 159.

Where the parties, erroneously supposing themselves bound by law so to do, submitted the rate of salvage of wrecked property to arbitrators, who awarded, and a libel was afterwards filed by the United States; held, by two of the judges, that the award

was fairly entered into, and though both parties were mistaken in respect to the obligatory force of the law, yet that the award was conclusive: two other judges regarded the award as the opinion of fair intelligent men, on the spot, as to the real merit of the salvors, but not absolutely conclusive and binding: three of the judges, however, thought the award of no validity whatever. (*Peisch v. Ware*, 4 Cranch, 347, 366.)

It has been questioned, whether a want of notice of hearing before the arbitrators, would not avoid the award. In *Peters v. Newkirk*, (6 Cowen's Rep. 103,) it was said, that an award of mere appraisal as to a chattel, was void, because it was done *ex parte*, without notice to the person to be charged therewith. See *Falconer v. Montgomery*, 4 Dall. Rep. 232, 3. *Browning v. M'Manus*, 1 Whart. Rep. 177. *Rigden v. Martin*, 6 Harr. & Johns, 403. *Mendenhall v. Smith*, 1 Alab. Rep. 380. But in *Elmendorf v. Harris*, (5 Wend. 516,) the same court held directly, that in a suit on an arbitration bond for not performing an award, it was no defence that a party had not notice of the hearing and did not attend. They reviewed *Peters v. Newkirk*, *supra*, and *Savage, C. J.* delivering the opinion, regarded the appraisement in that case as hardly entitled to be dignified with the name of an award. "It seems to me," he says, "that there is an essential difference between an award upon matters in controversy and a bare appraisement of a chattel. But if there is not, and the appraisement is to be considered an award in legal effect and operation, then it must be conceded, that point was not decided in accordance with the whole current of authority." (Id. 521. And see *Gould v. Gould & Banks*, stated id. at p. 521, 2, in connection with a note by the reporter at p. 522, 3.) The decision in *Elmendorf v. Harris*, seems in direct consonance with the English adjudications. In *Braddick v. Thompson*, (8 East, 344,) to an action of debt on an arbitration bond, after oyer, the defendant pleaded that the arbitrators did not, before making the award, appoint any time for hearing the defendant, or his witnesses and proofs: that the award was made without giving him an opportunity of producing any witnesses, or of examining or observing on the plaintiff's witnesses and proofs; the plaintiff demurred. Upon the argument the court suggested that this matter could not be pleaded in bar, nor serve otherwise than as a ground on which to have applied to the equitable jurisdiction of the court for the purpose of setting aside the award; the demurrer was sustained and judgment given for the plaintiff.

Certain other defects, besides those already mentioned, may be shown to obviate the operation of an award. Thus, where an attorney agreed to submit a matter for his client, and by the terms of the submission, the award was only to be valid and effectual in case the latter approved of it, it was held, that the client having dissented, this might be shown, and that then the award would not be binding upon him. (*Markley v. Amos*, 2 Bail. Rep. 603, 606.)

So, it may be shown that the submission was legally revoked, and consequently, that the award was made without authority or jurisdiction. (*Barker v. Lees*, Keb. 79 Cald. on Arb. 31. *Robertson v. M'Niel*, 12 Wend. 578. *Watson on Ar. & Awards*, 16 to 21, et seq. Law Lib. No. 31, Philadel. *Allen v. Watson*, 16 Johns. Rep. 205. *Freys v. Freys*, 1 Cowen's Rep. 335. *Marsh v. Bulteel*, 1 Dowl. & Ryl. 106. *Relyea v. Ramsay*, 2 Wend. 602, 604.) A party, it has been held, may revoke the powers conferred by the submission, even where they are declared by it irrevocable. (*Aspinwall v. Tousey*, 1 Tyl. Rep. 328.) The party may revoke, it seems, at any

time before the award is made. (Kyd on Awards, 32, 33. Allen v. Watson, 16 Johns. Rep. 205. Mylne v. Geatrix, 6 Bing. 443.) A submission required the award to be made and published to the parties on or before the 1st of August; on the 29th of July, the arbitrator made his award and published it to one of the parties, but before it was published to the other, the latter undertook to revoke the submission. Held, that, though there is no doubt the authority of an arbitrator may be revoked, provided it be done before the authority is executed; yet that in this case the award was complete before the revocation; the proviso in the award as to publication, say the court, did not require a formal notification to the parties. (Hunt v. Wilson, 6 New-Hamp. Rep. 36, 37, 38.) But where the submission required that the award should be attested by a subscribing witness, and the award was drawn up and duly subscribed by the arbitrators, but before it was attested by a witness, one of the parties revoked; it was held, that at common law, such revocation was in time. (Bloomer v. Sherman, 5 Paige, 676.) In New-York, it is now provided by statute, that "neither party shall have power to revoke the powers of the arbitrators, after the cause shall have been finally submitted to them upon a hearing of the parties for their decision." (2 R. S. 544, § 23.) And in Bloomer v. Sherman, *supra*, the learned chancellor decided that this section applied to *all* cases of submission to arbitration; whether the same was made a rule of court as provided by 2 R. S. 541, § 1, or otherwise. See also Wells v. Lain, 15 Wend. 99, et seq. The revocation must be according to the submission. If the latter is by parol, the former may be so also. (Kyd on Awards, 32, 3. Cald. on Arb. 31. Marsh v. Buttesly, 5 Barnw. & Ald. 507.) When the submission is by deed, the revocation must be by deed. (Van Antwerp v. Stewart, 8 Johns. Rep. 125. Wild v. Vinor, Browne, 62.) No particular form of words is necessary to constitute a valid revocation; and though the instrument of revocation does not in terms declare that the party revokes, yet if enough appears to shew an intention so to do, it is sufficient. (Frets v. Frets, 1 Cowen's Rep. 335.) Where the submission is by one on the one side, and two on the other, one of the two cannot revoke without the assent of the other. (Robertson v. M'Niel, 12 Wend. 578. Kyd on Awards, 30. Keb. 64, 69.) The arbitrators must, in general, have notice of the revocation. (Cald. on Arb. 31. Marsh v. Buttesly, 5 Barnw. & Ald. 507. Allen v. Watson, 16 Johns. Rep. 205. Frets v. Frets, 1 Cowen's Rep. 335.)

It may be shown too, that before the award was completed, one of the parties to the submission died; for this is equivalent to a revocation. (Potts v. Ward, 1 Marsh. 366. Cald. on Arb. 30. Touissant v. Hartop, 7 Taunt. 571. Cooper v. Johnson, 2 Barnw. & Ald. 394. Rhodes v. Haigh, 2 Barnw. & Cress. 345. See post of the text, Vol. 2, p. 82.) And marriage of a feme sole, is a revocation of the arbitrator's authority as it respects her. (Jamin v. Norton, 3 Keb. 9. Roll. Abr. 330. Charnelly v. Winstanley, 5 East, 266. Cald. on Arb. 32.) In these cases of implied revocation, by death, marriage, &c., no notice of revocation is necessary. (Watson on Arb. and Awards, 16, 17. No. 31, Law Lib. Philadel.)

So it may be shown that the arbitrators resigned their office, and such resignation was accepted by the parties. After such resignation, they are without jurisdiction, and any award made by them will be void. (Relyea v. Ramsay, 2 Wend. 602. See Graham's adm'r v. Pence, 6 Rand. 529.)

So it may be shown, doubtless, that their authority has been executed by the ma-

king of one award, and that they afterwards assumed to make the one in question. "The law we take to be clear, that the authority of the arbitrators extends to the making of an award between the parties, and then terminates; and a subsequent determination by them would not be within the terms of the submission, and consequently not obligatory upon the parties." (Per Cur. *Green v. Lundy*, 1 *Coxe's Rep.* 435.) This was said in an action on the submission bond, where it appeared that the arbitrators had made two awards at the same time, differing from each other; and the court held both void, inasmuch as it was impossible to determine which was the actual award. (Id.)

Where a parol award is sought to be avoided on the ground of the dissent of one of the arbitrators, it must appear that he dissented at the time it was published. (*Jackson, d. Edson, v. Gager*, 5 *Cowen's Rep.* 383.)

A party, it seems, may avoid the effect of an award by showing that he was an infant when he made the agreement of submission. (See *Baker v. Lovett*, 6 *Mass. Rep.* 78, 80, per *Parsons, C. J.* *Britton v. William's devisees*, 6 *Munf.* 453. *Watson on Arb. and Awards*, 41. No. 31, *Law Lib. Philadel.* 2 *R. S.* 541, § 1. *Kyd on Awards*, 35, et seq.) So, *semble*, as to a lunatic, feme covert, &c. (*Rumsey v. Leek*, 5 *Wend.* 20, 22. See *Watson on Arb. and Awards*, 43. No. 31, *Law Lib. Philadel.* 2 *R. S.* 541, § 1. *Kyd on Awards*, 35.) An attorney, it has been intimated, has authority, as such, to submit for his client. Thus, where an attorney had submitted a question, as to his client's right of set-off, to the decision of a judge, extra judicially; the court, per *Story, J.* inclined to regard it as an award, and so, conclusive. In respect to the attorney's power to make the submission, it was regarded as maintainable, and within his general authority. "If he exceeds it, the remedy for his client is to be sought in his own personal responsibility." (*Green v. Darling*, 5 *Mason*, 202, 205.) See *Washington v. M'Gee*, 3 *Dana*, 446, as to when a submission to a judge shall be deemed an arbitration. Further, as to an attorney's or an agent's authority in this respect, see *Eastman v. Burleigh*, 2 *New-Hamp. Rep.* 484, 488. *Somers v. Balabrega*, 1 *Dall.* 464. *The Inhab. of Buckland v. The Inhab. of Conway*, 16 *Mass. Rep.* 396. *Holker v. Parker*, 7 *Cranch*, 496. *Watson on Arb. and Awards*, 49, 50. No. 31, *Law Lib. Philadelphia*.

An award, like a judgment of a court of concurrent jurisdiction, binds only the parties and privies, so as to prevent them from again litigating the same subject matter which was determined by the award. But strangers to the submission can neither be benefitted nor prejudiced by an award. (*Watson on Arb. and Awards*, 145. Nos. 31 and 32 *Law Lib. Philadel.* *Kyd on Awards*, 42 to 49. See *Vosburgh v. Bame*, 14 *Johns. Rep.* 302. *Studebaker v. Moore*, 3 *Binney*, 124. *Commonwealth v. Simon-ton*, 1 *Watts, Rep.* 310. *Pullett v. Rainnard*, 1 *Whart. Rep.* 524. *Jackson v. Davis*, 5 *Cowen's Rep.* 123.) M. made a lease to H. of a mill and other premises, with certain special agreements respecting repairs; the rent for which when ascertained, was agreed to be paid to S., to whom M. had mortgaged them. On the same day M. assigned the lease to one T., who afterwards drew an order on the lessee in favor of S. for the payment of whatever sums might be found due for rent, which was accepted. Afterwards, T. and H. entered into an arbitration of the various subjects of rent, expenses and repairs, pursuant to statute, whereupon judgment was rendered in favor of T. for the balance found due by the award. In a subsequent suit by S. against H.

for use and occupation of the premises, H. tendered the amount of this judgment; but it was held that S. was not bound by the account thus adjusted, and that the award as to him was *res inter alios acta*. (Smith v. Hall, 8 Greenl. 348.) Where the vendor of slaves had submitted an adversary claim made to them by A. to arbitration and obtained an award in his favor, held, that his vendee might avail himself of the award in a subsequent suit brought against the latter by the same claimant. (Evans v. M'Kinsey, Litt. Sel. Cas. 262.) See post, note 697, p. 1040.

A submission made by one partner in the firm name, without the consent of the other partner, is invalid as to the latter, and an award thereon will not be evidence in a suit where both are prosecuted. (M'Bride v. Hagan, 1 Wend. Rep. 326. Karthaus v. Ferrer, 1 Peters' Rep. 222, 228. Stead v. Salt, 3 Bing. 101. Buchanan v. Dubarry, 19 Johns. Rep. 137. See Southard v. Steele, 3 Monroe, 435, et seq. Wilcox v. Singletary, 1 Wright's Rep. 420.) Whether such award can be received as evidence, in an action by the one upon whose submission it was made, against the other, or against the firm, quere. (See Karthaus v. Ferrer, *supra*; also, Burnel v. Minot, 4 J. B. Moore, 340.) Where one partner, who had submitted a partnership demand to arbitration without the assent of the other, had accepted the amount awarded, and endorsed a receipt in full on the award, held, that the circumstances amounted to a bar to the partnership claim; they operated either as a release by one partner, or an accord and satisfaction. (Buchanan v. Curry, 19 Johns. Rep. 137. See Bacon v. Dubarry, 1 Salk. 70.)

A feme covert cannot, as such, bind her husband or herself by a submission, and an award pursuant to such submission will not be allowed to affect the husband, unless it be shown that she acted in the matter as the husband's agent. (See Rumsey v. Leek, 5 Wend. 20, 22.) How far the submission of the husband, as to real estate, shall bind the wife, see Pullen v. Rainhard, 1 Whart. Rep. 514, 524.

In assumpsit on a policy of insurance, Lord Kenyon admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favor of the plaintiff. (Kingston v. Phelps, Peake, 227. Roscoe's Ev. 116.)

And the right to attack an award, it seems, is confined to parties and privies. Accordingly it has been held in Vermont, that where an award is offered in evidence, which the parties thereto have adopted and acquiesced in, it is not competent for a third person to impeach it, as not following the submission, or on any other ground. (Penniman v. Patchin, 6 Verm. Rep. 325.)

When parol evidence is admissible for the purpose of explaining the subject matter covered by an award, see post, note 697, p. 1038, 9. Also, note 698.

NOTE 696—p. 380.

Watson on Arb. and Awards, 145.

In respect to the question, whether an award, to conclude, must be specially pleaded, the same rule prevails which is applicable to judgments, and which was noticed ante, note 558, p. 804, et seq. See also ante, note 692, p. 971. The subject was considered by the supreme court of errors of Connecticut, in a very recent case, and the rule as to

estoppels by judgment, and otherwise, was directly applied. There, the defendants, being sued in trespass upon lands, justified by plea, under one A., who, they alleged, had title, but how obtained, or when, the plea did not show. On the trial, the plaintiff, after the defendants had given evidence under their plea, introduced a submission and award, between those under whom he claimed, of the one part, and A. and B. (the latter of whom had since sold all his right to A.) of the other; the award was made several years before the trespass, and found that the *locus in quo* belonged to those under whom the plaintiff claimed. In answer the defendants insisted, among other things, that the award should not conclude, because it was merely used as evidence, whereas it should have been specially pleaded. But the court held otherwise, and laid down the rule thus: "It is now well established that, if the state of the case is such that a party has not opportunity to plead it, [the estoppel,] he may shew it in evidence, and it will have the same effect." For this position they cite *Trevivian v. Lawrence*, 3 Salk. 151; S. C. 1 id. 276, and *Adams v. Barnes*, 17 Mass. Rep. 368; and then say as follows: "The only question here, is, whether such an opportunity has been afforded to this plaintiff. To the trespass complained of, the defendants plead the order, and justify under the title of A. How that title was derived, or when it accrued, they do not show. The plaintiff cannot be supposed to know on what title they rely. If he had set out this award, and demanded they should be estopped by it, it is apparent it would not have answered the plea; because an award showing that A. had no title in June, 1830, (the date of the award,) is no answer to a plea that he had title at the time of plea pleaded, viz. in August, 1835. It is not very easy to see then, how the plaintiff, in his replication, could have had advantage of his estoppel." (*Shelton v. Alcox*, 11 Conn. Rep. 240.) As to this rule in Kentucky, see per Owsley, J., in *Shackelford v. Purket*, 2 Marsh. (Ken.) Rep. 488.

The effect of an award in transferring a chattel has been sometimes made a question. Where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay left upon the premises, by the tenant, should be delivered up by him to the landlord, upon the tenant being paid a certain sum, it was held, that the *property* in the hay did not pass to the landlord on his tender of the money, by mere force of the award. (*Hunter v. Rice*, 15 East, 100.) Per Lord Ellenborough, delivering his opinion in the above case: "There is a difference between property *awarded* to be transferred to the owner by another, and property which is actually transferred by the contract of the owner through the medium of his agent. In the present case, there is no other remedy for the plaintiff but to proceed against Sharpe (the tenant) upon the award. If indeed Sharpe had accepted the money tendered, that would have been a ratification of the award, and an assent on his part to the transfer of the property; but without that I cannot conceive that the property was transferred by the mere force of the award." See also *Gunton v. Nourse*, 5 J. B. Moore, 259; 3 Brod. & Bing. 447, S. C. But it is not to be inferred from these cases, that a right to any species of property may not be ascertained, so as to give the party in whose favor the award is made, a possessory remedy for the recovery of it; for if two persons submit to arbitration a dispute respecting the right to property, when the arbitrator ascertains to whom the property belongs, the parties are concluded by the award. (*Watson on Arb. and Awards*, 143. No. 31 Law Lib. Philadel.) And see the next succeeding note, and cases there, in regard to this doctrine as it respects real property.

NOTE 697—p. 380.

Whether a contest relating to the title of land, is, at common law, an arbitrable matter, was anciently a question of doubt; but in latter times those doubts have been dispelled, and it is now settled that such a contest may be determined by arbitration. The decision of the arbitrators, it is true, cannot convey the title to land, but an award upon the title is binding upon the parties, and estops the plaintiff or defendant from disputing the title affirmed by the award. And hence it is said, that although an arbitrator cannot convey land from one to another, yet if he determine the right to be in one, this is conclusive evidence of title, and cannot be disputed in an action of ejectment. (Per Owsley, J., *Shackleford v. Purket*, 2 Marsh. (Ken.) Rep. 435, 439.) Contra, *Drane v. Hodges*, 1 Harr. & M'Hen. 262.

"An award, whether it relates to the title, the possession, or the location or boundaries of land, has not the operation of a conveyance. But the parties are concluded by their agreement from disputing the location, or boundaries, or title, as settled by the arbitrators. Its operation is in the nature of an estoppel. The award, in such case, is not offered as evidence of title, but to prevent either party from setting up a title, &c. which had been negotiated by the arbitrators." (Curia per Sutherland, J., *Jackson v. Gager*, 5 Cowen's Rep. 383, 387. *S. P. Cox v. Jagger*, 2 id. 639. *Shelton v. Alcox*, 11 Conn. Rep. 240. *Robertson v. M'Niel*, 12 Wend. 575. *Sellick v. Addams*, 15 Johns. Rep. 197. *Carey v. Wilcox*, 6 N. Hamp. Rep. 177. *Jones v. Boston Mill Corporation*, 6 Pick. 143, 154. 4 id. 507. But see *Whitney v. Holmes*, 15 Mass. Rep. 152.) The same effect will follow, though the submission were by parol, so far as questions of mere *boundary* are concerned. (*Jackson v. Gager*, 5 Cowen's Rep. 383.) Whether this is so as to questions of *title*, quere. (See id. and *Lodgson v. Roberts' ex'rs*, 3 Monroe, 255, 256, 257. *Evans v. M'Kinsey*, Litt. Sel. Cas. 262, 264.) See ante, note 695, p. 1026, 7. A parol submission and award that B. shall pay M. a sum of money, as a compensation for the future use of M.'s private road, made by him partly over his own land and partly over the land of others, without their consent, was held valid, and not obnoxious to the objection of being an agreement concerning an interest in land within the statute of frauds. (*Mitchell v. Bush*, 7 Cowen's Rep. 185.) In *Davy's ex'rs v. Faw*, (7 Cranch, 171, 176,) an objection was taken to an award concerning the price of lands, that the submission and award should have been by deed. Marshall, C. J., said: "That is where the *title* is in question. But here the title was conveyed—the dispute was only as to *price*. The question of title was not submitted." *Seem*, that a partition, made by persons appointed for that purpose by the parties, may be considered as an award of arbitrators, which, though it might not have the operation of conveying the land, would estop the parties. (*Shepard v. Ryers*, 15 Johns. Rep. 497, 502, 3.)

In Pennsylvania, an award in respect to real property, when made pursuant to the act of 1705, is put upon the same footing with a verdict in ejectment, and is not conclusive as to title. (See *Duer v. Boyd*, 1 Serg. & Rawle, 203.) Not so, however, as to an award pursuant to a common law submission; accordingly it was held, on a review of all the Pennsylvania cases, that in trespass, an award under a submission at common law, fixing a boundary line between the parties, was conclusive. (*Davis v. Havard*, 15 Serg. & Rawle, 165. See *Calhoun v. Dunning*, 4 Dall. 120; *Dixon's les-*

see *v. Morehead*, Addis. 216; *Duer v. Boyd*, 1 Serg. & Rawle, 208.) *Contra*, in Maryland. (See *Drane v. Hodges*, 1 Harr. & M'Hen. 262.) This latter case, however, was decided before the revolution, and seems a solitary exception to the current of American decisions. (Per Williams, C. J., 11 Conn. Rep. 248.)

In New-York, by the revised statutes, this power of submitting controversies concerning real estate to arbitration, has been in some degree restricted. It is now provided, that "No such submission shall be made, respecting the claim of any person to any estate in fee or for life to real estate; but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be so submitted to arbitration." (2 R. S. 541, § 1.) The revisers, in introducing this section, remark: "The old law certainly was, that freehold or inheritance of lands could not be determined by arbitrament. 1 Roll. 242, l. 10. Comyn's Dig. Arbitrament, d. 3. And although it has been qualified in modern times, 3 East, 11, 15 Johns. Rep. 197, by saying, that the award cannot operate to *transfer title*, but merely to estop the parties, yet it is conceived that this is only calculated to mislead those who may wish to resort to an arbitration to determine their titles. Besides, on principles of public policy, it is believed that such controversies, which always involve intricate legal questions, ought not to be thus determined. The exceptions stated, embrace the cases which seem to require it, and which have been most usually presented to the courts." (4 Revisors Rep. ch. 8 of part 3, tit. 14, p. 156.)

The award need not show upon its face that the matter sought to be concluded by it was decided by the arbitrators. S. the plaintiff, on the trial of an ejectment, claimed title under a deed executed by P. the defendant; P. gave evidence tending to show that the deed was obtained by fraud and unfair practices; whereupon S. offered in evidence an award made between the parties, finding the legal and equitable title in S., and proposed to prove by parol that the question of fraud sought to be raised was controverted before the arbitrators, and considered by them in making their award. On appeal from the decisions on the trial, which excluded the evidence thus sought to be given, it was held, that the court below erred; and after showing the conclusiveness of awards in respect to title, the learned judge, who delivered the opinion, says, that though this doctrine did not appear to be denied by the court *a quo*, yet they seem to have entertained the opinion, that to be admissible to disprove the alleged fraud, the award should show upon its face that the arbitrators passed upon it. He then proceeds: "This court cannot admit that there exists any necessity for an award to contain statements of all the points decided by the arbitrators. To be evidence of any particular fact, the award should, no doubt, be sufficiently comprehensive to imply a decision of it; but that which may be fairly implied, is equivalent to an express allegation of it. That the award offered in evidence implies a decision of the question of fraud, we apprehend there is little room to doubt." (*Shackleford v. Purket*, 2 Marsh. (Ken.) Rep. 435, 439.) "If, by the terms of the submission, the arbitrators were not empowered to decide on the question of fraud, their having so decided, it will be conceded, ought not and cannot conclude the parties; but we suppose the terms of submission are sufficiently comprehensive to authorize an inquiry into that matter. It purports to refer to the decision and final determination of the arbitrators all matters in dispute between

the parties, as to the title of the land conveyed by Purket. Whether or not the question of fraud was a matter then in dispute, the deed of submission affords no certain information; but the parol evidence which was rejected by the court, was offered to prove that the question of fraud was then disputed; so that we are brought to examine the correctness of that decision which excluded the parol evidence. We think the evidence ought to have been admitted. Without the aid of parol evidence, it would be impossible to sustain a general submission of all matters in dispute. For, as the submission contains no suggestion of the matters disputed, it must be inoperative, unless those matters can be ascertained by matters extraneous from the submission; for it is plain, no defect in the submission, the mere act of the parties, can be explained by any thing contained in the award, the act of the arbitrators; and there is nothing else but parol evidence which can be resorted to, for the purpose of supporting the submission." (Id. p. 439, 440.)

Where the submission was of a controversy respecting the title to certain lands, and the award was, that the land *belongs to*, &c., naming one of the parties; held, that the award was equivalent to finding that such party had the whole estate. (Shelton v. Alcox, 11 Conn. Rep. 240. See S. P. Cox v. Lundy, 1 Cox's Rep. 255.)

If the award is not within the submission or the jurisdiction conferred upon the arbitrators, it must necessarily be so far at least void. (See ante, note 695, p. 1027, 8.) A submission, however, of all demands, includes questions concerning real as well as personal property. (See ante, note 591, p. 841, and cases there cited to this point. Also, Byers v. Van Deusen, 5 Wend. 268.)

We observed, ante, note 695, p. 1027, that courts would presume in favor of awards. Accordingly, where parties submitted the settlement of a division line between their farms, and the bonds recited that a *cedar post* should be the place of beginning, and that the lines described in certain *original leases* should guide as to courses and distances; and that parol evidence should be excluded; and the award adopted a *stake* as the place of beginning, and certain stakes newly set up, &c. to regulate the courses and distances, and said nothing as to the *cedar post* or *original leases*: held, that the place of beginning, and courses and distances mentioned in the award, should be intended the same as those described in the bonds. The contrary is matter of defence, and comes properly from the other-side. (Bacon v. Wilber, 1 Cowen's Rep. 117.)

Where the submission was of a controversy between the owners of two adjoining farms, as to boundary, and the submission authorized the arbitrators to establish the line, without any limitation to their powers, other than that their decision should be governed by an *original tier line*, and the arbitrators made an award, declaring a certain line, specifically set forth, as the boundary line between the parties; held, that it was conclusive; and that it was not competent for the party against whom the award was made, in an action of ejectment brought against him for the land which he was found by it to be in possession of belonging to the other party, to show that the line established by the award was not according to the true tier line, for that was matter upon which the arbitrators had adjudicated. Held also, that parol evidence of the arbitrators to show that the line established, was in conformity to the original tier line referred to in the submission, was admissible on the part of the plaintiff as explaining the location and operation of the award. (Robertson v. M'Niel, 12 Wend. Rep. 578, 581, 2, 3.)

By a private inclosure act, commissioners were directed to fix and settle the bounda-

ries of a parish, in a certain manner therein specified, and to advertise in a provincial newspaper the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the commissioners, and to be binding, final and conclusive. The commissioners having fixed the boundaries in the mode specified, duly advertised a description of them; but the boundaries mentioned in the award varied from those which had been advertised; and held, that the authority given to the commissioners had not been pursued, and that their award was not binding as to the boundaries of the parish. (*The King v. The Inhab. of Washbrook*, 4 Barn. & Cress. 732. Roscoe's Ev. 115.)

The award will conclude the party and those claiming under him. (*Shelton v. Alcox*, 11 Conn. Rep. 240. See the next preceding note, p. 1035, 6, where this case is stated.)

And one claiming under a party to the award, may avail himself of it to conclude the other party and those claiming under him. (*Evans v. M'Kinsey*, Litt. Sel. Cas. 262, cited in next preceding note, p. 1035; see also *Cox v. Jagger*, 5 Cowen's Rep. 638. *Shelton v. Alcox*, supra.)

NOTE 698—p. 381.

We noticed, ante, note 591, p. 840, 1, that if the subject matter of the action were embraced by the express terms of the submission, the award would be a bar, even though such subject matter had not been enquired into. This, we supposed, to be the English doctrine as laid down in *Smith v. Johnson*, there cited; and our view is fortified by the subsequent case of *Dunn v. Murray*, (9 Barw. & Cress. 780.) In the latter, an action was brought to recover damages for a breach of contract, in discharging the plaintiff before the agreed time, without reasonable cause. A former action had been commenced by the same plaintiff against the defendant, for the same demand, and also for work, labor, &c., and all matters in difference therein had been referred, by order at nisi prius, to the arbitrament of a barrister at law, who awarded to the plaintiff a sum for the services he had actually performed, but none for damages on account of his dismissal. This was distinctly proved, and it was shown that no claim whatever was made before the arbitrator, for any compensation on the ground of the dismissal, and consequently, of course, it was not made the subject of inquiry. The court, under these circumstances, held, that the plaintiff could not recover. And per Tenterden, C. J. delivering the opinion: "It is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith v. Johnson*, 15 East, 213, Lord Ellenborough lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here, the present claim was within the scope of the former reference; it was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist upon it as a matter in difference, and he cannot now make it the subject matter of a fresh action."

This doctrine has been distinctly recognized in Connecticut. Accordingly, where A. and B. made a submission of *their accounts*, which were awarded upon, and the award complied with; and afterwards, A. brought an action, claiming to recover for certain articles which accrued before the submission, but which were not in fact laid

before the arbitrators; held, that the award was a complete bar. (*Bunell v. Pinto*, 2 Conn. Rep. 431.) "It is clear," says Swift, C. J., (id. 433,) "that the word accounts, will include all book accounts, so that the question is, whether, when a man has made a submission which will comprehend book accounts, he can exhibit to the arbitrators a part of his books to be adjusted, and then, when an award is regularly made, bring an action of book debt to recover the articles omitted. No case can be found to warrant this doctrine. A book account is an indivisible claim, as much as a promissory note; and a party may as well pretend that he kept back part of his claim on a note, and then, after the award, bring a suit on the note, as he can in the case of a book of account. If this should be allowed, men could never know whether their books were settled by arbitrament. One party might keep back a part of his accounts, and then, in an action to recover it, there would not only be a question whether he had a legal claim, but also, whether it had been settled by the award. This would be to make arbitrations an instrument, not to diminish, but to increase litigation. An award is as conclusive on the matter included in the submission as a judgment; and no one will say, that a second action can be brought on book, on pretence that the charges claimed, were omitted in the former action." Hosmer, J., delivered an opinion to the same effect. He says, (id. 434,) "The cases of *Ravee v. Farmer*, and *Golightly v. Jellicoe*, 4 T. R. 146, 147, do not sustain the ground assumed by the plaintiff. They merely decide, that a submission of *all matters of difference*, does not comprise a matter not in difference, which was not brought before the arbitrator. The expression, *matters in difference*, the court probably construed as synonymous with matters in *actual* controversy. Of this opinion was the court, in *Webster v. Lee*, 5 Mass. Rep. 334, and the submission of *all demands*, they construed as co-extensive. But, none of these decisions apply to the present case, in which the submission was of *all accounts*; comprehending beyond all question, the subject matter of the plaintiff's action. The case of *Seddon v. Tutop*, 6 T. R. 607, has no bearing on the question before us. A person is not bound in an action at law, to unite different causes of action; and if he has done it, he may support one count, and omit to give evidence in relation to another. But if persons will blend in one submission, numerous and distinct causes of action, they have agreed that the award shall be conclusive upon them." (id. 435.) See also, *Park v. Halsey*, 2 Root's Rep. 100.

In Kentucky, it would seem, that a submission of all demands, concludes only as to such matters as were actually brought before the arbitrators. This was noticed ante, note 591, p. 841; and we there saw, that the same doctrine prevails in several other states. In *Engleman's ex'rs v. Engleman*, (1 Dana, 437,) the plaintiff sued the executors of his father for work done by the former, for the latter, during his life time, in 1828, and 1829. The executors proved, that after the father's decease, they and the plaintiff, to avoid a law suit, submitted, by parol, the plaintiff's claim for compensation for services, to arbitrators, who awarded two hundred dollars for the year 1829. It appeared that the plaintiff was an infant, during 1828; and the court held the award a bar. The decision does not go upon the ground that the award (the whole demand as well for 1828 as 1829, being included within the submission,) must necessarily be conclusive against the claim for 1828; it however affirms, that the submission and award, independent of any other evidence, would afford a presumption that the arbitrators had taken the whole claim into consideration, rejecting that for

1828, and allowing that for 1829. The decision also proceeds upon deductions from the testimony of the arbitrators, which was admitted to show what passed on the hearing before them, and what was considered in making their award. Further, as to this doctrine in Kentucky, and when parol evidence is admissible in aid of an award, to show what was passed upon by the arbitrators, see *Shackleford v. Purket*, 2 Marsh. (Ken.) Rep. 435, et seq. stated in the next preceding note. See also, as to parol evidence, ante, note 591, p. 841, and note 692, p. 971, 2.

NOTE 699—p. 381.

In New-York, it is provided by statute, that whenever a judgment upon any conviction shall be rendered in any court, it shall be the duty of the clerk thereof, to enter such judgment fully in his minutes, stating briefly the offence for which such conviction shall have been had; and the court shall inspect such entries and conform them to the facts. (2 R. S. 739, § 5.)

Another section makes it the duty of the district attorney, upon the requisition of the clerk, to prepare for him a statement of the offence of which any person shall be convicted, as the same is charged in the indictment, to be entered in the minutes of such clerk; but the court is enjoined to inspect that also. (Id. § 6.)

Within ten days after the adjournment of any court, at which any convictions for offences shall have been had, the clerk is required to make out and certify a transcript of the entry in his minutes, of all such convictions, and the sentences thereon; and to transmit the same by mail to the secretary of state. (Id. § 7.)

The secretary of state is to file such transcripts, and on being required by the attorney general or district attorney of any county, he is to furnish exemplifications of a part or the whole thereof, under his seal of office; which exemplifications are declared sufficient evidence on the trial of any person for a second or subsequent offence, of the conviction stated in the transcript. (Id. § 8.) But neither such transcript, nor the exemplification thereof, is evidence of such conviction in any other case. (Id. § 9.)

A copy of the minutes of any conviction, with the sentence of the court thereon, entered by the clerk of any court, duly certified by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment on which such conviction shall have been had, certified in the same manner, is also declared evidence in all courts and places of such conviction, in all cases in which it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction, has been signed and filed. (Id. § 10.)

It is also provided in respect to courts of special sessions, that the magistrates holding them, except in the county of New-York, shall, when any conviction is had before them, make a certificate of such conviction under their hands, or under the hands of any two of them, in which it shall be sufficient to state briefly, the offence charged, and the conviction and judgment thereon, and if any fine has been collected, the amount thereof, and to whom paid. (2 R. S. 717, § 38.)

Within twenty days after such conviction, the said magistrates shall cause such certificate to be filed in the office of the clerk of the county in which such conviction shall be had. (Id. § 39.) And every such conviction, made and filed under these

provisions, or a duly certified copy thereof, is declared evidence in all courts and places of the facts stated therein. (Id. § 41.)

As to courts of special sessions in the city and county of New-York, it is provided, that the magistrates holding them, shall not be required to certify transcripts of convictions had therein; nor need such transcripts be filed; but a duly certified copy of any such conviction, made by the clerk of such court, is rendered evidence in all courts and places. (2 R. S. 598, § 53, ed. of 1836.)

NOTE 700—p. 382.

Certain certificates, in New-York, are made *prima facie* evidence of marriage. It is there provided, that a magistrate or minister, by whom a marriage shall have been solemnized, shall furnish on request, to either party, a certificate, specifying, 1. The names and places of residence of the parties married, and that they were known to him, or were satisfactorily proved, by the oath of a person known to him, to be the persons described in such certificate, and that he had ascertained that they were of sufficient age to contract; 2. The name and place of residence of the attesting witness or witnesses; and, 3. The time and place of such marriage. The certificate shall also state, that after due inquiry made, there appeared no lawful impediment to such marriage; and it must be signed by the person making it. (2 R. S. 140, § 13.) Provision is made by which the certificate, when signed by a magistrate, may be filed in the office of the clerk of the city or town where the marriage was solemnized, or where either of the parties reside, if the same is presented to the clerk within six months after the marriage; and the clerk is to enter the same in a book to be provided by him, in the alphabetical order of the names of the parties, and in the order of time in which such certificate shall be filed. (Id. § 14.) The certificate, when signed by a minister, may be filed and recorded in like manner, if there be endorsed thereon, or annexed thereto, a certificate of any magistrate residing in the same county, setting forth that the minister, by whom the marriage certificate is signed, is known personally to the magistrate, and has acknowledged the execution of the certificate in his presence; or that the execution of such certificate, by a minister or priest of some religious denomination, was proved to such magistrate by the oath of a person known to him, and who saw the certificate executed. (Id. § 15.) The entry of the certificate to be made by the clerk, shall specify, 1. The names and places of residence of the parties married; 2. The time and place of marriage; 3. The name and official station of the person signing the certificate; and 4. The time of filing the same. (Id. § 16.) "Every such original certificate, the original entry thereof, made as above directed, and a copy of such certificate, or of such entry duly certified, shall be received in all courts and places, as presumptive evidence of the fact of such marriage." (Id. § 17.)

In Massachusetts, they have a statutory provision on this subject; but the certificate of the clergyman, it seems, is not admissible in favor of the libellant, for the purpose of proving a second marriage of the husband during the life of the first wife, on a libel filed for divorce because of adultery. (Ellis v. Ellis, 11 Mass. Rep. 92.) The certificate, it is said in the report, was "such as is usually received as

evidence of a lawful marriage in prosecutions of this kind;" and hence, we infer, that such certificate would be evidence in an ordinary case, to prove a lawful marriage. If so, our position, incidentally introduced, ante, note 415, p. 543, and for which, *Ellis v. Ellis* was cited, is to be received with the qualification above shown. It is settled, that the record of the certificate, kept by the magistrate or minister solemnizing a marriage there, and founded upon the certificate merely, is evidence of the fact of the marriage. (*Inhabitants of Milford v. The Inhabitants of Worcester*, 7 Mass. Rep. 48. See also, *Commonwealth v. Littlejohn*, 15 id. 163. *Commonwealth v. Norcross*, 9 id. 492.)

See post, p. 408, et seq. of the text and notes, as to registers of marriages, &c.

NOTE 701—p. 382.

The certificate of the secretary of state of the general government, under his seal of office, that a particular person had been recognized by the department of state as a foreign minister, has been received as full evidence of his official standing. (*United States v. Benner*, 1 Baldw. Rep. 234.) This was on an indictment for arresting the person so accredited, contrary to an act of congress. Likewise on an indictment for an assault and battery upon an attaché and secretary to the legation of Spain, the certificate of the secretary of state was held the highest and best evidence of the official character of the complainant. (*United States v. Liddle*, 2 Wash. C. C. Rep. 205.) In the latter case, the certificate was dated after the assault, and stated that Mr. Feronda, charge d'affaires of Spain, had introduced the complainant as a gentleman attached to the legation, and performing the duties of secretary of legation. (See further, *United States v. Ortega*, 4 Wash. C. C. Rep. 531.)

The certificate of an American consul, residing in a foreign country, attesting the official character of a person there, is not evidence; because, as it seems, it is not within the range of consular duties. (*Stein v. Stein's curator*, 9 Lou. Rep. (by Curry) 277, 280, 1. See also *Las Caggas v. Larionda's syndics*, 4 Mart. Lou. Rep. 233, 4, 5, et seq.; *Church v. Hubbart*, 2 Cranch, 236, 7, 8, S. P.)

Where the official character of a notary abroad is sought to be proved, a certificate under the national seal of the foreign country, attesting that the person certifying the instrument is a notary by regular appointment, would be evidence. *Semble*; (*Las Caggas v. Larionda's syndics*, supra.)

In New-Hampshire it has been held, that the certificate of a county clerk in New-York, under the seal of the county, is competent evidence to show that an individual, who had acted as magistrate in taking a deposition in the latter state, was in fact a justice of the peace. The decision goes upon the ground, that the evidence of the due appointment of justices, in New-York, is found in the clerks' offices of the respective counties, and that the clerk of the county in which the justice resides, is the proper certifying officer to these facts. (*Dunlap v. Waldo*, 6 New-Hamp. Rep. 450.)

NOTE 702—p. 382.

The certificate of an officer, by way of attesting an independent fact, and not to authenticate copies, &c. is hardly ever admissible, unless rendered so by positive stat-

utory enactment. Accordingly, the certificate of the secretary of North Carolina, that a grant had not been recorded in his office, was held, in Tennessee, to be no evidence. The business of a keeper of records, say the court, is not to certify the official order of papers from which official facts are inferred. The general scope and substance of the certificate might more properly furnish matter for a deposition. (*Ayers v. Stewart*, 1 *Overton's Tenn. Rep.* 221.) On the same principle, the certificate of a clerk, containing a historical account of the proceedings of a court, has been held inadmissible; he should certify a copy. (*Barry's lessee v. Rhea*, 1 *id.* 345. *Wilcox v. Ray*, 1 *Hayw. Rep.* 410.) So too of the like certificates to prove the loss of papers, which, it is said, must be shown in the ordinary way of proving other facts. (*Robinson v. Clifford*, 1 *Wash. C. C. Rep.* 1, 2. *Wilcox v. Ray*, 1 *Hayw. Rep.* 410.) Though this is otherwise in Pennsylvania. (See *Ruggles v. Alexander*, 2 *Rawle*, 232.)

In New-York, it is provided by statute, that when any officer, to whom the legal custody of any document or paper shall belong, shall certify under his official seal that he has made diligent examination in his office for such paper, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified in all causes, matters and proceedings, in the same manner, and with the like effect, as if such officer had personally testified to the same. (2 *R. S.* 552, § 12.)

The general principle as to certificates of an independent fact, seems to have been acted on in Vermont in the following case: The defendant in ejectment, in establishing a vendue title arising out of the collection of special taxes, produced a certificate from the clerk stating at what sum the committee's account of their expenditure of tax, prior to the sale, was allowed. Held inadmissible, and that a certified transcript of the record of the account kept by the clerk, and of the allowance upon the same, was the only legitimate evidence. (*Coit v. Wells*, 2 *Verm. Rep.* 318.)

So, in North Carolina, where the clerk was authorized, by statute, to certify the record of certain bonds, and he certified that "the following and none other were the bonds," &c.; held, that what the clerk had attested as a record was admissible, but that which he certified, not as a record, but a fact, viz. that no other bonds were given, was not evidence, because he did not do it officially. (*Governor v. McAfee*, 2 *Dev.* 15, 18.) This doctrine prevails in Massachusetts. (*Oakes v. Hill*, 14 *Pick. Rep.* 442.) And, *semble*, in New-York. (*Wolfe v. Washburn*, 6 *Cowen's Rep.* 261, 265.)

In Ohio, where, in making title under a judgment and execution, the execution, as certified by the clerk, varied from the judgment, held, that though the fact of such execution having issued on the judgment produced, might be shown, notwithstanding the variance, yet it could not be established by the clerk's certificate. His certificate is good so far as it relates to matter of record, or copies of papers filed in his office. But he cannot certify independent facts within his knowledge; to prove such things he should be sworn. (*Bank of the United States v. White*, 1 *Wright's Rep.* 51, 52.)

In respect to the power of authenticating copies of records, it has been said to be a general principle, that a public officer, whose duty it is to keep the originals, may certify copies, and these shall be admitted. (See per *Marshall, C. J.*, *United States v. Percheman*, 7 *Peters' Rep.* 53, 85.) *Quere.* These certificates we shall have occasion to speak of hereafter, under subsequent heads, and we shall not notice them particularly here.

In general, where an officer is not required by law to certify his doings, and he does so, his certificate is not evidence. (*Hathaway v. Goodrich*, 5 Verm. Rep. 65. *Stephen v. Clements*, 2 New-Hamp. Rep. 390.) Both of these cases were instances of certificates upon process by way of return, when no such return was authorized. In those cases where the law has made it the duty of an officer to make a return, and holds him responsible for its truth, it is generally evidence. This doctrine and the distinction adverted to, will be found recognized and illustrated by various cases occurring hereafter, when we come to speak of the returns of sheriffs and other officers.

It is moreover another rule, that even where an officer is authorized by statute to certify, and his certificate is rendered evidence, the statute is not to be so construed as to authorize him to certify to what he must necessarily derive from mere hearsay, unless the legislature have so expressly enacted. (See *Johnson v. Hocker*, 1 Dall. 406, stated *infra*; also per Gibson, J., *Stewart v. Allison*, 6 Serg. & Rawle, 324, 329, et seq.) Accordingly, in North Carolina, where the certificate of an adjutant general is made evidence by statute of certain delinquencies in not making returns; held, that it was not evidence of such delinquencies as consisted in neglecting to make returns to other officers, but only of such as related to returns to be made to himself; for, in respect to the former, he could have no official knowledge, and must rely entirely upon hearsay. (*Governor v. Jeffreys*, 1 Hawks' Rep. 207. See *Governor v. Bell*, 3 Murph. 331.) Upon the same principle, a law of congress, authorizing transcripts of treasury accounts to be received as evidence, was held to extend to such accounts only as arose through the direct official dealings of the department; and an account for monies received by a deputy commissary, from a deputy quarter master, to the use of the United States, is not within the provision. "An account stated at the treasury department," say the court, "which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by the books. In these cases, the officers may well certify, for they must have official knowledge of the facts certified. But where moneys come into the hands of an individual, as is the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made." (*United States v. Buford*, 3 Peters' Rep. 12, 29.)

And where an officer's certificate is made evidence, by statute, of certain facts, he cannot extend its effect to others, by incorporating them with those to which he is authorized to certify. Accordingly, in North Carolina, under the statute above referred to, in an action brought to recover a penalty imposed upon a militia officer for delinquency in not making a return; held, that the adjutant general's certificate could not reach beyond the fact of the delinquency, and though he had also certified that the defendant was an officer, yet the court decided that the certificate was no evidence of this, but that it must be proved independently. (*Governor v. Bell*, 3 Murph. Rep. 331.) So, though the certificate of the inspector of ashes, in the city of New-York, is made presumptive evidence by statute, (1 R. S. 548, § 66, 67,) of the facts contained in it, yet this must be understood in reference to those facts to which the statute has

authorized him to certify, viz. the fact of inspection, the quality, weight, tare, crustings, scrapings, &c. These he may certify; but not as to the title. In respect to the latter, he has no power to certify, and his certificate will not be regarded as evidence on questions relating to it. (*Williams v. Merle*, 11 Wend. 80, 82.) See *Governor v. McAfee*, 2 Dev. 15, 18, stated *supra*. In such cases, the certificate is not to be rejected altogether, but such parts as are pertinent and official may be read. Thus, in an action on a bond in Pennsylvania, a certificate of an officer was introduced, which, by the local law, was competent evidence of payment, but which also stated that a tender had been made to the plaintiff in the suit, in the presence of H. and R., and that he had refused to receive it; *MPKean, C. J.*, delivering the opinion, said: "We certainly should not permit Mr. S., (the certifying officer,) if he were here present, to swear that he was told that such persons were present at the tender: but the question is, whether, having certified what he ought not to certify, the whole ought to be rejected. We think it ought not. The paper should be admitted to prove that payment was made agreeably to the act of assembly, at the time mentioned. All the rest may be struck out; or indeed, only so much as goes to that point may be read and admitted to be proved." He accordingly read to the jury so much as related to the receipt, and suppressed the rest. (*Johnson v. Hocker*, 1 Dall. 406.) See *Wolf v. Washburn*, 6 Cowen's Rep. 265.

Certificates are to be confined, in their operation and effect, to the special purposes contemplated by the law authorizing them. Accordingly, in New-Jersey, a certificate of surveyors of highways, or in the New-York phrase, "fence-viewers," adjudging where the parties therein mentioned should set their partition fence, is not admissible evidence on the question of title. The order of the surveyors is intended by statute for fixing the place of a temporary partition fence, until the place shall be legally settled, and to enable the party making the fence to recover from the other his just proportion of the expense. (*Corlis v. Little*, 1 Green's Rep. 229.)

The certificate must be by the proper officer. The certificate of Mr. Nourse, register of the treasury department of the general government, under his hand, was offered to show that certain receipts, copies whereof were annexed, were on file in his office. This was accompanied by the certificate of the secretary of the treasury, under the seal of the department, that Mr. N. was register; yet held, not evidence; for though the register might have the custody of the papers, yet he is not authorized by law to certify them. (*Bleecker v. Bond*, 3 Wash. C. C. Rep. 529.) The certificate should, in general, be by the officer who has, at the time, the legal custody of the evidence. Thus, to prove certain passengers, imported by the defendants into Pennsylvania, to be convicts, and to have undergone punishment in the Spiel-House of Hamburg in Germany, a written report was returned with a commission issued in the cause, containing a list of the convicts in the Spiel-House, which report appeared to have been signed by the *late directors* of the Spiel-House. The court considered the paper as not competent evidence. "It is not," say they, "an *official* paper certified by the proper officers, who at the time had the custody of the Spiel-House or of the books. They style themselves *late directors*." (*Jones q. t. v. Ross*, 2 Dall. Rep. 143.)

We had occasion to observe, ante, note 489, p. 674, that all certificates, receipts, accounts stated, or other papers, framed by private persons, stood upon the footing of mere naked hearsay, and that they were never allowed to possess any intrinsic force

as evidence against third persons. This principle was directly held in two recent cases in Pennsylvania, in one of which it was decided, that a certificate of a third person, of the amount of a debt due by him to the defendant, could not be received to affect the rights of the plaintiff; (*Paull v. Mackey*, 3 Watts' Rep. 110, 124;) and in the other, that a schoolmaster's receipt was no evidence of payment against any one but himself. (*English v. Hannah*, 4 id. 424.) See also *S. P. Cutbush v. Gilbert*, 4 Serg. & Rawle, 551, 555, 6. So the certificate of an attorney, to prove that a judgment had been obtained on certain notes, was held inadmissible. (*Tuthill v. Davis*, 20 John. Rep. 285.) A number of cases, standing on the same principle, will be found ante, note 432; see particularly, id. p. 563, 4, 5, 6, et seq.

Certain receipts of public officers have made an exception. In Louisiana, the receipt of the receiver of public moneys, for government lands, has often been held sufficient to show that the title is out of the government. (*Newport v. Cooper*, 10 Lou. Rep. (Curry) 155.) Similar receipts are admitted in Pennsylvania, but their extent and force as evidence, we are unable precisely to ascertain. See *Goddard v. Gloninger*, 5 Watts' Rep. 209, 219, and the cases cited at the latter page; also, *Cluggage's lessee v. Swan*, 4 Binn. Rep. 150. Where land has been sold for taxes, a receipt of the treasurer for the surplus bond required of the purchaser by the act of assembly, is evidence in favor of the purchaser of the fact that such bond had been executed and delivered. (*Fager v. Campbell*, 5 Watts' Rep. 287.) Payment for land, made to the officers of the land office, may be proved in that state by the officer's receipt. On the same principle it has been usual to admit the receipts or certificates of deputy surveyors for their fees and expenses of survey. But a certificate of the latter kind, given after the deputy had ceased to hold the office, attesting the fact of his having received the fees, &c. at a *previous time*, and not at the time the money was paid, is not evidence to affect third persons. (*Cluggage's lessee v. Swan*, 4 Binn. Rep. 150.) See ante, note 479, p. 641.

In respect to foreign certificates, they have occasionally been admitted as well as rejected upon grounds from which it is difficult to deduce any rules of a very general nature. Where it is probable that the officer of another country would not make a deposition, his certificate has been received. Thus, to prove that the governor of the island of St. Thomas refused a captain's petition for leave to take away the cargo of a vessel, the governor's certificate, given at the time of the petition, was offered; it was not under seal, but was proved to be in his hand writing, and the court admitted it, saying, "The certificate is of an official act, given at the time, by which it appears the captain petitioned for leave to take away the cargo, which the governor refused. We know no way by which that fact could be better proved than by this certificate, unless the deposition of the governor had been taken, which it is not to be supposed he would have consented to give. This is very different from evidence of matters not official, in which latter case such certificate could not be admitted." (*United States v. Mitchell*, 3 Wash. C. C. Rep. 95, 96.) In another case, the certificate of the collector of Havana was offered; it was under his official seal, and stated the arrival of a certain ship at that place for the purpose of watering; that to effect this object, the captain was obliged to present himself to the intendant general of the royal armies and treasury, by whom the ship's cargo was decreed to be sold, on account of the scarcity, at that place, of the articles of which it consisted. It appeared that the collector was

authorized to grant such a certificate, by a local law of Cuba, and indeed that he alone could do so; but the court denied that it was evidence. "We admit," say they, "it is an authentic instrument; but still it is only an *ex parte* certificate of a fact, which the officer was authorized to certify. But it is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examining, particularly for the purpose of eliciting the true cause of the order of sale." (Wood v. Pleasants, 3 Wash. C. C. Rep. 201, 203.) Washington, J., added, that although it appeared that the Spanish verb, which in this certificate was translated "decreed," means also "ordered, resolved, determined," and does not necessarily imply that it was in writing; yet that the decrees of every civilized country, in respect to the sale or disposition of property, ought to be presumed written until the contrary appears. If, he said, it had appeared that the decree was not in writing, evidence of its purport, taken in a proper manner, might be received; or if it had appeared that the officer who gave the certificate, would not be permitted, by the government of Havana, to give a deposition, inferior evidence, in that case, might be received. (Id. p. 203.) Peters, J., gave no opinion on the last point, and doubted whether the decree should be presumed in writing.

The following miscellaneous cases, relate to certificates under various local regulations, with some of which we are unacquainted. They are introduced here, because they do not seem to range very properly under any subsequent head of this volume.

Sheriff's certificate of sale. In New-York, the sheriff or officer making sale of real estate by virtue of an execution, is required by statute to make out and subscribe duplicate certificates of such sale, containing; 1. a particular description of the premises sold; 2. the price bid for each distinct lot or parcel; 3. the whole consideration money paid; and 4. the time when such sale will become absolute and the purchaser be entitled to a conveyance pursuant to law. (2 R. S. § 70, § 42.) One of such certificates, within ten days after such sale, is to be filed in the office of the clerk of the county, and the other is to be delivered to the purchaser. If there be two or more purchasers, a certificate is to be delivered to each, (id. § 43;) and the original certificate, on being proved or acknowledged in the way required by law to entitle deeds to be recorded, or a copy of such original, duly certified by the clerk in whose office such original is filed, is declared presumptive evidence of the facts therein contained. (Id. § 44.) The force of this certificate, as evidence, came under consideration in a recent case before the chancellor. A question was raised, whether the farm was put up for sale on condition that the prior incumbrancers were to be paid out of the purchase money. The deputy who sold the property, swore he thought J. Gale, (the purchaser and one of the defendants,) supposed, at the time of the purchase, that prior incumbrances were to be deducted from the amount bid. The certificate, filed pursuant to the statute, was made a part of the proofs in the case; and the chancellor said, that under the circumstances, it amounted to conclusive evidence to show that, at the time of the sale, the property was not put up and sold on the condition pretended, inasmuch as the certificate was given for the entire amount bid, leaving prior incumbrances a lien upon the premises, to be paid by any creditor who might wish to redeem in addition to the amount of the purchase money. "The giving such a certificate," he justly said, "would be a fraud upon creditors having a right to redeem, if the sheriff did in fact sell the property upon the condition of having prior incumbrances paid out of the purchase money.

The certificate is the only legal evidence, which has been given in the present case as to the terms of the sale, or the amount of the bid ; and the sheriff's present supposition, as to what the purchaser then thought, cannot now be received to falsify his official certificate, given at the time of the sale." (Bartlett v. Gale, 4 Paige, 503, 508, 2.)

In Illinois, a sheriff's certificate of the sale of real estate is no evidence of title in the purchaser without producing the judgment. (Curtis v. Swearingen, Breese, 160.)

Certificate of sale of a vessel. In Louisiana, the certificate of a parish judge, who, in his capacity of auctioneer, had sold a vessel which had been stranded and protested, was held good evidence of the mere fact of sale, but not of the circumstances which authorized the sale. (Peck v. Gale, 3 Mill. Lou. Rep. 320, 325.)

Certificates of register of the land office. In Illinois, the certificate of the registers of the respective land offices are not evidence *per se* ; they have no public seal to authenticate their signatures, and their hand writing must be proved ; for the court will not officially recognize such signatures. (Tail v. Goodtitle, Breese, 156.)

Certificate of commissioners of forfeitures. In New-York, the certificate of the commissioners of forfeitures, made pursuant to the 26th section of the act of May 12, 1784, (Laws N. Y. Greenl. ed. 139,) is not evidence of title ; nor is it evidence from which the delivery of a deed by the commissioners can be presumed. (Jackson v. Miller, 6 Cowen's Rep. 751.)

Certificate of a deed having been recorded. In Massachusetts, the certificate of a recording officer, on the back of a deed, attesting the fact of its having been recorded, is only prima facie evidence, and may be contradicted. (Hastings v. The Blue Hill Turnp. Corp., 9 Pick. 80.) See post, as to "proof of deeds, agreements, &c."

Certificate of cancellation of a mortgage. In Louisiana, the certificate of the recorder of mortgages, is prima facie evidence of the facts expressed in it respecting the cancelling of a mortgage. It may be contradicted, but it is not sufficient to destroy its effect, to show that it was granted on irregular testimony : it must be shown positively false in point of fact. (Lafarge v. Morgan, 11 Mart. Lou. Rep. 462, 525, 6, 7.)

Certificate of surveyor of highways. In New-Hampshire, the certificate of a surveyor of highways, of his doings upon his warrant, are not evidence in his favor. The reason given is, that his warrant is not returnable process. The law has not made it his duty to certify his proceedings upon it, nor is he in any wise rendered responsible for the truth of any return he may make. (Davis v. Clements, 2 New-Hamp. Rep. 390.)

Certificate of election of the trustees of a religious society. In New-York, the act in relation to the incorporation of religious societies, directs that the inspectors, or presiding officers, "shall immediately" after the election of trustees, "certify under their hands and seals, the names of the persons elected," &c. (3 R. S. 207, ed. of 1836, § 3.) A certificate under this section has been held evidence of the validity of the election of trustees, though the same was made some months after the election, and though two others like it, respecting the same election, had been made by the inspectors before. "The statute," say the court, "is directory to the presiding officers, to certify the result immediately ; but should they refuse or neglect to do so, the church is not to be without officers ; the votes of the members cannot thus be rendered ineffectual." (The People v. Peck, 11 Wend. Rep. 604, 611.)

Certificate of a collector of taxes. In Vermont, a collector of taxes cannot make his certificate on the rate-bill or warrant, evidence in his favor. He is not a certifying

officer in this respect, nor is his rate-bill returnable process. (*Hathaway v. Goodrich* 5 Verm. Rep. 65.)

Certificate under inspection laws. In New-York, an inspector's mark, or certificate, under 2 R. L. 340, providing for the inspection of sole leather, is not conclusive evidence as to the quality of the leather; but it may be shown, by witnesses, to be of a quality different from that denoted by the stamp. So held, in an action on a contract to deliver sole leather, where the defendant relied upon a tender, and the question was as to the quality of the leather tendered. (*Clintsman v. Northrop*, 8 Cowen's Rep. 45.) As to a certificate of inspector of ashes, in New-York, when evidence, and of what facts, see *Williams v. Merle*, 11 Wend. 80, 82, stated supra.

Certificate as to completion of drawing lottery tickets. In Pennsylvania, the certificate of the commissioners superintending the drawing of lottery tickets, under the act of 4th April, 1798, has been held evidence of the time when the drawing was finished, but not conclusive. (*Neilson v. Mott*, 2 Binn. Rep. 301, 306, 7.)

Certificate of a justice of the peace. In Louisiana, the courts recognize the capacity of justices of the different parishes, appointed by the governor with the approbation of the senate. And an authorized certificate of one of them will not be rejected, because in the date of it he omitted to state of what particular parish he was a justice. (*Despeau v. Swindler*, 3 Mart. Lou. R. N. S. 705.) So held, as to a justice's jurat to an affidavit. (*Id.*)

NOTE 703—p. 382.

In New-York, in an action under the old law for regulating highways, (2 R. L. 277,) brought to recover the penalty imposed for an encroachment, the certificate of the jury finding the encroachment under the 26th section, was held conclusive evidence of the fact that such encroachment existed. (*Bronson v. Mann*, 13 Johns. Rep. 460. See *Fleet v. Youngs*, 7 Wend. 291, 300. *Pugsley v. Anderson*, 3 Wend. 468, 470.) So also, doubtless, with regard to the like certificate under 1 R. S. 522, § 107.

These, and the like certificates, it will be seen at once, partake of a judicial character, and their effect, as well as admissibility, are frequently determined by reference to proceedings of that nature. The following cases belonging to this class, may as well be noticed here.

In *Swan's lessee v. Hughes*, (1 Wash. C. C. Rep. 216,) it was held, in the United States circuit court in Pennsylvania, that the certificate of the commissioners of Virginia, appointed under a law of that state to adjust the claims for settlement and pre-emption rights to lands, having been obtained by S., ex parte, without notice to M., was not evidence in favor of the former against the latter, to establish S.'s prior settlement. "If M. had been before the commissioners," say the court, "it would have been otherwise." (*Id.*)

An officer authorized to ascertain and certify certain facts, is confined to the power given him, and if he certifies to such facts, and others beyond the power conferred upon him, his certificate so far as the excess is concerned, will be regarded as null and void. (See the cases cited, ante, note 702, p. 1046, 7, particularly *Williams v. Merle*, 11 Wend. 80, 82.)

In Massachusetts, the certificate of the two justices of the peace under the poor

debtor act, that the return of the notification to creditors was according to law, is conclusive as to that fact, if the justices had power to act. The statute renders it the duty of the justices to examine the return, and their certificate is treated as an adjudication, which may not be controverted, save for lack of jurisdiction. (*Haskell v. Haven*, 3 Pick. Rep. 404.)

The principle was applied to a certificate of a justice and two freeholders, under the North Carolina statutes relating to damages done by cattle, the duties of which officers seem analogous to those of the New-York fence viewers. (*Nelson v. Stewart*, 2 Murph. Rep. 298.)

The certificate of a magistrate under the U. S. constitution and law of congress, that a black man is the slave of the one claiming him, is conclusive, in *de homine replegiando*, that he is such slave according to the laws of the state where his alleged owner resides. (*Jackson v. Martin*, 12 Wend. 311, 323, 9.) See *Fanny v. Montgomery*, Breese's Rep. 188.

The certificate of a judge and justice, that the principal ought to be discharged from the jail limits, no defect of jurisdiction appearing on its face, is a conclusive defence in an action against the sheriff, or on the jail bond, for an escape. (*Thorn-ton v. Robinson*, Brayt. 199, 200.)

In an action for an escape in granting the jail liberties, on taking sureties certified to be competent by two justices, their certificate is a conclusive protection to the jailor, being a judicial act. (*Fullerton v. Harris*, 8 Greenl. Rep. 393, 397.)

The same principle was applied to proceedings under the U. States statute for naturalizing a foreigner. (*Spratt v. Spratt*, 4 Pet. 393.) The certificate of naturalization was held conclusive, in ejectment, as to title depending on the fact of naturalization. (*Id.*) See the certificate at length, *id.* 397, 8. But see *Vaux v. Nesbit*, 1 M'Cord's Ch. Rep. 370, 1.

A certificate of adjudication founded upon legal evidence, which is set out, is entitled to more credit, it would seem, than one granted without such means of ascertaining the truth. And, independent of any statute declaration on the subject, a certificate of mere matter of opinion, would not be evidence. (See per *Ford, J.*, in *Corlis v. Little*, 1 Green's Rep. 232.)

NOTE 704—p. 382.

In Louisiana, it is said, that with regard to "cases of protested bills of exchange, the certificate of a foreign notary public, authenticated by his seal of office, is received in the courts of the United States as full proof of the drawer's refusal to accept or pay the bill; and according to the commercial law of England, when a notary public resides in the place to which it is sent, no other evidence will be received of that fact, in a contest relating to a foreign bill. This is perhaps allowed for the benefit of commerce; as delays necessary to obtain authenticity to the protest, under the great seal of the nation, may be considered as incompatible with the dispatch required in aid of fair and profitable commerce. It might be further remarked, that this evidence is never offered to prove the main fact in the case, which is always the signature of the drawer and indorsers. Whatever may be the reason for it, it is in such case an established rule of

evidence; but we believe it does not extend further." (*Las Caggas v. Larionda's syndics*, 4 Mart. Lou. Rep. 283, 285, 6.) These notarial acts, done in a foreign state, are admitted as evidence in aid of commerce, and their authenticity rests solely on commercial law. (*Phillips v. Flint*, 3 Mill. Lou. Rep. 146, per Matthews, J.)

So, also, it has been said in Maryland, that "a notary public, except in those cases where a protest by the *lex mercatoria*, as in cases of foreign bills, or by statute, has no authority to take a protest. The point of view in which the authority of this officer is to be considered *generally*, relates to those commercial transactions occurring in one country, which are to be proved in another, or in which foreigners are interested; and the office derives its existence from the courtesy of one nation to another; and where he is to do certain acts by statute, the authority is limited to its designated object." (Per Earle, J., *Patterson v. Maryland Ins. Co.*, 3 Harr. & John. 71, 74.) But with respect to bills of exchange, a foreign protest is evidence in that state. And held, there, "that the minutes of the proceedings of a foreign notary public, are to be considered as records under the courtesy of nations; and that a copy, under the hand and notarial seal of the notary, is sufficient evidence of the protest of a foreign bill of exchange for non-acceptance." (*Bryden v. Taylor*, 2 Harr. & John. 396, 399, 402.)

But in Virginia, held, that the copy of a protest, certified by a notary of Liverpool to be a true copy of a London notary's protest, was not evidence. (*Fitzhugh v. Love's ex'r*, 6 Call, 5, 9, 10, 11.)

A foreign protest of a bill of exchange, is evidence, without proof of the signature of the notary or other officer who signed it, (*Canue v. Sagory*, 4 Mart. Lou. Rep. 81,) or of his capacity as such. These notarial acts may be considered as an exception to the general rule, that the acts of a person assuming power as an officer of a foreign state, when contested in a court of justice, can have no weight until his capacity be proven. (*Phillips v. Flint*, 3 Mill. Lou. Rep. 146, 149, per Matthews, J.)

That a notary's certificate is, in general, only evidence of such acts as he does under the *lex mercatoria*, has been recognized in several cases. Accordingly, a deed of partition, made and acknowledged in Alabama, before a notary, was held not proved, in Louisiana, by such acknowledgment. (*Phillips v. Flint*, 3 Mill. Lou. Rep. 146, 148, 9. And see *id.* 151, S. P.) In England, the certificate of an American notary, under his seal, of the fact of a power of attorney having been executed in his presence, which certificate was verified by the British consul, has been held no evidence of the due execution of the power. There was a subscribing witness to the power, and the court say, "Probably, in a court of civil law, the notarial certificate would be sufficient; but in a court of common law, we can only act upon the affidavit of the subscribing witness. We know of no instance in which the court have dispensed with such evidence of the execution of such an instrument." (*Ex parte Church et al.* 1 Dowl. & Ry. 324. See also, S. P., *Las Caggas v. Larionda's syndics*, 4 Mart. Lou. Rep. 283, 4, et seq.)

In Maryland, it has been held also, that the protest of the master of a vessel, made before a notary, is not evidence. (*Patterson v. Maryland Ins. Co.*, 3 Harr. & John. 71. See the dissenting opinion of Chase, C. J., *id.* 75, 76.) As to protests of captains of vessels, see post, vol. 2, of the text, p. 56, and notes.

We spoke, ante, note 489, p. 675, 6, et seq., of the admissibility of the entries of notaries, in order to prove their acts in demanding payment, and giving notice of non-payment, upon promissory notes. At p. 676 it was mentioned that several of the states

had passed statutes regulating domestic notarial evidence. Pennsylvania may be named as one of them, in addition to those there alluded to ; (see *Stewart v. Allison*, 6 Serg. & Rawls, 324.) But the protest of a notary, a stockholder in the bank which is a party to the suit, is there held incompetent evidence to charge an endorser. (*Bank v. Porter*, 2 Watts' Rep. 141.) The court go upon the ground, that the protest of a notary is his deposition to the truth of the facts contained in it ; and his position in the cause, is that of a witness deposing under the sanction of an official oath to which no temporal penalty is annexed. And they say, "Can it be supposed that the legislature intended to make him competent, when he would not be heard under the sanction of a judicial oath, for the violation of which he would be exposed to the pains and penalties of perjury ? The danger to be apprehended from such competency would be imminent, as the defendant, being seldom able, from the nature and circumstances of the case, to disprove the protest but by the notary himself, would have no other resource than the testimony of a witness not only interested against him, but substantially a party to the cause." (Id.) The statute of New-York on this subject is stated ante, note 421, p. 550, 1. Louisiana, it seems, has a statute relating to protests as evidence. (See *Gale v. Kemper's heirs*, 10 Lou. Rep. (Curry) 205, 6, et seq.)

NOTE 705—p. 382.

The reader will find the mode of proving an insolvent discharge in England adverted to, ante, p. 219 of the text. It is there seen that a discharge is not proveable by parol, nor by the acknowledgment of the party against whom it is sought to be used ; the proceedings ought to be produced. See also the case of *Summersett v. Adamson*, 1 Bing. 73, and post, vol. 2 of the text, p. 229, n. (5), S. C.

Under the insolvent act, 53 Geo. 3, c. 102, § 10, it has been held, that an order made by the insolvent court for the discharge, and delivered to the gaoler in whose custody the prisoner was, was evidence of the discharge. (*Neale v. Isaacs*, 4 Barn. & Cress. 335 ; 6 Dowl. & Ryl. 484, S. C.)

By the general insolvent act, 7 Geo. 4, c. 57, § 76, a copy of the petition, schedule, order, and other orders and proceedings under the act, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order or other proceeding, and sealed with the seal of the insolvent court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupts and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid. (*Roscoe's Ev.* 244.) The power given by this clause of offering a certified copy in evidence, does not preclude the right of giving the original order of adjudication in evidence. (*Northam v. Latouche*, 4 Carr. & Payne, 143.)

Where the defendant pleaded that he was "duly discharged," and the plaintiff, in his replication, denied that such discharge took place, held, that the defendant need not prove the filing of the petition, although that fact was essential to give jurisdiction. (*Andrews v. Pledger*, 4 Carr. & Payne, 271.) The only evidence, says Mr. Roscoe, which appears to be necessary under the plea of discharge is, the copy of schedule to show that the

defendant is discharged from the debt in question, and the copy of the adjudication to prove the actual discharge. (Rosc. Ev. 244.)

In New-York, insolvent discharges are provided for by several statutes. Thus, "voluntary assignments pursuant to the application of an insolvent and his creditors." (2 R. S. 16, et seq.) So, "proceedings by creditors to compel assignments by debtors imprisoned on execution in civil causes." (Id. 24, et seq.) Likewise, "voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment." (Id. 28, et seq.) And also, "voluntary assignments by a debtor imprisoned in execution on civil cases." (Id. 31, et seq.)

In respect to all discharges granted under these several N. Y. statutes, save the one last cited, it is provided, that they shall be recorded by the clerk of the county in which they are respectively granted; "and the original discharge, the record thereof, and a transcript of such record duly authenticated, shall be conclusive evidence of the proceedings and facts therein contained." (2 R. S. 38, § 19.)

A discharge reciting the facts necessary to give jurisdiction, is evidence of those facts; but it is still competent to show that there was a want of jurisdiction. (*Barber v. Winslow*, 12 Wend. 102, and cases there cited. See ante, note 694, p. 1016; also *Betts v. Bagley*, 12 Pick. 572.)

NOTE 706—p. 333.

See S. P., *State v. Twitty*, 2 Hawks. Rep. 441, 442; *Lincoln v. Battelle*, 6 Wend. 483; 1 Starkie's Ev. 196, 6th Amer. ed.; also, ante, notes 552, 553, 554, as to the distinction between private and public statutes, and when they will be judicially noticed.

By the revised statutes of New-York, the state printer is required to publish forthwith, in the state paper, every certified copy of a law which shall be delivered to him by the secretary of state for that purpose. (1 R. S. 183, § 6.) The state printer is to furnish a proof of every law so published, to the secretary of state, to be by him revised and corrected. (Id. § 7.) And every law, so published, may be read in evidence from the paper in which it shall be contained, in all courts of justice in the state, and in all proceedings before any officer, body, or board, in which it shall be thought necessary to refer thereto, until three months after the close of the session in which it became a law. (Id. § 8.) All laws passed by the legislature, may be read in evidence from the volumes printed by the state printer. (Id. 184, § 12.) By an act of Dec. 10th, 1828, it is made the duty of the revisors, or any two of them, to certify the revised statutes to have been examined and compared by them with the original acts, and with the acts amending such originals; and to deposit a copy so certified, in the office of the secretary of state, which shall be conclusive evidence of such statutes. (2 R. S. 778, § 13.) The certificate is required to be printed in each copy of the revised statutes, under the direction of the revisors; and every copy so printed by the printers employed for that purpose, in which such certificate shall be inserted, is allowed to be read in evidence. (Id. § 14.) By an act passed April 19th, 1830, (L. N. Y. session 53, p. 285, § 1,) it is provided, that any person or persons in the state, may print and publish the whole, or any part of the revised statutes, but to entitle a copy of a law so published to be read in evidence, there must be contained in the same book or pamphlet, a certificate of the revisors, that such copy is a correct transcript of the text of the revised statutes,

as published, except such typographical errors in the original as may be corrected in such copy, and except such parts as shall have been altered by acts of the legislature; and that with respect to such parts, it conforms to the acts by which such alterations shall have been made. A copy of any of the statutes of New-York, certified by the secretary of state, and authenticated by his seal of office, would doubtless be good evidence of the existence of such statute. (See 1 R. S. 166, §§ 1, 4.)

NOTE 707—p. 383.

Where there is a clause in the act, declaring that it shall be taken to be a public act, and be noticed as such by all judges, &c. without being specially pleaded, it is not necessary to prove a copy examined with the roll, or a copy printed by the king's printer, but it stands upon the same footing as a public act. (*Beaumont v. Mountain*, 10 Bing. 404.) For other purposes, however, as with regard to the recital of facts contained in it, this clause does not give the statute the effect of a public act. (*Brett v. Beales*, 1 Mood. & Malk. 421. See ante, note 554, p. 802, 3.)

Where a statute contains provisions of a private nature, yet, if it also contain provisions of a public nature, it is frequently regarded as a public act. (See ante, note 552, p. 801, and the cases there cited; also 1 Starkie's Ev. 196, 6th Amer. ed.)

To constitute a statute a public act, it is not necessary that it should be equally applicable to all parts of the state; but it is sufficient if it extends to all persons within the territorial limits described in the statute. (*Pierce v. Kimball*, 9 Greenl. 54.) The Massachusetts statute of 1829, c. 2, to regulate pilotage for the harbor of Boston, has been held a public statute, because the first section imposed a penalty upon every person who should violate its provisions. This was regarded as decisive of its character. (*Heridia v. Ayres*, 12 Pick. Rep. 334.)

NOTE 708—p. 384.

In Viner's Abr. vol. 12, p. 81, it is stated, that "a private act, printed among the public acts, hath been allowed in evidence." The general rule, however, in England, is the other way, and the usual proof is by means of a copy, proved upon oath to have been examined with the parliament roll. A private act may also be proved by an exemplification under the great seal. (1 Starkie's Ev. 176, 177, 6th Amer. ed. Bull N. P. 225. Roscoe's Ev. 53.)

In Pennsylvania, a printed volume purporting to have been printed by Francis Bailey, under the direction of T. M. Thompson, secretary of the commonwealth, pursuant to a resolution of the legislature, has been held good evidence of a private act. (*Biddis v. James*, 6 Binn. Rep. 321.) Indeed, the distinction in this respect, between private and public acts, has there been entirely abolished. (*Id.* 326, 7. See also *Kean v. Rice*, 12 Serg. & Rawle, 203; *Thompson v. Musser*, 1 Dall. Rep. 462.)

So, it seems, in the supreme court of the United States; and there, also, a printed volume, purporting to have been printed by authority, in Virginia, has been deemed evidence of a private act. (*Young v. The Bank of Alexandria*, 4 Cranch, 387, 8.

See also *United States v. Johns*, 4 Dallas' Rep. 412; 1 Wash. C. C. Rep. 363, S. C.)

Whether such is the doctrine in Vermont, quere: (see *Pearl v. Allen*, 1 Tyl. Rep. 311, 313.)

In Kentucky, the courts will judicially take notice of private as well as public acts, without their being formally proved in any way. (*Halbert v. Skyles*, 1 Marsh. Ken. Rep. 368, 9. *Farmers and Mechanics Bank v. Jarvis*, 1 Monroe, 4, 5.)

In Massachusetts, the printed book of the printers to the general court, has been held not admissible as evidence of a private act. An exemplification seems there to be necessary. (*The Proprietors of the Kennebeck Purchase v. Call*, 1 Mass. Rep. 483.)

In New-York, also, the general rule was formerly admitted to be, that the printed statute book could not be used as evidence of private acts. But the rule was held not to apply, where the party against whom the evidence was adduced, was the individual for whose benefit the act was passed. (*Duncan v. Duboys*, 3 John. Cas. 125.) But now, by statute, *all* laws passed by the legislature may be read in evidence from the volumes printed by the state printer. (1 R. S. 184, § 12.) See ante, note 706, p. 1055, 6.

In respect to private acts as evidence with reference to the parties, see ante, note 554, p. 802; also *Farmers and Mechanics Bank v. Jarvis*, 1 Monroe, 4, 5.)

See also ante, notes 552, 553, as to when the courts will judicially notice private statutes.

NOTE 709—p. 384.

S. P., *Burk's ex'rs v. Tregg's ex'rs*, 2 Wash. Rep. 215; *Patton v. Miller*, 13 Serg. & Rawle, 254. See also *Eisenhart v. Slaymaker*, 14 id. 153, 155; *Graham's N. Y. Prac.* 615; *Tidd's Prac.* 689, 690; *Roscoe's Ev.* 53; 1 *Starkie's Ev.* 188, 6th Am. ed.; *Green et al. v. Ovington et al.* 16 John. Rep. 55; *Adams v. Betz*, 1 Watts, 425; *Reed v. Hooper*, 3 Price, 495.

Where a record of a court is put in issue by a proceeding in the same court, the original record must be inspected; and it is error if the court inspect a transcript only. (*Anderson v. Dudley*, 5 Call's Rep. 529.) Accordingly, where the defendants pleaded no such record to a *scire facias*, on issue joined, the court below, upon inspection of a copy of the record, having given judgment for the plaintiff, the appellate court, on exception taken, reversed the judgment. (*Burk's ex'rs v. Tregg's ex'rs*, 2 Wash. Rep. 215.)

NOTE 710—p. 385.

See *Roscoe's Ev.* 53; 1 *Starkie's Ev.* 188, 6th Am. ed.; *Graham's N. Y. Prac.* 615.

NOTE 711—p. 385.

In New-York, the court will assume that the inferior tribunal has sent up the very record itself, and act upon it as such, notwithstanding that in the return to the certio-
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rari, it is called a copy. (Wolfe v. Horton, 3 Cain. Rep. 86. Blake v. Hall, 5 Cowen's Rep. 37.) In practice, all the formalities mentioned in the text, are dispensed with; and an exemplified copy of the record of an inferior, or other tribunal, under the seal of the court, is admitted upon an issue of *nul tiel record*, without resorting to a certiorari. (Vail v. Smith, 4 Cowen's Rep. 71, 72, per Woodworth, J. Graham's N. Y. Prac. 765, 6, 2d ed.) It is moreover expressly provided, that copies of all papers filed in the office of the county clerk, and transcripts from the books of record kept therein, certified by such clerk, with the seal of his office affixed, shall be evidence in all courts in like manner as if the originals were produced. (1 R. S. 377, § 65. See also 2 id. 403, § 59.)

By immemorial usage, in Massachusetts, a copy of the records of the court of common pleas, attested by the clerk, is received in evidence, in the supreme court, on an issue of *nul tiel record*; (Ladd v. Blunt, 4 Mass. Rep. 402;) indeed, upon a writ of error or certiorari, nothing but the tenor of the record is sent up, which is only a copy attested by the clerk; and it has never been the practice there to require the original to be transmitted. (Id.)

In most of the United States, where a domestic record is put in issue by the plea of *nul tiel record*, the question arising upon it, though a question of *fact*, is one to be tried by the court, and not by the jury. (State v. Isham, 3 Hawks' Rep. 185. Barker v. McClure, 2 Blackf. Rep. 14. Adams v. Betz, 1 Watts' Rep. 425. Hill v. The State, 2 Yerg. Rep. 248.) But, in New-York, it is provided by statute, that all issues of *fact*, joined in any court proceeding according to the course of the common law, shall be tried by jury, except in those cases where a reference shall be ordered. (2 R. S. 409, § 4.) Under this provision, it seems, an issue of *nul tiel record* must be tried by jury. (Trotter & Douglass v. Mills, 6 Wend. 512.) And, before the above statute, the supreme court held, that a replication of *nul tiel record*, to a plea of a judgment recovered for the same cause of action in the *circuit court of the United States*, must conclude to the country, and consequently that the issue must be tried by a jury. Their reasoning is thus: "The circuit court of the United States, in relation to this court, is neither a *superior* nor an *inferior* court; but is to be regarded as a court of another government. Their records, therefore, as to this purpose, are foreign records, and the verity of them must be tried by a jury. The original record of that court cannot be brought here to be inspected by this court; nor can the tenor of it be brought in by *certiorari* or *mittimus* out of chancery." (Baldwin et al. v. Hale, 17 John. Rep. 272.)

In England it has been held, that a plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment, must conclude to the country; for though since the *union*, such judgment is a *record*, yet it is only proveable by an examined copy, on oath, the verity of which is to be tried by a jury. (Collins v. Matthews, 5 East's Rep. 473.)

NOTE 712—p. 385.

See the next succeeding note.

NOTE 713—p. 985.

The term *exemplification*, in its strictly legal sense, ought to be understood as synonymous with *inspeximus*, and as importing something beyond an ordinary certified copy under seal. (See Page's case, 5 Coke's Rep. 54.) The courts of this country, however, seem to have made no distinction, and certified copies under seal, have been very generally received in evidence upon the same footing, and treated as entitled to the same measure of respect as exemplifications.

The rule in respect to copies of records under the seal of a court, is the same with that which is mentioned in the text, (p. 385,) in respect to exemplifications under the great seal of chancery, viz. that, in general, the whole record which concerns the matter in question, should be exemplified: for the court must be enabled to judge of the legal effect of the whole of it, which may be quite different from that of a part: a bare *extract*, therefore, is not the best evidence of which the case is susceptible. (Edmiston v. Schwartz, 13 Serg. & Rawle, 135. Vance v. Reardon, 2 Nott & M'Cord, 299. Dismukes et al. v. Musgrove, 8 Mart. Lou. Rep. N. S. 375, 381. Ingham v. Cray, 1 Pennsylv. Rep. 389, 394.) In Louisiana, it is said, that the rule requiring the whole record to be certified, from its reason, does not apply, where the party offering the copy apprizes his adversary that it is incomplete, and proposes to introduce a transcript of the part omitted: for that rebuts the idea that there is any thing in the part omitted which would make against him. (Dismukes et al. v. Musgrove, supra.) The suppletory transcript, however, it is presumed, should be of as high authenticity and credit, as the defective copy which it is intended to supply. (See James' lessee v. Stookey, 1 Wash. C. C. Rep. 330. Rex v. Bellamy, Ry. & Mood. N. P. C. 174, 5.) Where a party in the supreme court of Louisiana, claimed in virtue of a sale under a *fi. fa.*, held, that the certificate authenticating the judgment on which the *fi. fa.* issued, need not state that the copy contains all the proceedings in the case. For, "he who claims under a *fi. fa.* is only bound to produce the judgment on which it issued. When a case comes up to this court after a trial, entirely on documental evidence, the certificate ought to certify that it contains all of it. But in other cases, the certificate is only that the copy is a true one." (Thompson v. Chauveau, 6 Mart. Lou. Rep. N. S. 458, 462.) And it has been held in that state, that a certificate of the clerk that the transcript contains *the proceedings on file and of record*, is presumptive evidence that it contains the *whole* proceedings, and therefore a transcript thus authenticated may be read. (Peck v. Gale, 3 Miller's Lou. Rep. 320, 323, 4.)

In New-York, where the plaintiffs claimed indemnity against a certain judgment recovered against them in Havana, which they had paid, held, that for the purpose of establishing the fact of a recovery and payment, it was not necessary to produce a certified copy of the whole record; but that *extracts*, showing the recovery and satisfaction were admissible and, *prima facie*, sufficient. (Packard et al. v. Hill, 7 Cowen's Rep. 434. See S. C. 5 Wend. 385, 393.)

In Pennsylvania, a certificate from the prothonotary annexed to the exemplification of a record, that *the paper is truly copied from the records*, imports that it is a copy of the whole, and not a mere extract. (Edmiston v. Schwartz, 13 Serg. & Rawle, 135.) So, if the clerk certify that the paper is a *copy of the record*, merely, this im-

ports that it is a copy of the whole. (*Voris v. Smith*, 13 Serg. & Rawle, 334.) In *Edmiston v. Schwartz*, *supra*, the court proceed upon the ground, that "a true copy" imports *an-entire copy*; and in *Voris v. Smith*, *supra*, they say that "a copy of the record," *ex vi termini*, means *a copy of the whole*. From the subsequent adjudication in *Christine et al. v. Whitehall*, (16 Serg. & Rawle, 98,) it would seem that the court were not called upon in either case to go so far, inasmuch as in both of them, the respective certificates had the words, "so fully and entire as it remained in court." (Id. 106, per Huston, J.) And where a paper, purporting to be an exemplification of the records of an orphan's court, was offered, stating that A. B. appeared and agreed to take certain lands, at the appraisement, and containing the decree of the court assigning the lands to him, without setting forth the other proceedings, and certified thus: "I certify that the foregoing is a true copy of the original remaining in the office of the orphan's court of York county;" held, that it was inadmissible. (*Christine et al. v. Whitehall*, *supra*. See also *Ingham v. Crary*, 1 Pennsylv. Rep. 388.) Otherwise, it seems, if the officer had added the words, "so full and entire as in my office it remains." (Id. 107.) A paper containing short minutes of the proceedings in court, but not appearing to be a record of the whole proceedings, nor certified by the clerk to be a copy of any part of the record, is not evidence. (*Barton v. The Commonwealth*, Sup. Ct. April 20th, 1814, MS. Wharton's Dig. 272, § 17. See *Ingham v. Crary*, 1 Pennsylv. Rep. 388, 394.)

Several of the states have their peculiar local enactments with respect to the form of these certificates. In South Carolina, by a statute passed as early as 1721, copies of all records certified by the clerks of the respective courts, are allowed as evidence. This is deemed there, an act in derogation of the common law and to be construed strictly, and even without the aid of such a rule of interpretation, the court say, it appears obvious that the legislature never intended by the term *copies*, to make *extracts* evidence; the terms themselves are of different import, and besides, the mischiefs of confounding them are too manifest to need exposure. Accordingly, where a party claimed title to personal property under a sheriff's sale, and produced a certified copy of the judgment and one execution; and it appeared that an *alias* and a *pluries* had issued, of which extracts only were certified, and much irregularity being shown as to the proceedings on the face of the certificate, held, that it was not even *prima facie* evidence. (*Vance v. Reardon*, 2 Nott & M'Cord, 299. See *Thompson v. Chauveau*, *supra*.)

In New-York, by the revised statutes, it is expressly provided, that whenever a certified copy of any affidavit, record, document, or other paper, is declared by law to be evidence, such copy shall be certified by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original; and if such officer have any official seal by law, the certificate must be attested by such seal; and if the certificate be given by the clerk of any county, in his official character as such, it must be attested by the seal of the court of common pleas of his county. (2 R. S. 403, § 59. See also *ante*, note 711, p. 1058, as to certificates of county clerks.) But the seal is not required to be affixed to any copy of a rule or order of a court, or of any paper filed therein, when such copy is used in the same court, or before any officer thereof; nor to a rule or order of the supreme court, when used in any circuit court.

(2 R. S. 404, § 60.) The seal may be affixed by making an impression directly on the paper, without wax or wafer. (Id. § 61.)

In Massachusetts, a copy of the records of the common pleas, attested by the clerk, is evidence in the supreme court by immemorial usage. (Ladd v. Blunt, 4 Mass. Rep. 402.) And, indeed, a copy of the proceedings of any court of record of that state, certified to be a true copy of the record of such court by the clerk thereof, under the seal of the court, is competent evidence of the existence of the record in every other judicial tribunal in the commonwealth. (Commonwealth v. Phillips, 11 Pick. Rep. 29.)

In North Carolina, the clerk's certificate, that it "*appeared to him* from the docket that a judgment had been entered" for so much, and that an execution had issued, and that the rest of the record except what appeared on the docket was lost, has been rejected. For this was only giving "a history of the record as it appeared to him, whereas the very words should be copied, that the court may judge of the true import of it. The clerk may mistake the meaning of the entries and draw improper conclusions from them." (Wilcox v. Ray, 1 Hayw. Rep. 410. Barry's lessee v. Rhea et al. 1 Tenn. Rep. 345. See ante, note 702, p. 1044, 5.) A certificate in this form is technically called a *constat*, as to which see Page's case, 5 Coke's Rep. 54; also Coke on Litt. 225, b.

In Tennessee, courts are presumed to know the officers of government, especially the clerks; and a certificate commencing thus, "I, James Hicks, clerk of," &c., was deemed sufficient when accompanied by the seal of the court, without any formal signature at the bottom. (Burton v. Pettibone, 5 Yerg. Rep. 443.)

It is proper to remark, that unless the defect in an exemplification or a certificate be objected at the proper time, the party will be precluded from availing himself of it. (See Burton v. Pettibone, 5 Yerg. Rep. 443; also ante, note 545, p. 790; note 432, p. 558.)

NOTE 714—p. 385.

The seals of courts, instituted for the public administration of justice, are allowed to prove themselves, for this reason; they are a part of the courts, supposed to be known to every one, as is every law of a public and obligatory nature. (Den v. Vreelandt, 2 Halst. 352, 355, per Kinsey, C. J. Delafield v. Hand, 3 John. R. 310. De Sobry v. De Laistrie, 2 Harr. & John. Rep. 219. Dunlap v. Waldo, 6 New-Hamp. Rep. 453.) But where the seal was so indistinct that it could not be recognized as the seal of any court, the exemplification was rejected on the issue of *nullius in terra*. (State v. Isham, 3 Hawks' Rep. 185.) Seals recognized by the law of nations prove themselves; thus, the seal of a foreign sovereign, (1 Story's Conf. of Laws, 530,) and the seal of admiralty courts; (id. 531.) Not so, however, as to other foreign courts. (Id. 530.) On this subject see the notes, post, as to foreign judgments, &c.

NOTE 715—p. 386.

The seals of private courts or of private persons are not evidence of themselves ; there must be proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them. The seals themselves, and the proof of their genuineness, must go together to the jury. (*Den v. Vreelandt*, supra. *Church v. Hubbard*, 2 Cranch, 239.)

NOTE 716—p. 386.

See S. P. with respect to the seal of a banking corporation; (*Leazure v. Hillegas*, 7 Serg. & Rawle, 313;) a public incorporated hospital, (*Jackson v. Pratt*, 10 John. Rep. 381, 387;) an incorporated church, (*Den v. Freelandt*, 2 Halst. Rep. 352;) so in Pennsylvania as to the seal of the corporation of Belfast, Ireland, (*Foster v. Shaw*, 7 Serg. & Rawle, 156;) of the city of London, (*Chew v. Keck*, 4 Rawle's Rep. 163;) and indeed of all foreign corporations. (See *Foster v. Shaw*, and *Chew v. Keck*, supra.)

In *Woodmas v. Mason*, (1 Esp. N. P. C. 53,) cited by our author in note (3) of the text, it seems to have been held that the seal of the city of London proves itself. This case is adverted to by Kinsey, C. J., delivering the opinion of the court in *Den v. Vreelandt*, (2 Halst. Rep. 356;) and with respect to it he says, "London is a corporation of high antiquity; its customs are confirmed by *magna charta* and several acts of parliament. It is the great emporium of the kingdom, the seat of all the principal courts of justice; it has under it several courts, vested with great powers, and its authority and antiquity may well entitle it to the privilege of having its seal admitted as evidence of itself in all courts of the realm. Lord Kenyon may therefore be warranted in saying, that the common seal of London proves itself, and we in practice have uniformly done the same. But there is nothing in his opinion extending the doctrine to other corporations, more recent in their origin, and more limited in their authority."

NOTE 717—p. 386.

The affixing of the seal in these cases need not be proved by a person who was present and saw it done, but the seal itself, i. e. the impression, must be proved by some person acquainted with it, who knows the device, motto, &c. (*Leazure v. Hillegas*, 7 Serg. & Rawle, 313, 318. *Foster v. Shaw*, id. 163. *Den v. Vreelandt*, 2 Halst. Rep. 352.) And if a similar seal has already been given in evidence, without objection, the jury are not to be permitted to take the two seals, and judge of the genuineness by comparison. (*Chew v. Keck*, 4 Rawle's Rep. 163.) After proving the seal it will be presumed to have been properly affixed, and it will lie on the opposing party to show that the seal was affixed by a stranger. (*Lord Brounker and Sir Robert Atkyns*, *Skinner's Rep.* 2.) See the cases cited in note (3) of the text.

NOTE 718—p. 386.

As to what shall be regarded as a record, with other matters relating to the same subject, see ante, note 550, p. 799, and the cases there cited. In England, the minutes from which a record is afterwards made up, do not constitute a record. There the record is never considered as such until enrolled. (Per Ross, J., in *Adams v. Betz*, 1 Watts' Rep. 427.)

A minute book in which an entry is made of the proceedings of the quarter sessions, and from which the roll, containing the record, is subsequently made up, is not a record, nor in the nature of a record, so as to be admissible evidence to prove the facts there stated. (*Rex v. Bellamy*, Ryan & Mood. N. P. C. 171. Roscoe's Ev. 54. Roscoe's Crim. Ev. 154. See *Cooke v. Maxwell*, 2 Starkie's N. P. Rep. 183.) Where, in order to prove an allegation that an indictment for felony had been preferred, the indictment itself, (which was in another court,) indorsed "a true bill," was produced by the clerk of the peace, together with the minute book of the proceedings at the sessions at which the indictment was found; the king's bench held, that it was inadmissible, though no record had been made up; and that to maintain the allegation, the record should be regularly drawn up, and an examined copy produced. Such, said Lord Tenterden, has always been the practice. And per Bailey, J., the record itself, or an examined copy, is the only legitimate evidence. (*Rex v. Smith*, 8 Barnw. & Cress. 341. Roscoe's Ev. 54. Roscoe's Crim. Ev. 154.) So, an allegation that the grand jury at the sessions found a true bill, is not proved by the bill itself, with an indorsement upon it, but a record regularly drawn up must be produced, or an examined copy of it. (*Porter v. Cooper*, 6 Carr. & Payne, 354. Roscoe's Crim. Ev. 154.) On an indictment for perjury, in order to prove the allegation that an appeal came on to be heard at the sessions, the sessions-book was produced by the deputy clerk of the sessions; on objection being made, the deputy clerk was asked, whether, on being applied to, he would have drawn up the record of the appeal on parchment, as if he were making a return to a *certiorari*, to which he answered in the affirmative: it was then stated by the clerk of the assize, that at the assizes, the judgment roll is not the record; but that from it, and from the indictment, a record can be made up. And per Park, J.: "I am of opinion the objection is fatal. There is certainly a great difference between the case of an indictment and that of an appeal; yet still an appeal is a matter before a court of record, and we ought to consider the importance of having the proper evidence: for if it was not heard before a court of competent jurisdiction, perjury cannot be committed on the hearing of it. The defendant must be acquitted. (*Rex v. Ward*, 6 Carr. & Payne, 366.) So in *Rex v. Thring*, (5 Carr. & Payne, 507,) the prisoner was indicted for perjury committed at the quarter sessions, and to prove that the proceedings alleged were had before the sessions, the minute book was produced by the officer of the sessions. Gurney, B., inquired if the record was made up on parchment, and was answered in the negative by the counsel for the prosecution, who added, that it was not considered necessary. Gurney, B. "The minute book of the court of quarter sessions is not evidence. The record should be made up on parchment, and then an examined copy of it would be evidence."

A plea of *autre fois convict* must be proved by the record regularly made up; and the indictment with the finding of the jury, indorsed upon it by the proper officer, is

not sufficient. (*Rex v. Bowman*, 6 Carr. & Payne, 101.) See the case of *The State v. Benham*, 7 Conn. Rep. 414. In *Tooke's case*, (25 How. St. Tr. 446,) the minutes of the court were received to prove the acquittal of Hardy. This case is distinguished by Lord Tenterden from the foregoing, on the ground that the matter proved by the minutes occurred before the *same court*, sitting under the same commission. (*Rex v. Smith*, 8 Barnw. & Cress. 341.) When the proceedings of inferior courts are sought to be proved, inasmuch as their proceedings are not usually made up in form, the minutes will be admitted, if they are perfect and omit nothing material. (See post, 396 of the text. See also *Rex v. Smith*, 8 Barn. & Cress. 341, 2.) In *Hyer's case*, (6 City Hall Rec. 30,) it was held, that to prove a record of conviction or acquittal, it was necessary that it should be under the seal of the court, signed by the magistrate before whom the cause was tried; and that it should be produced by the clerk from the files of the court. The record sought to be introduced in this case, was a record of the same court where the trial in which it was offered took place, and was rejected because it lacked the above requisites.

By statute in New-York, a copy of the minute of any conviction, with the sentence of the court thereon, entered by the clerk of any court, duly certified by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment on which such conviction shall have been had, certified in the same manner, shall be evidence in all courts and places of such conviction, in all cases in which it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction has been signed and filed. (2 R. S. 739, § 10.) See ante, 699, p. 1042. It is also provided, that within ten days after the adjournment of any court at which any conviction for offences shall have been had, the clerk thereof shall make out and certify a transcript of the entries in his minutes of all such convictions and the sentences thereon, and shall transmit the same to the secretary of state. (2 R. S. 738 § 7.) The secretary of state is to file such transcripts, and when required by the attorney general or district attorney of any county, he shall furnish an exemplification of such transcript or a part thereof, which shall be sufficient evidence on the trial of any person for a second or subsequent offence, of the conviction stated in such transcript. (Id. § 8.) But neither the transcript nor the exemplification thereof, shall in any other case be evidence of such conviction. (Id. § 9.) See further as to evidence of convictions, ante, note 699, p. 1042.

Under a former statute, similar in its provisions to the 7th and 8th sections above cited, (1 R. L. 462, K. & R.) where an objection was made to the competency of a witness on the ground of his having been convicted of an infamous offence, and it was shown that the records of the court where the conviction was had were lost or destroyed, a copy of the transcript required to be sent to the exchequer by the above statute, was held to be the next best evidence to show such conviction, and that parol evidence could not be resorted to till it was shown that such transcript had not been filed. (*Hilts v. Colvin*, 14 John. Rep. 182; see ante, note 415, p. 543; and as to proving lost records, see post, note 723, p. 1067.

A party who seeks to exclude a witness from testifying on the ground of infamy, must in general have a copy of the record of conviction ready to produce in court. (*The People v. Herrick*, 13 John. Rep. 82, 83; see also ante, note 59, p. 65.)

The entry in the minutes of a rule for judgment cannot be received as evidence to

support a plea of a former recovery; nor can an entry of a rule vacating a judgment be received to prove there was no judgment, or that it has been vacated in opposition to the record. (Croswell v. Byrnes, 9 Johns. Rep. 287, 290. See also, Den v. Downam, 1 Green's Rep. 135. Harvey v. Brown, 1 Hamm. Rep. 268.)

A *vacatur* ought to be enrolled or entered of record as much as the rule for judgment, and until this is done, it cannot receive the consideration due to a record. (Croswell v. Byrnes, *supra*.)

So with respect to a *satisfaction piece*. (Lownds v. Remsen, 7 Wend. Rep. 35.)

NOTE 719—p. 386.

S. P. Hill v. Packard, 5 Wend. Rep. 387. In Lynde v. Judd, (3 Day's Rep. 499,) the witness, to prove a copy of a paper, said, that the defendant read a paper as the original, and he, the witness, looked at the copy, and it agreed with the paper read to him. On objection being made, the court said—"This is the usual mode of comparing papers. The proof is sufficient to entitle the party to read the copy."

In Fyson v. Kemp. (6 Carr. & Payne, 71,) the witness testified, that he could not undertake to say he saw the original, but he believed another clerk held the original, and he, the witness, held the duplicate produced, when they examined them. Law, submitted that the papers should have been examined crossways. But Gurney, B., was of opinion that what had been done was sufficient. Indeed, all the cases cited in the text on this point show, that is not necessary for the persons examining to exchange papers. (See note (a) to Fyson v. Kemp, *supra*; also Roscoe's Crim. Ev. 155.)

If a witness has made two copies at the same time, of the original, and has compared one of them with the original, and the other with the first copy which he has found correct, this is sufficient. (Winn v. Patterson, 9 Peter's Rep. 663, 677, 8.)

NOTE 720—p. 386.

The copy produced must be a copy of the judgment from the clerk of the court which rendered it, and also a copy of the original. Accordingly, where a person in Louisiana claimed property on the ground of his being a judgment creditor, and for the purpose of proving himself such, offered in evidence the record copy of the judgment in the parish judge's office, held, that it was inadmissible. Per Porter, J., delivering the opinion; "This was not the best evidence of which the case was susceptible; a copy of the judgment from the clerk of the court which rendered it, should have been produced. That presented was the copy of a copy; of a copy too, which had passed through the hands of the judgment creditor, or his agent, before it was recorded in the parish judge's office, and consequently, open to nearly every objection which can be made to secondary evidence. (Lum v. Kelso et al., 3 Miller's Lou. Rep. 64, 67.)

The copy of a copy is not, in general, admissible, whatever be the mode of its authentication. (See Whiteacre v. M'Ilhaney, 4 Munf. Rep. 310; Lincoln v. Battelle, 6 Wend. Rep. 475, 484; Morris' lessee v. Vanderen, 1 Dall. Rep. 64, 65.) This

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rule, says Mr. Justice Story, properly applies to cases where the copy is taken from a copy, the original being still in existence, and capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record if in existence being by law deemed as high evidence as the original; for then it is also a second remove from the record. But it is quite a different question, whether it applies to cases of secondary evidence, when the original is lost, or the record of it is not, in law, deemed as high evidence as the original. (*Winn v. Patterson*, 9 Peter's Rep. 663, 677.)

In Louisiana, a certified copy from a copy of a Spanish record of the judicial proceedings and adjudication of property, ordered to be deposited and kept in the archives of the Spanish government, at Baton Rouge, has been held legal evidence, it appearing that the originals had been remitted to Pensacola and only a copy retained, as was the practice of such government when the property was situated in different jurisdictions. (*Vidal's heirs v. Duplantier*, 9 Lou. Rep. (Curry,) 525, 527.)

NOTE 721—p. 386.

This species of evidence, it is said, can only be applicable to those cases where very ancient records are lost; for if a recent record be lost, and its contents can be ascertained, the court will permit a fresh one to be filed. (*Norris' Peake*, 60.) Thus, in *Jackson v. Hammond*, (3 Cain. Rep. 496,) where the original nisi prius record and issue roll were not to be found in the proper office, the supreme court, after a lapse of six years, allowed the plaintiff, upon affidavits, to file a new nisi prius record and postea, to enter judgment, and issue execution. (See also *Douglass v. Yallop*, 2 Burr. Rep. 722.) In *Lyons v. Gregory*, (3 Hen. & Munf. 237,) where the records of a court had been destroyed, an imperfect minute of a judgment was admitted to record under the provisions of a local act, the substance of the original being contained in the minute; and held, that the record of such minute, made by order of the court, was good evidence on the plea of *nul tiel record*, although the clerk had failed to endorse upon it that the original was lost, or destroyed, and had failed to make an entry to the same effect in the record book. (See *Poorman v. Crane's adm'r*, 1 Wright's Rep. 347.)

A record on the record book of a manor, of admittance to a copy hold, reciting a surrender of the same copy hold to the use of a will, has been held admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrenders being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll. (*Rex v. Thruscross*, 1 Adol. & Ellis, 126.)

See the next succeeding note.

NOTE 722—p. 387.

But see *Gresley's Eq. Ev.* 112. *Lord Irwin v. Sirapson*, 7 Bro. P. C. 317.

In respect to secondary evidence of chancery records in Maryland, see *State of Ma-*

ryland v. Wayman, 2 Gill & John. 255. Evidence which leaves the mind in doubt, whether by a further search, certain record books sought for might not have been found, is not sufficient to let in parol proof of their contents; (said, in *id.*) Quere, whether in an action against the clerk for not making up records, his reports to the chancellor, that he had made up such records, and the statement of the chancellor in the minutes of the court, that the clerk had made them up, would be evidence. (*Id.* 283, 4.)

NOTE 723—p. 387.

Where a record of conviction was destroyed, parol evidence of it was held inadmissible, inasmuch as a transcript of the certificate, required to be sent to the court of exchequer by 1 R. L. 462, § 2, (K. & R.) was the next best evidence, and should have been produced. (*Hilts v. Colvin*, 14 John. Rep. 182. See ante, notes 415, 416.) Where it was proved that most of the records of a clerk's office had been burnt and the rest mutilated, the journals of the court were allowed as the best evidence of which the case was susceptible. (*Cook v. Wood*, 1 M'Cord's Rep. 139. See also *Lyons v. Gregory*, 3 Hen. & Munf. Rep. 237, stated ante, note 721.) In North Carolina, a memorandum from the clerk's docket of the amount of the judgment, was received as evidence of a record in favor of a purchaser at a sheriff's sale, upon the ground that the record was made a long time ago, at the close of the revolutionary war, and in a new and frontier county, it being proved that nothing more could be found among the records connected with the suit. Though, had the record purported to be one of recent date, the court say they would have hesitated in admitting it as such. (*Doe v. Greenlee*, 3 Hawks' Rep. 281.) In Vermont, where records were lost, the files of the court have been resorted to, and copies of the writ and declaration. (*Lowry v. Cady*, 4 Verm. Rep. 504.) And generally, in case of a lost or destroyed record, parol evidence is admissible of its contents; especially where no higher evidence is shown to exist. (*Donaldson v. Winter*, 1 Miller's Lou. Rep. 137, 145. *Jackson, ex dem. Taylor, v. Cullum*, 2 Blackf. Rep. 228. *Newcomb v. Drummond*, 4 Leigh, 57, 60. *Adams v. Betz*, 1 Watts' Rep. 427, 428.) See an able vindication of the doctrine allowing mere parol evidence to supply the place of a record, lost or destroyed, by *Haywood, J.*, in *Hargett and wife v. —*, 2 Hayw. Rep. 76, note; but *Moore, J.*, in *S. C.*, held, that the contents of a record could not be proven otherwise than by a copy. See what is said by *M'Kean, C. J.*, in *Morris' lessee v. Vanderen*, 1 Dall. 64, 5; also *Alleyn's Rep.* 18; 12 Vin. Abr. 124, 247; 1 Salk. 285; 2 Roll. Abr. 575, pl. 20; Sty. 22, 34; Hardr. 120. "Records, generally, are proved by inspection, or by copies properly authenticated; but if there be sufficient proof of the loss or destruction of a record, much inferior evidence of its contents may be admitted;" (*The Inhab. of Stockbridge v. The Inhab. of West Stockbridge*, 12 Mass. R. 400;) "and it cannot be doubted, that parol evidence is competent to prove the existence and loss of a record." (*Id.* 402.) This was said and held in respect to the act of incorporation of a town, of which no record could be found. So, evidence of reputation was held properly admissible to prove the corporate existence of a parish, where no act of incorporation could be found. (*Dillingham v. Snow*, 5 Mass. Rep. 547.) And where the

records of the sessions could not be found appropriating apartments in the jail to the use of debtors, evidence of long continued usage was held admissible. (*Clapp v. Cofran*, 7 Mass. Rep. 98.)

Before inferior evidence can be received of the contents of a record, the absence of the higher evidence must be clearly accounted for, as by showing that the original record is lost, destroyed, or otherwise incapable of being produced; or is "so obliterated as not to be legible." (See *Adams v. Betz*, 1 Watts' Rep. 428.) This general principle will be found tacitly assumed, or expressly asserted, in nearly all the cases *supra*. See also *ante*, note 414, p. 540, et seq.; note 415, p. 542, et seq.; note 416, p. 544; *Brown v. Wright*, 2 Verg. Rep. 57, 66; *Judge of Probate v. Briggs*, 3 New Hamp. Rep. 309; *State of Maryland v. Wayman*, 2 Gill & John. 283, 4. And the party objecting to secondary evidence in these as in all cases, must be careful to point his objection to the real error intended to be relied on. (See *ante*, note 545, p. 790.) Where he objected to parol evidence of a record, because that species of evidence was intrinsically incompetent, held, that on error brought, he could not be allowed to avail himself of the objection that a proper ground was not laid for the introduction of secondary evidence. (*Wolverton v. The Commonwealth*, 7 Serg. & Rawle, 273.)

It has been held that the certificate of the clerk having the custody of records could not be received to prove the record lost. (*Robinson v. Clifford*, 2 Wash. C. C. Rep. 1, 2. *Wilcox v. Ray*, 1 Hayw. Rep. 410.) See *ante*, note 702, p. 1045. But in Pennsylvania, such certificate is competent evidence to prove search and loss without the oath of any individual. (*Ruggles v. Alexander*, 2 Rawle, 232, 236.)

And by the revised statutes in New-York it is expressly enacted, that when any officer to whom the legal custody of any document or paper shall belong, shall certify under his official seal, that he has made diligent examination in his office for such paper, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified, in all causes, matters, and proceedings, in the same manner, and with the like effect, as if such officer had personally testified to the same. (2 R. S. 552, § 12.) This was deemed the introduction of a new principle, and was designed to save officers from the inconvenience of personal attendance as witnesses. (4 Revisors' Rep. ch. 8, part 3, p. 183, § 11, note.)

NOTE 724—p. 387.

See *ante*, note 475, p. 628.

But the office copy of an affidavit made in another cause in the same court, has been admitted as good evidence. (*Wightwick v. Banks*, Forrest, 153.) And, says Mr. Roscoe, there is no reason for distinguishing between the effect of office copies in different causes in the same court; the principle of the admissibility being that the court will give credit to the acts of its own officers. (*Roscoe's Crim. Ev.* 155. See *Gresley's Eq. Ev.* 102.)

The rule that an office copy must be in the same court, has been so strictly adhered to in England, that where on a trial at law of an issue directed by chancery, an office copy of the defendant's answer was proposed, the court rejected it, though it was offered to impeach the very party who had made and used it in the court of chancery.

And per Best, C. J., "I cannot agree that one of his majesty's supreme courts is to be considered as merely an auxiliary to the court of the vice chancellor." (*Burnand v. Nerot*, 1 Carr. & Payne, 578. But see *Highfield v. Peake*, 1 Mood. & Malk. 109, 111; *Roscoe's Crim. Ev.* 155; *Studdy v. Sanders*, 2 Dowl. & Ryl. 347.)

NOTE 725—p. 387.

Who is and who is not competent to authenticate copies, is a question which, practically, must depend so much upon particular local regulations, that we can say scarcely any thing on the subject which would be generally useful. See ante, note 702, p. 1045, 1047. The principle that copies given out by a person not authorized are inadmissible, has been recognized in the following among many other American cases. *Schnertzell v. Young*, 3 Harr. & M'Hen. 502. *Sampson v. Overton*, 4 Bibb's Rep. 409. *Donohoo v. Brannon*, 1 Tenn. Rep. 328. *The President, &c. of the Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178. *Stoever v. Whitman's lessee*, 6 Binn. Rep. 416.

In New-York, the person in whose custody the paper is lodged by law, is authorized to give out copies, whenever certified copies are evidence. (2 R. S. 403, § 59. *Id.* 404, § 60.) See ante, note 702, p. 1047.

NOTE 726—p. 387.

See *Den v. Downam*, 1 Green's Rep. 135, 143; *Adams v. Betz*, 1 Watts' Rep. 425, 427. Where a deed had upon it the certificate of the clerk that it had been recorded, held, that it was *prima facie* evidence of the fact merely, and that it might be rebutted by producing the record showing that it was not recorded. (*Hastings v. The Blue Hill Turnpike Co.*, 9 Pick. Rep. 80.)

NOTE 727—p. 388.

In an action on a ward under a judge's order, an office copy of the rule making it a rule of court, is sufficient to prove the order. (*Still v. Halford*, 4 Camp. Rep. 17.) In *Dance v. Robson*, (1 Mood. & Malk. 294, 5, 6,) to prove an allegation that there was a rule of the insolvent debtors' court, making it the duty of a provisional assignee to attend at the K. B. prison on a particular day, the defendant produced a printed copy of the rules and orders of the court: it appeared that these rules were thus printed by order of the court; but that the originals were under the seal of the court, and were kept at the court. There was no evidence that the copy produced had been examined with the originals, and Brougham objected to its admission. But Lord Tenterden admitted it, saying, that it was what the court put forth and circulated among their officers for their guidance; and was therefore evidence of their duties.

A rule of court is not a record, and hence cannot be used to control or vary a record. (*Rex v. Bingham*, 3 Young. & Jervis, 101; see ante, note 718, p. 1064, 5;) nor can the rule itself be varied by parol. (*Edwards v. Cooper*, 3 Carr. & Payne, 277.)

The allegation in a rule of the time when a writ was returnable does not prove the fact; it is the mere suggestion of the party. (*Woodroffe v. Williams*, 6 Taunt. Rep. 19.) The production of a rule of court for committing a defendant convicted of a misdemeanor to a gaol, to be imprisoned for a term according to his sentence, is evidence, it has been held, to prove an allegation that he has received judgment of imprisonment for that term. (*Carlisle v. Parkins*, cor. Abbott, C. J., West. Sitt. after Mich. T. 1822, cited 2 Starkie's Ev. 721, 6th Am. ed.)

As to a certified copy of a rule of court in New-York, see 2 R. S. 403, § 59, 60, 61, ante note 713, p. 1060.

NOTE 728—p. 388.

See the general proposition on this subject laid down by Marshall, C. J., in *United States v. Percheman*, 7 Pet. 53, 85, stated ante, note 702, p. 1045. See also the cases cited ante, note 725, p. 1069.

NOTE 729—p. 339.

In that case the verdict would not be evidence of any of the facts found by it. (*Richardson's Lessee v. Parsons*, 1 Harr. & John. 253. *Ridgeley v. Spencer*, 2 Binn. Rep. 70. *Green v. Stone*, 1 Harr. & John. 405.)

In Kentucky, a verdict without the judgment is inadmissible as evidence of the facts found. (*Donaldson v. Jude*, 2 Bibb's Rep. 60.) And in Tennessee, even where it appeared that a rule for a new trial had been continued for several terms, and at length discharged, the verdict was held inadmissible without the judgment; for the court will not presume that judgment was entered; that fact must be shown affirmatively by the party seeking to avail himself of the proceeding. (*Ragan v. Kennedy*, 1 Overt. Tenn. Rep. 94.)

But in North Carolina, owing to the looseness of practice which has prevailed there, the verdict is received without the judgment; and the latter it seems will be presumed to have been entered until the contrary be shown. (*DeLoah v. Worke*, 3 Hawks' Rep. 36. *State v. Grayton*, 3 id. 187. *Murphy v. Guion's Ex'rs*, 1 N. Car. Law. Repos. 94. *Jones v. Zollicoffer*, id. 376, 378.) And therefore where the judicial proceedings of that state are offered in evidence in South Carolina, the courts of the latter state extend all possible indulgence and liberality toward them; even going so far as to give them effect, wherever they have found any thing from whence a judgment could be inferred. But where the record showed a verdict only, held, that a judgment would not be presumed. (*Hincle v. Carruth*, 1 Const. Rep. So. Car. 471.)

In Pennsylvania, a verdict in a former ejectment is evidence against the defendant, if he has acquiesced in it by paying the costs and delivering possession, although no judgment has been entered upon it. (*Shaeffer v. Kreitzer*, 6 Binn. Rep. 430.)

The doctrine that a verdict is not evidence without the judgment, is obviously, from its reason, entirely inapplicable to a verdict rendered before a court possessing no power to arrest judgment or grant a new trial. Accordingly, in New-York, a verdict

rendered before a justice of the peace is evidence without producing the judgment. (*Felter v. Mulliner*, 2 John. Rep. 181.) Nor would it be applicable, where the sole object of introducing the verdict was to prove the rendition of the verdict itself, as a fact, without reference to the circumstances upon which it was founded. (See *Barlow v. Dupuy*, 1 Martin's Lou. Rep., N. S. 442.)

With respect to the doctrine above adverted to, in its application to criminal cases, see ante, note 692, p. 955.

NOTE 730—p. 389.

See 1 Barnardis. Rep. 243; Barnes, 449; 7 Mod. Rep. 451. In a prosecution for perjury, the indictment alleged a trial at nisi prius, and that the accused committed the offence on such a trial. It turned out in evidence that on the alleged trial, one of the defendants was acquitted and examined as a witness; that the accused was then called to impeach him, and on his cross-examination, denied having had any communication with the party for whom he was sworn respecting the trial. The perjury was assigned as consisting in what the accused stated on his cross-examination. To prove that the cause came on for trial, as alleged, the nisi prius record was produced, with a minute of the verdict endorsed by the officer in these words: "verdict for plaintiff, damages, 1s." Lord Tenterden at first inclined to think this was not sufficient without the postea; and he suggested that if the minute were taken as evidence, it would appear that there was a general verdict against all the defendants, whereas it seemed necessary to the support of the prosecution to show that the defendant who was made a witness, had been acquitted, inasmuch as the imputed perjury only arose out of his being examined as a witness. On consultation, however, with Bayley, Littledale and Park, Js., his lordship held, that the minute endorsed as mentioned, was competent evidence of the trial, and that the other difficulty might be obviated by parol evidence that the defendant who had been used as a witness on the first trial, had been there examined. A short hand writer was then called who testified, that such defendant was acquitted on the first trial, and then examined; whereupon Denman inquired if that was deemed proof of the *acquittal*? Per Lord Tenterden, C. J., "No; but it is good proof that he was *examined*." (*Brown's case*, 1 Mood. & Malk. 315; S. C., 3 Carr. & Payne, 572.)

In Pennsylvania, on an indictment for perjury, the postea in the suit in which the perjury was alleged to have been committed, has been held essentially necessary. (*Respublica v. Goss*, 2 Yeates' Rep. 479. See *Rex v. Page*, 2 Esp. N. P. Rep. 650, note.)

NOTE 731—p. 389.

In an action on an indemnity bond, the postea was held sufficient proof of an allegation that the plaintiff was obliged to pay and did pay a certain sum as and for damages recovered, where, in consequence of an arrangement between the parties, no judgment was entered up. (*Havraes v. Bradshaw*, 9 Price, 359.) And in New York, in an ac-

tion to recover over on a bond of indemnity, held, that the *postea* was evidence to prove the fact of a suit and verdict, and the extent to which the defendant was liable. (*Kip v. Brigham*, 7 John. Rep. 168, 171.) So in an action by the grantee against the grantor of lands on a covenant against incumbrances, the *postea* in an action of ejectment against the former, was held evidence of the existence of the ejectment suit, and the fact of a verdict having been rendered. (*Waldo v. Long*, 7 John. Rep. 173.) See also *Gresley's Eq. Ev.* 109.

NOTE 732—p. 390.

See ante, note 718, p. 1063, et seq.

In *Godefroy v. Jay*, (1 Moore & Payne, 236,) the plaintiff declared against an attorney, for negligence in not causing an application to be made to the court to set aside proceedings in an action brought against him, alleging, that in consequence thereof, judgment passed against him by default, and that afterwards final judgment was obtained and execution issued; held, that it was incumbent on the plaintiff to produce an examined copy of the record to prove both judgments; and that proof of the entry of the judgment by default in the prothonotary's book, and the inquisition with the prothonotary's allocatur, were not sufficient evidence. (See S. C., 3 Carr. & Payne, 192.) In *Wade v. Odeneal*, (3 Dev. Rep. 423,) the action was to recover a penalty, given by statute for collecting taxes of one whom the sheriff had returned an insolvent; and it became necessary, on the trial, that the plaintiff should prove himself to have been regularly adjudicated by the county court an insolvent. For this purpose the clerk of the county court was called, who produced a list of the insolvent taxables in the hand writing of the defendant, the sheriff. The list was endorsed "allowed," and the clerk swore that no other order was made by the court respecting insolvents of that year, and that the defendant had settled the county taxes by that list. The testimony was objected to, and the supreme court held it inadmissible. "The question," says Ruffin, J., delivering the opinion, "is, how this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. If they choose to keep minutes, which they understand, and can act on to their own satisfaction, it is well. If, from them, they can afterwards undertake to draw out the record to perpetuate it to their successors, or to communicate its contents to another court, I know nothing to prevent them, but the difficulty in their own minds of being sure they make it what it was originally intended to be. But, until the record be so framed, another court cannot know more than the words of the minutes in themselves import. The records may be identified, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot be thus established. Here, the testimony of the witness was indispensable to make out a case. Had he sent a transcript under the seal of his office of what was deposited there, nothing could have been made of it." In the circuit court of the United States, sitting in New-Jersey, the plaintiff, a surety in a custom house bond, sought to recover against his principal the amount of a judgment recovered on the bond in the district court of Pennsylvania, which the plaintiff had paid. On the trial, to establish the judgment,

he offered a paper under the seal of the district court, certified by the clerk of that court to be a true copy of the docket entries in a suit of the United States v. Dayton & Leveringe, with a certificate of the judge of that court subjoined, that the attestation was in due form. The contents of the paper were nearly as follows, viz: "United States v. Leveringe, &c., nar. filed; on motion, judgment for the United States v. Leveringe; exit *capias ad satisfaciendum*, \$1602," to which were added the interest and cost in figures; and then, "July 3d, satisfaction acknowledged." It was proved that the plaintiff applied to the clerk of the district court for a copy of the judgment and other proceedings, and that in compliance with that application the above paper was delivered, and that it was the practice of that officer to deliver a similar paper in all cases like the present. The court refused to admit the evidence. And per Washington, J.: "The plaintiff relies upon a record to prove payment of a certain sum composed of principal, interest and costs, under a judgment and execution against him. But the paper produced is no record of a judgment or execution; it is a mere minute of the proceedings of the court, taken by the clerk to enable him to make up a record. The paper contains no judgment, nor even the minute of a judgment for any sum at all, unless we are to connect the figuring with the general entry, 'judgment for the United States,' and then conclude that the aggregate of the sums stated is that for which the judgment was rendered; which would be going much farther than any court in my opinion ought to do. In short, this paper does not inform us that the action to which it relates was on a bond, in which the plaintiff was surety, or what was the nature of the demand; for what sum the judgment was entered, or the execution issued. I do not say that the record need be made out with the same precision in matter of form, as if it were to accompany a writ of error to a superior court. But the proceedings should be stated and the judgment ought to have substantially at least the form of a judgment." (*Leveringe v. Dayton*, 4 Wash. C. C. Rep. 698; see also *Ferguson v. Harwood*, 7 Cranch, 408.) In *Tuthill v. Davis*, (20 John. Rep. 285,) the action was on a note, to which the defendant set up usury; the plaintiff, by way of rebutting this defence, sought to show that the note in question was given on the settlement of a judgment obtained on two other notes, and that though those notes were usurious, the defendant was precluded from alleging it, in consequence of the judgment. In order to prove the judgment, and that the note in question was given on the settlement, he produced the certificate of the attorney, who brought the suits on the first notes; and the supreme court held it inadmissible. Per Platt, J., delivering the opinion: "The right to recover in this action depended on the fact whether a judgment had been obtained in the suit on the first notes; and there is no ground for contending that the mere certificate of John Everitt (the attorney) was competent evidence of the fact. An exemplified copy of the judgment was undoubtedly the proper evidence." In Vermont, it has been said, that "an exemplified copy of a judgment is the legal and proper evidence to prove the same. Neither the records themselves, nor minutes, should ever be received, when copies can be obtained, unless there is some strong reason for dispensing with the usual and appropriate evidence." (*Lowry v. Cady*, 4 Verm. Rep. 504.) In Ohio, where defendants justify under a judgment, the fact of a judgment must be proved on their part by the record or a transcript. And the fact that the witnesses of the adverse party in giving their testimony spoke collaterally of the judgment, will not supersede the necessity of resorting to the regular mode of proof. (*Seaton v. Cordray*, 1

Wright's Rep. 102.) Where a judgment is sought to be used on the footing of mere hearsay, it must be proved by the record, or an authenticated copy; it cannot be established by depositions. (*Vaughan v. Phebe*, Mart. & Yerg. 1, 24, 25.)

It has been held in Massachusetts, that in order to prove that a suit was discontinued, it was necessary to produce the record or an authenticated transcript. Thus, in an action on an agreement of the defendant to pay costs in a certain suit, "he [the plaintiff] withdrawing said suit and making no further costs therein," the plaintiff offered to show by his attorney in the suit mentioned in the agreement, that the same was withdrawn, and that the words "neither party" were entered in the docket of the court where such suit was pending. This was held inadmissible by the common pleas, and the supreme court affirmed the judgment. Per Curiam: "The exception in the present case was founded upon a rule strictly technical; still it is a well settled rule, founded in considerations of general expediency, that the judgments and proceedings of a court of record must be proved by the record or an authenticated transcript. The plaintiff's case required him to show that a final judgment had been entered in the action in question pending in another county. The evidence offered by the testimony of a witness might have been very satisfactory in the particular case; but by a general rule, adopted for general convenience, we think it was inadmissible." (*Sheldon v. Frink*, 12 Pick. Rep. 568.) A similar case has been decided in the common pleas in England; and it was there held, that the allegation of discontinuance could not be supported without proof of a rule to discontinue. Gaslee, J., mentioned a case at nisi prius where it was decided that the production of a rule to discontinue was not enough, but that it was incumbent on the plaintiff to show that it had been entered on the roll. (*Fanshaw v. Heard*, 1 Moore & Payne, 191, 194, 5. S. C., 3 Carr. & Payne, 190. See *Graham's N. Y. Prac.* 603, 2d ed.) In South Carolina, the court say: "There can be no doubt, that out of the court in which the proceedings are had, a regular judgment is the only legitimate evidence of the termination of a cause, for the obvious reason that the non-production of the judgment would furnish a presumption that an intermediate or interlocutory order had been reversed or set aside; but this reason does not apply in cases where the proceedings are had in the same court in which they are offered in evidence; for, in legal contemplation, the whole record is before the court." Accordingly, they allowed the entry of a nonsuit on the back of a declaration, as legitimate evidence of the termination of a former suit in the same court. (*Baker v. Delleseline*, 4 M'Cord's Rep. 372.) In New-York, where the defendant, in an action of assault and battery and false imprisonment, set up by way of accord and satisfaction, that the plaintiff had settled with and discharged a co-trespasser, who was sued with him, the defendant, in a previous suit brought by the same plaintiff for the same cause of action; and it appeared that such co-trespasser had, before the settlement, instituted an action against the plaintiff, the discontinuance of which constituted a portion of the consideration of the settlement; held, that in order to show such discontinuance, it was not indispensably necessary to produce the record; but the fact of the co-trespasser having ordered his attorney to discontinue the suit, together with the payment of the costs by him, was sufficient; especially as there were circumstances in the case warranting the inference that the writ by which the suit was commenced had never been filed in the clerk's office. (*Foster v. Trull*, 12 John. Rep. 456.)

In some, and perhaps in most of the United States, the ancient common law judgment-roll is entirely out of use, and other modes of perpetuating judicial proceedings have been substituted, possessing the same intrinsic force as evidence. Thus, in New-Jersey, a book called a judgment book is used, which is entitled to all the consideration due to the English "rolls of court," and equally excludes the minutes of the clerk as evidence. (See *Den v. Downam*, 1 Green's Rep. 135, 6. See also *Penn v. Meeks*, 1 Pennington's Rep. 153, per Pennington, J.) So also in Ohio, it seems. (See *Harvey v. Brown*, 1 Hamm. Rep. 268.) In Pennsylvania, the docket stands in the place of a record; or rather, the docket is the record, where all the proceedings in the cause appear, except the writ, narr., and execution; and an authenticated copy of the docket entries of a suit, appearance, plea and issue, is admissible to shew a suit brought; and whether the suit was an ejectment for a particular tract of land, may be proved by an authenticated copy of the narr., or in case of its loss, by parol. (*Ruggles v. Alexander*, 2 Rawle's Rep. 232, 236.) The copy must be a copy of the whole, however, and not a mere *extract*. (*Ingham v. Cray*, 1 Pennsylv. Rep. 389, 394. See also ante, note 713, p. 1059.) And in that state, where the original record of the common pleas had been removed by writ of error into the supreme court, held, that on a trial in the former court, the docket entries might be received; held also, that the original record, so removed, was admissible without being authenticated by the seal of the supreme court, where it was then lodged; (*Eisenhart v. Slaymaker*, 14 Serg. & Rawle, 153;) and the court say, "In England records are not permitted to be carried from place to place; but in Pennsylvania, we know that the original records of the land office, as well as courts of justice, are permitted to be taken to any place where the production of the original is necessary for the administration of justice; and in such case, it is never authenticated with a seal, but proved to be the original by parol evidence." (Id.) In Tennessee, it is the practice to use the original papers in suits, as records, where they are of the same court in which the trial is had. The propriety of it is doubted, however, not because they are not the best evidence, but because of the danger to the records of the country. (*Nichol v. Ridley*, 5 Yerg. Rep. 63.)

On a trial at the circuit, in New-York, an original judgment record was introduced, without being proved to be a record by the oath of the clerk, or his deputy; this was held irregular, but that the irregularity was cured by the production, upon the argument before the supreme court, of an exemplification of the record. (*Wood v. Williams*, 14 Wend. 129.) That a deficiency in record evidence at the circuit may be supplied at bar, see, also, *Ritchie v. Putnam*, 13 Wend. 524.

The omission of the officer signing the record to add his title of office to his signature, will not vitiate the record. The omission may in all cases be supplied by parol proof. (*Elliott v. Cronk's adm'r*, 13 Wend. 35, 40.) As to what shall be sufficient evidence of a judgment in South Carolina in favor of a party claiming title to land in virtue of a sheriff's sale under it, see *M'Call v. Boatwright*, 2 Hill's Rep. 438.

We saw ante, p. 316, 317 of the text, that in general, the material and substantial parts of a record are not liable to be contradicted. In addition to the exceptions noticed at the latter page, it may be well to observe, that the mere fictitious parts of a record never estop the parties. Accordingly in England, by fiction of law, all judgments are supposed to be recovered in term, and to relate to the first day of term; yet where the purposes of justice require the true time to appear, it may be shown. (Lit-

deton v. Cross, 3 Barn. & Cress, 317. See *Johnson v. Smith*, 2 Burr. Rep. 950.) See post, note 735, p. 1077.

NOTE 733—p. 390.

In an action by an officer against the bailee or receptor of property, attached by him, it is not necessary, in order to prove the attachment, to produce the original writ; but the fact may be proved by other evidence; and the receipt itself, if one has been taken, is the appropriate and proper evidence. (*Lowry v. Cady et al.* 4 Verm. 504.)

The receipt is conclusive as to the fact of attachment, and the persons signing it, are not allowed to controvert such fact, in a suit against them on the receipt. (*Id.* *Lyman v. Lyman*, 11 Mass. Rep. 317. *Spencer v. Williams*, 2 Verm. Rep. 209.)

NOTE 734—p. 390.

Where a writ of execution has been returned, it becomes part of the record, and a copy thereof properly authenticated is evidence, the same as a copy of any other part of the record. (*Pigot v. Davis*, 3 Hawks' Rep. 25. See *Frost v. Shapleigh*, 7 Greenl. 236.)

NOTE 735—p. 390.

In general, the contents of a writ must be proved by the highest evidence of which the nature of the case is susceptible. Accordingly, in *Foster v. Trull*, (12 John. Rep. 456,) the general proposition was considered unquestionable, that parol proof respecting the existence of process issued out of a court, is inadmissible. The process itself, or a sworn copy, must be produced; and if the original is lost it ought to be accounted for. In *Brush v. Taggart*, (7 John. Rep. 19,) the plaintiff sued on a justice's judgment; and the defendant sought to prove that a certiorari had been allowed and served in the former cause; held, that the contents of the writ of certiorari could not be established by parol, so long as the writ itself or a sworn copy of it, was attainable. And even the confession of the party, against whom the process is sought to be given in evidence, will not supersede the necessity of producing it. Hence, in *Hasbrouck v. Baker*, (10 John. Rep. 248,) the court held, that in an action against A., for non-attendance as a witness after having been duly subpœnaed, the confession of A., as to his having been subpœnaed, would not dispense with the production of the subpœna itself. "The confession of the party, will not, in such case, supply the omission of such a document." And in trover, where the defendant justified the taking under an attachment against the plaintiff, held, that inasmuch as the existence of the attachment was matter of record, the defendant could not be allowed to prove it by the confession of the plaintiff. (*Jenner v. Joliffe*, 6 John. Rep. 9. See ante, note 415, p. 543; note 416, p. 544.)

But where a sheriff was sued for an escape on a *ca. sa.*, and notice had been regularly given him to produce the writ on the trial, held, that parol evidence was admissi-

ble to prove the issuing of it, its delivery to the sheriff, and the arrest; the sheriff having neglected to return and file it. The plaintiff *may*, in such cases, but he is not bound, to compel the sheriff to return the writ. (*Hinman v. Breese*, 13 John. Rep. 529.)

The mere fact, that a suit has been commenced, may be proved by a written agreement of the party in which the existence of the suit is conceded, without producing the writ. (*Foster v. Trull*, 12 John. Rep. 456, 458.)

And where there is no question as to the existence of a suit, the *time* of commencing it, may be proved by parol; because, for that purpose, it is not necessary to prove the *contents* of the writ. Accordingly, where a declaration was entitled generally, of Hilary term, 1828, and the demand upon which the plaintiff prosecuted did not become due until afterward; held, that it was competent for the plaintiff to show, by the parol evidence of his attorney, without producing the writ, that the action was not commenced until the demand had fallen due. (*Lester v. Jenkins*, 8 Barnw. & Cress. 339; see also *Mathews v. Haigh*, 4 Esp. N. P. Rep. 100.) And note; that the memorandum of the declaration, in these and similar cases, is *prima facie* evidence of the suit having been commenced at the time therein stated; but neither party is precluded by it from showing the true time. (*Lester v. Jenkins*, *supra*; see *S. P. Morris v. Pugh*, 3 Burr. Rep. 1241. *Wilton v. Girdlestone*, 5 Barnw. & Ald. Rep. 847. *Granger v. George*, 5 id. 149. *Michaels v. Shaw*, 12 Wend. 587.) The fiction of law, in England, is that all writs are supposed to issue in term; but where it is necessary, with a view to the statute of limitations, or for any other legitimate purpose, that the exact time should appear, the parties may show that in fact the writ issued in vacation. (*Johnson v. Smith*, *supra*; also, per *Holroyd, J.*, and *Abbot, C. J.*, in *Littleton v. Cross*, 3 Barn. & Cress. 317. See *ante*, note, 732, p. 1075.) So, as between parties and privies, the exact hour when an execution issued, may be shown by parol, notwithstanding its date, for the purpose of establishing that it issued too soon. (*Allen v. The Portland Stage Company*, 8 Greenl. Rep. 207. See *Taylor v. Dundass*, 1 Wash. Rep. 94.)

A writ of supersedeas, reciting that a commission of bankruptcy issued, was held evidence to shew the fact of such a commission having issued. (*Gervis v. The Grand Western Canal Co.*, 5 Maule & Sel. 76.)

NOTE 736—p. 390.

In Louisiana, the record of a suit in which a sequestration issued, is evidence to prove the fact that such a writ was obtained, though the suit was not proceeded in to judgment. (*Barlow v. Dupuy*, 1 Martin's Lou. Rep. 442.) In Pennsylvania, the docket entries of the prothonotary are not evidence of the issuing, service and return, of the writ of *hab. fac. poss.* Such entries are the mere minutes of the officer, and inferior to the writ itself with the return endorsed upon it. (*Vincent v. Huff's lessee*, 4 Serg. & Rawle, 298, 300.) In New-Jersey, the transcript of a justice's docket is not evidence of the delivery of execution to a constable; because the justice is not authorized to enter upon his docket the delivery of execution to the constable. (*Hunt v. Boylan*, 1 Halst. Rep. 211.) This is otherwise in New-York. See 2 R. S. p. 268, § 243, et seq.

NOTE 737—p. 390.

Where an action of debt was brought on a recognizance taken upon a plea of title in a justice's court, conditioned that if the plaintiff commenced a suit in a given time, the defendant would appear and put in special bail; held, that a record of the common pleas stating the suit commenced by the issuing of a *capias*, &c. was mere *prima facie* evidence of the suing out of the writ within the regular period; and the court say: "The entry on the record could not be conclusive of that fact, for then, as was observed in the case of Conry v. Jacob, (1 Sid. 220) upon a similar question, it would be in the power of an attorney to make an entry of the issuing of the writ, though the writ had never issued. Such an entry is like a *committitur* entered of record. It does not estop the party to deny the fact, and it shall be tried *per pais*, and the record is but evidence and not conclusive. Keeling, C. J., in Middleton v. Manuaptors of Sylvester, 1 Sid. 216." (Brown v. Van Deuzer, 10 John. Rep. 51, 53.)

NOTE 738—p. 390.

That in an action brought by the defendant in execution against the officer, for taking goods under it, the latter need not show a judgment, is a rule now well settled and very generally recognized. It stands upon the same principle noticed ante, note 694, p. 1005, et seq. which protects a ministerial officer in other cases, for acts done by him in virtue of process, *regular and valid upon its face*. And though the court which issued the process had no jurisdiction, and the party in whose favor it issued would not be able to justify under it, still a complete protection will be afforded to the officer, to whom the law has confided the duty of executing it. (Holmes v. Nuncaster, 12 John. Rep. 395. Parmelee v. Hitchcock, 12 Wend. 96. Coon v. Congden, id. 496. Yates v. St. John & Van Alstyne, id. 75. Savacool v. Boughton, 5 id. 170. Harget v. Blackshear, Taylor's N. Car. Rep. 107, per Haywood, J. Damon v. Bryant, 2 Pick. 411, 413. Clay v. Caperton, 1 Monroe, 10, 11. See also Cleveland v. Rogers, 6 Wend. Rep. 438. Britton v. Cole, 1 Salkeld, 408, 9. M'Cormick v. Miller, 3 Pennsylv. Rep. 230. See Earl v. Camp, 16 Wend. Rep. 563. Parker v. Walrod, id. 514. Hoose v. Sherrill, id. 33. But there is a distinction between the plaintiff, at whose suit an execution is issued, and the officer. The former, when sued, must show a judgment, if he justifies under the process. (Clay v. Caperton, 1 Monroe's Rep. 10. Britton v. Cole, 1 Salk. 408, 9.) Where the plaintiff in an execution, however, sues the officer or his representatives, for money collected under the same, the former need not show a judgment. It is not for the officer or his representatives to put the plaintiff upon proof of a judgment in such cases. They are estopped from denying it. (*Semble*, Elliott v. Cronk's adm'rs, 13 Wend. 35, 40.) And the sheriff, to recover the purchase money from his vendee, need not produce the judgment, but only the writ upon which he sold, and prove the sale. (Davis v. Baxter, 5 Watts' Rep. 515.) An officer who sues a mere stranger, having no pretence of title, in trespass or trover, for intermeddling with goods levied on by him under an execution, need not show a judgment. (Barker v. Miller, 6 John. Rep. 195. Blackley v. Sheldon, 7 id. 32. Spoor v. Holland, 8 Wend. 445. Wilbraham v. Snow, 2 Saund.

Rep. 47.) So where the officer is sued by such stranger. (Per Cur. in *Barker v. Miller*, supra. Ante, note 794, p. 1011, S. P. wrongly expressed.) Otherwise, however, where a stranger suing the officer shows in himself a title to the property, anterior to the levy, and good as against the defendant in the execution; for then the officer, in order to defend himself, can only do so by attacking such title as void for fraud in respect to creditors, in which case he is bound to show a judgment. (Per Walworth, Ch., *Parker v. Walrod*, 16 Wend. 514, 516, 517. See post, p. 391 of the text, and the next succeeding note.) The officer's right to sue an officious stranger, as above mentioned, depends upon his special property and his liability over. His process and levy in such case show him *prima facie* entitled to the property; but where he establishes no prior actual possession, the defendant may defeat the suit by proving that the officer's process was void, as having issued upon a judgment obtained without jurisdiction. For, in that event, it appears that the officer has no special property and is not liable over. (*Earl v. Camp*, 16 Wend. 562.) His endorsement of levy and possession taken is, it seems, sufficient to show an actual possession in the first instance; but when the process is impeached as utterly void for any cause, if he would maintain his action on the ground of prior possession, he should go further and show such possession by better evidence. (Id. 569, 570.) And where an officer sues to recover property levied on by him, and it appears clearly that the plaintiff in the execution is the real prosecutor, the officer being merely a nominal party, he must show a valid judgment. (*Semble*, id.)

Where a purchaser, through sale under a judgment and execution, sues as such to recover the property purchased, he must, in general, produce the judgment, execution, &c.; for they are parts of his title. This is so, whether the property be real or personal. (*Yates v. St. John & Van Alstyne*, 12 Wend. 74, 75, 6. *Jackson v. Hasbrouck*, 12 John. Rep. 213. *Carter v. Stimpson*, 7 id. 535. *Doe v. Smith*, 2 Stark. Rep. 199. *Glasier v. Eve*, 1 Bing. Rep. 209. S. C., 8 Moore, 46. *Lanning's lessee v. Dolph*, 4 Wash. C. C. Rep. 624, 5. S. P., per Moore, J., in *Harget v. Blackshear*, Taylor's N. Car. Rep. 107; *Earl v. Camp*, 16 Wend. 563; but see *contra*, per Haywood, J., id. p. 107 to 110.)

In the above case of *Yates v. St. John & Van Alstyne*, the plaintiff in the execution became the purchaser at the sale, and sued to recover the property. The defendants, after the sale under the plaintiff's execution, took and sold the property on an execution against the same person named as defendant in the plaintiff's execution; *St. John*, the plaintiff in the last execution, becoming the purchaser, and *Van Alstyne* acting as sheriff. On the trial, the plaintiff proved his execution, the sale, the value of the property, and then rested; and the defendants, after proving their judgment, execution and sale, insisted, that the plaintiff could not maintain his action unless he produced his judgment. The circuit judge held accordingly, and directed a nonsuit, which was afterward moved to be set aside; but the supreme court denied the motion, holding, agreeably to the general doctrine above stated, that the purchaser who seeks to make title, as such, must produce the judgment. But *Savage, C. J.*, who delivered the opinion, added: "It is true, that as against the defendant in the execution, it is not necessary to produce the judgment, because he is the party to the record. It is contended that all who claim under him stand in the same situation. This last proposition seems to have been denied in the case last cited. (*Glasier v. Eve*, 1 Bing. Rep. 209.)"

The execution may have been *prima facie* sufficient, but when the defendant St. John showed himself a *bona fide* purchaser of property in possession, as I infer, of the former owner, the plaintiff was called on to show a complete title. The defendants in this suit, I apprehend, do not stand precisely in the situation of the defendant in the execution, in relation to the plaintiff. These parties both claim the property as once owned by Y., (the defendant in both executions,) and claim adversely to each other. The defendants in this suit are neither parties nor privies to the execution under which the plaintiff purchased." (Id. 75, 6.) We have not been able to find any other adjudged case, in which it has been suggested that a purchaser, under a sheriff's sale, making title merely as such, against the defendant, was not bound to produce the judgment; unless, indeed, something of that nature may be gathered from the very meagre report of *Glasier v. Eve*, supra, as contained in Bingham, and in 8 Com. Law Rep., from which latter the chief justice cited it. The same case is better reported in 8 Moore, 46, and there it will be seen that no such proposition was sanctioned by the court. The case was briefly this: the plaintiff sued in trover for certain cattle, and sought to make title under two executions against B., and a bill of sale in virtue thereof to him by the sheriff. The defendants claimed as assignees of B., who became bankrupt subsequent to the bill of sale by the sheriff. The plaintiff produced the warrants of attorney under which his judgments were confessed, and also the executions and bill of sale; but omitting to prove the judgments, he was nonsuited. On motion made to set aside the nonsuit, it was contended, that, as against the defendant in the execution, the plaintiff would not be bound to produce the judgment, and that, as the assignees claimed under him, they must abide by the same rule. On the other side it was answered, that the defendants were not shown to be assignees; and even if they were, still the plaintiff's title depended on the judgments, which should have been produced. Dallas, C. J., according to the report in Moore, gave no opinion upon the question whether, if the defendants had been shown assignees, the plaintiff would have been excused from producing the judgments; but he confined himself strictly to the case presented, and assuming that they were not shown to be assignees, held, that the nonsuit was properly granted. Park, J., concurred. Burrough, J., however, distinctly repudiated the doctrine advanced on the side of the plaintiff, and said: "It appears to me that even if the defendants had defended the action as assignees, the judgments should have been produced on being called for at the trial." (8 Moore, 51.) He admitted, however, that the writ would be sufficient for the sheriff, because it is the authority under which he acts; "but that does not extend to other persons." (Id.)

Nor is this doctrine, that as against the defendant in the execution, a purchaser, seeking to make title under it, need not produce the judgment, supported by the New-York cases. But the same court which decided *Yates v. St. John & Van Alstyne*, supra, in a former case, (*Jackson v. Hasbrouck*, 12 John. Rep. 213,) laid down a doctrine directly the reverse. There, a purchaser of land under a sheriff's sale, sued in ejectment, to recover possession from one who, as was shown, was in possession under the defendant in the execution. The court held, that the plaintiff was bound to produce the judgments under which the premises were sold, as well as the executions. Thompson, J., who delivered the opinion, said, that the defendant was not a party to the judgments; that although it appeared he held under S., the defendant in the executions, still it might be questioned whether he was chargeable with knowledge of the

judgments in the same manner as S. would be. "But admitting," he added, "the defendant to stand in the same situation as S. himself would, I should still think it necessary to prove the judgments. A tenant by *elegit*, in order to recover possession of the land extended, must prove the judgment, as well as the *elegit*. (Buller, 104. 2 Peake's Ev. 315.) And in the case of *Carter v. Simpson*, (7 John. Rep. 535,) this court decided, that proof of a purchase of property at a constable's sale, did not show such an interest in the purchaser as would enable him to maintain trespass for an injury done to the property, without showing the authority under which the constable acted." (Id. 274, 5.) See also *Fenwick v. Floyd's lessee*, 1 Harr. & Gill. 172. *Cooper's lessee v. Galbraith*, 3 Wash. C. C. Rep. 546. *Smith v. Moorman*, 1 Monroe, 154.

The reason given by the learned C. J., in *Yates v. St. John & Van Alstyne*, viz. that the defendant is *the party to the record*, seems to us not at all satisfactory. The principle upon which a purchaser in making title in ordinary cases, has been held bound to produce the judgment, is, that otherwise the defendant's property might be divested where there was in fact no judgment, or only one utterly void. He must therefore show such a judgment, as would at least be valid until reversed, though he cannot be affected by any mere *irregularity* either in the judgment or execution not rendering them entire nullities. (See *Earl v. Camp*, 16 Wend. 567.) And therefore to say, that as against the defendant in the judgment, the purchaser need produce only the execution "because he is the party to the record," looks very much like a *petitio principii*; for non constat that there is a record.

The same rule which requires a purchaser, when plaintiff and seeking to make title, to produce the judgment as well as the execution, applies to him also when sued for the property purchased. (*Wilson v. Conine*, 2 John. Rep. 280. *Thompson v. Chauveau*, 6 Mart. Lou. Rep. N. S. 458. *Jackson v. Caldwell*, 1 Cowen's Rep. 622, 640, 641, 643, 4. *Curtis v. Swearingen*, Breese, 160. *Den v. Wright*, 1 Pet. C. C. Rep. 64, 66. See *Jackson v. Roberts' ex'rs*, 11 Wend. 422, 433, et seq.) And in such case, where the sale was under a decree of the court of chancery, and the purchaser in deraigning title produced a decretal order directing execution to issue on a prior decree recited in the decretal order, held, that the original decree which was the basis of the execution should be produced. (*Wilson v. Conine*, supra.) The recital in the sheriff's deed of property sold under an execution, will not prove the judgment; the judgment itself as well as the execution, must be directly proved in the regular mode. (*Weyand v. Tipton*, 5 Serg. & Rawle, 332. See *Jackson v. Roberts' ex'rs*, 11 Wend. 433. *Thompson v. Bullock*, 1 Bay's Rep. 364.) Where the judgment is thus collaterally called in question, merely to show the officer's authority to sell, a very imperfect transcript has been admitted. (*Lansing's lessee v. Dolph*, 4 Wash. C. C. Rep. 625.) Further as to the mode of proving judgments in these and similar cases, see post, vol. 2, of the text, p. 305; also ante, note 713, p. 1059; and note 732, p. 1072, et seq. As to their admissibility, and the effect of irregularities, and variances in the execution from the judgment, when they are used by purchasers, see ante, note 693, p. 978. *Ten Eyck v. Walker*, 4 Wend. 642. *Jackson v. Anderson*, id. 474. *Jackson ex dem. Hunter v. Page*, id. 585. *Allen v. The Portland Stage Company*, 8 Greenl. 207. When the execution is void, and not voidable merely, it seems no title can be acquired by a purchaser under it. (See *Swan v. Saddlemeyer*, 8 Wend. 676, 681, and cases there cited.)

In connection with the doctrine adverted to at p. 1078, of this note, protecting the officer, under certain circumstances, by his writ alone, independant of the judgment, it may be well to observe, that though it appears to have been held by several English cases, that he cannot justify under *mesne* process after the day appointed for the return, without showing it actually returned, yet with respect to writs of execution the rule is inapplicable. (Rowland v. Veale, 1 Cowp. Rep. 18, 20. Hoe's case, 5 Coke's Rep. 90. Doiley v. Joliffe, Lane's Rep. 50. Freeman v. Blewitt, 1 Salk. Rep. 409; S. C., 1 Ld. Raym. Rep. 632. 12 Mod. 394. Holt's Rep. 408. Cheasley v. Barnes, 10 East's Rep. 73, 82. Middleton v. Price, 1 Wils. Rep. 17; S. C., 2 Strange's Rep. 1184. Britton v. Cole, 1 Salk. 408, 9. Girling's case, Cro. Car. 446. 2 Roll's Ab. 562, pl. 14, 16.)

The rule that the sheriff, by neglecting to return *mesne* process, forfeits his protection under it, has been recognized incidentally in Massachusetts. (Oystead v. Shed, 12 Mass. Rep. 511. Purrington v. Loring, 7 id. 388, 392.) It has been directly declared to be law in New-Hampshire; and, it seems, would apply to the case of a sheriff levying on goods in virtue of an attachment; but its policy is strongly questioned, and the doctrine will not be extended to cases to which it has not been before expressly applied. (Parker v. Pattee, 4 N. Hamp. Rep. 530, 1, 2. Barrett v. White, 8 id. 229.) Whether it is law in New-York, quere. (See Coburn v. Hopkins, 4 Wend. 577, 578, 9. Gardner v. Campbell, 15 John. Rep. 400. Beals v. Guernsey, 8 id. 52. Hopkins v. Hopkins, 10 id. 372.) The doctrine has never been applied except as against the officer having control over the process. Hence, a bailiff may justify under process without shewing a return of it. (Britton v. Cole, 1 Salk. Rep. 408, 9. Freeman v. Blewitt, id. 409; S. C. 1 Ld. Raym. Rep. 632; 12 Mod. 394; Holt's Rep. 408; Rowland v. Veale, 1 Cowp. Rep. 20; Girling's case, Cro. Car. 446; Oystead v. Shed, 12 Mass. Rep. 511.) And so may the party at whose suit it issued. (Plummer v. Dennett, 6 Greenl. Rep. 421.) But if the party joins with the sheriff in a plea of justification, he will be bound to show the process returned. (Middleton v. Price, 1 Wils. Rep. 17; S. C., 2 Strange's Rep. 1184.)

NOTE 739—p. 391.

This doctrine has been recognized and acted upon in several American cases. The sheriff or other officer, in order to contest a sale on the ground of its being fraudulent as against creditors, can only do so by showing, preliminarily, that he is acting for a *creditor* who has a right to attack the sale; and this, in the case of an execution, is to be done by proving the writ and judgment. (Damon v. Bryant, 2 Pick. 411. Ackworth v. Kempe, 1 Doug. 41. High v. Wilson, 2 John. Rep. 46. See Martin v. Podger, cited in the text, reported 5 Burr. 2631; M'Gowen v. Hay, 5 Litt. Rep. 239, 241; Jackson v. Caldwell, 1 Cowen's Rep. 623; Reed v. Davis, 5 Pick. 388; Lum v. Kelso, 3 Mill. Lou. Rep. 64; post, vol. 2, of the text, p. 385.) See ante, note 694, p. 1011.

In High v. Wilson, *supra*, the defendant neglected to produce the judgment on the trial at the circuit, but obtained a verdict; he produced it however to the supreme court, on a motion made for a new trial; and the court being clearly satisfied that the

sale relied on by the plaintiff from the execution debtor, was fraudulent as against creditors, refused to disturb the verdict. The judgment in such cases must be proved by the best evidence. A copy of a copy is not admissible. (*Lum v. Kelso*, 3 Mill. Lou. Rep. 64. See ante, note 720, p. 1065.)

In Massachusetts, when the officer, being sued by a stranger, justifies under an attachment, and seeks to attack the sale to such stranger on the ground of fraud as against creditors, he must prove the debt for which the attachment issued. (*Damon v. Bryant*, 2 Pick. 411.)

NOTE 740—p. 391.

A paper cannot be said to be "filed," until it reaches its place of final deposit. (See *Garlick v. Sangster*, 9 Bing. 46; *Rex v. Wade*, 1 Barnw. & Adol. 861; *White v. Willard*, 1 Watts' Rep. 42; *Fager v. Campbell*, 5 id. 288.) And until an execution is actually deposited in the clerk's office, the return does not become matter of record. (*Welsh v. Joy*, 13 Pick. Rep. 482, per Shaw, C. J.)

NOTE 741—p. 391.

To know whether a return is competent evidence or not, we must look primarily to the process itself, and to the law regulating the officers duty thereon. We have before had occasion to observe, when speaking in respect to certificates, ante, note 702, p. 1046, that if the process is not what is called returnable process, or in other words, if it be process upon which the officer is not required to certify his doings, his return will not be evidence; for in that case the act is entirely *unofficial*, and is entitled to no more credit than would be due to the certificate of a private person, which, as we have seen, is mere hearsay. (See ante, note 702, p. 1047, 8; also ante, note 489, p. 674.) Thus, in Vermont, the return of a collector of taxes, upon his tax warrant, is not evidence, for he is not required to certify his doings. (*Hathaway v. Goodrich*, 5 Verm. Rep. 65.) So, for the same reason, in New-Hampshire, the return of a surveyor of highways on his warrant for the collection of highway taxes, is not evidence. (*Davis v. Clements*, 2 N. Hamp. Rep. 390.) See *Saxton v. Nimms*, 14 Mass. Rep. 315, 319, to 321.

And, doubtless, the general doctrine above stated would restrict the effect of a return, even upon returnable process, to such matters as were certified by the officer *officially*. On this subject it seems the rule is the same with that noticed ante, note 702, p. 1046, 7, with respect to certificates; and though a return go beyond the doings of the officer, as such, and though in that case it might be operative as to such parts as were official, yet the extra-official parts would be entitled to no credit. (See id. p. 1045, 6, 7.) Indeed, much of the doctrine laid down in the note just referred to, together with the cases there cited, may be advantageously adverted to by the student when considering questions relating to the admissibility and effect of returns.

On the principle that a return must be *official* in order to be evidence, it has been held, that a sheriff cannot make his return on an execution evidence of his having paid the amount collected thereon to the plaintiff. "Such a return is not commanded to be

made by the writ, nor is it authorized by law." (*First v. Miller*, 4 Bibb, 311.) So in England. (*Cator v. Stakes*, 1 Maule & Sel. 509, cited in text, note (4).) The officer cannot make his return evidence of any thing by way of excusing him for not having performed his duty; e. g., that he had omitted to return by reason of sickness; for such return is extra-official. (*Bruce v. Dyall*, 5 Monroe, 125, 6. See S. C., ante, note 165, p. 157.) And any mere apology for not having done what the law requires, as that he lost the process, &c. and therefore could not return it at the proper time, must be proved in the ordinary mode; it cannot be evidenced by the return, for "there is no law recognizing such a return." (*Holderman v. Brasfield*, Litt. Sel. Cas. 271.) He may certify his doings; but it is doubtful whether he can make evidence for himself by certifying facts beyond those doings; e. g., the doings of the plaintiff, as that the former levied &c. *by directions of the latter*. (*Barney v. Weeks*, 4 Verm. Rep. 146.) But *quere*, how far is this so as to parties, &c.? (See *Gyfford v. Woodgate*, 11 East, 297, cited and stated in the text. S. C., 2 Camp. 117. Also, see *Townsend v. Olin*, 5 Wend. 207, 209.)

An officer's return of acts done by him out of his precinct, as his having delivered to the defendant in an attachment, at his request, a copy of the writ, is extra-official, and furnishes no evidence of notice. (*Semle*, *Arnold v. Tourtelott*, 13 Pick. Rep. 172.)

But a fact unnecessarily, or even improperly returned, may be evidence *against the officer*, to be treated like his written acknowledgment. (See *Williams v. Cheesbrough*, 4 Conn. Rep. 356, 361.)

As to the person who makes the return, it has been held in Massachusetts, that where the deputy who sold under an execution, died after the return day without having entered on the writ a certificate of his doings; the sheriff might make the return, and that the purchaser would take a valid title under it. (*Ingersol v. Sawyer*, 2 Pick. Rep. 276.) And one who, as sheriff, has levied and sold under an execution, may make a valid return thereon a long time after he has ceased to be in office. So of a deputy sheriff. (*Welsh v. Joy*, 13 Pick. Rep. 477.) But *quere*: is such a return conclusive as it respects the parties? (See *Weidman v. Weitzel*, 13 Serg. & Rawle, 96; *Williams v. Carr*, 1 Rawle, 420, 422, 423; *Meredith v. Shewall*, 1 Pennsylv. Rep. 497, stated *infra*, p. 1089.) In Vermont, by statute, a deputy sheriff is recognized as a distinct officer, whose doings on process may be certified in his own name, and need not be in the name of the sheriff. (*Eastman v. Curtis*, 4 Verm. Rep. 616.) In Kentucky, though a deputy sheriff or sergeant cannot appoint a general deputy, yet he may empower another to do a particular act; and, therefore, where a deputy sergeant had authorized a constable to serve a summons in the general court, who accordingly did so, and the deputy sergeant returned the summons served, in his own name, held, that such return was properly made. (*Sergeant of the Court of Appeals v. George*, 5 Litt. Rep. 198.) In New-York, a plaintiff, if he be a sheriff, or specially deputed for that purpose, may serve his own *capias*, where no bail is required, and his return will, it seems, be evidence. (See *Bennett v. Fuller*, 4 John. Rep. 486; *Tuttle v. Hunt*, 2 Cowen's Rep. 436, 7.) So as to a summons in a justice's court, where the plaintiff is a constable, or specially deputed to make service. (*Tuttle v. Hunt*, 2 Cowen's Rep. 436. *Putnam v. Mann*, 3 Wend. 202, 204, 5.)

In giving effect to the return of an officer, even where it is strictly official, regard is in many instances to be had to his territorial authority. Thus, where it is material, for

any purpose, that a return should show a defendant not an inhabitant of a particular district, the return of an officer, whose bailiwick does not necessarily cover the whole district, that the defendant is not an inhabitant of *his bailiwick*, is not enough. (Gully v. Sanders, Litt. Sel. Cas. 424. See Palister v. Little, 6 Greenl. Rep. 350.)

In general, faith is given to the official returns of public officers, like the sheriff, &c. The law makes them certifying officers of their doings upon returnable process, by requiring them to return, and holding them responsible for the truth of their returns. Hence, such returns are commonly evidence, of more or less force, according to circumstances, and particularly with respect to the parties against or for whom they are sought to be used. (Hathaway v. Goodrich, 5 Verm. Rep. 65. Gyfford v. Woodgate, 11 East, 299. Davis v. Clements, 2 N. Hamp. Rep. 390.)

1. *As to strangers.* It is a well settled rule, that an official return, upon returnable process, is *prima facie* evidence, even against strangers; "because it is the official act of a man acting under oath." (Per Gibson, J., in Hyskell v. Givin, 7 Serg. & Rawle, 571.) "As relative to strangers, credence is due to the uncontradicted official act (return) of the sheriff, when third persons are concerned." (Per Hosmer, C. J., in Dutton v. Tracy, 4 Conn. Rep. 94.) Accordingly, the return of the sheriff, upon a writ commanding him to put T. in possession of certain premises, was received in a proceeding for forcible entry by T., to prove, as in his favor against persons not parties to the execution, that, *prima facie*, possession was delivered to T., as mentioned in the return. (Dutton v. Tracy, 4 Conn. Rep. 79.) A return of service upon process, is *prima facie* evidence that it was so served in an action against the officer who issued it. (Allen v. Gray, 11 Conn. Rep. 95.)

But a return of a sheriff is seldom more than *prima facie* evidence to affect strangers, and the latter may generally vary or contradict it by parol evidence. (See the cases *supra*; also Caldwell v. Harlan, 3 Monroe, 349, 351, 2; Bott v. Burnell, 9 Mass. Rep. 96, 99; Field v. The United States, 9 Peters' R. 183.) A familiar illustration is, where a person, other than the defendant in execution, sues or is sued for property levied on under it, in which case the return usually states the property to belong to the judgment debtor; but the real owner is always permitted to contradict such statement. (Whiting v. Bradley, 2 New Hamp. Rep. 82. Bloxham v. Oldham, 1 Burr. 22, 32; Alworth v. Kemp, 1 Doug. 40 to 43.)

A return, however, has sometimes been held to conclude persons who were not strictly parties or privies to the process. Thus, where A. assigned a bond, promising in the assignment to be responsible to B., the assignee, should the obligor prove insolvent, and B. assigned the same bond by the like assignment to D., who commenced a suit on the bond, obtained judgment, and issued a *fi. fa.* thereon, to which the sheriff returned "no effects;" held, that this return was sufficient to charge A., in a suit on his assignment by B., and proof that the obligor was not insolvent was decided inadmissible. (Goodall v. Stuart, 2 Hen. & Munf. 105.) The return of a sheriff that a *fi. fa.* is satisfied is conclusive upon his sureties that he had received the money, in an action on his official bond. (Governor v. Twitty, 1 Dev. Rep. 153; but see S. C., 2 Hawks' Rep. 5.) Although the sureties were not parties to the *fi. fa.*, still as it concludes the plaintiff therein so long as it stands, and prevents him from any remedy against the defendant, it shall therefore conclude the sureties. (Governor v. Twitty, *supra*.) In debt on a replevin bond, in Pennsylvania, the sheriff's return of *elongatur*,

after a judgment *de retorno habendo*, was held conclusive, and proof of the property having been tendered to the plaintiff was adjudged inadmissible. (*Phillips v. Hyde*, 1 Dall. 439.) In New-York, where the defendant has given security for an adjournment in a justice's court, pursuant to 2 R. S. 239, § 76, the plaintiff, it is provided, cannot recover on the bond, unless he shows an execution issued, &c. on the judgment obtained, and a return thereon that the defendant could not be found. (*Id.*, § 77.) In an action against the surety, after these proceedings have been had, the latter cannot, it seems, be permitted to contradict the constable's return on the execution, that being conclusive against him. (*Boomer v. Lane*, 10 Wend. 525, 527.) At any rate, it concludes the surety from alleging that the defendant had property in the county sufficient to satisfy the execution. (*Id.*) In Massachusetts, upon a *scire facias* against bail taken upon arrest, the bail are concluded as to the fact of arrest by the officer's return on the writ, which they are not at liberty to controvert save in an action against the officer for a false return. (*Bean v. Parker*, 17 Mass. Rep. 591, 600, 1.) So, in *scire facias* against the endorser of the original writ, (under a statute of that state,) the return of *non est inventus* on the execution, is conclusive as to the avoidance of the principal in an action against the endorser. (*Ruggles v. Ives*, 6 Mass. Rep. 494.) If the return be, that the body is taken and committed, it is *prima facie* evidence of the principal's inability to pay, to be controlled only by evidence of his having paid. (*Id.*) A similar statute seems to exist in Maine, and there, the sheriff's return that he could find no property, which means *in his precincts*, is not conclusive evidence of inability to pay, and does not therefore prevent the indorser from showing the ability of the principal. (*Palister v. Little*, 6 Greenl. Rep. 350.) In debt against bail to the action, in South Carolina, a memorandum on the *ca. sa.* sued out, thus, "N. E. I. per Jackson," (Jackson being a deputy and the memorandum in his hand writing) together with the following return: "I have, by my deputy, J. T. Smart, made diligent search for the defendant, but could not find him, John R. Cleary, sheriff," were produced; the sheriff and Jackson were both dead; Smart was sworn and denied that the *ca. sa.* had ever been in his hands; yet held, that the whole amounted to a sufficient return under the peculiar circumstances. (*Mathewson v. Moore*, 2 M'Cord's Rep. 315.)

Where a third person is in a situation to be concluded by a return, and thereby injured, he may maintain an action for a false return against the officer, in which it is always competent for the plaintiff to controvert its truth. Accordingly, in Massachusetts, A. attached an equity of redemption of B., and C. subsequently attached the same equity; the equity was taken on an execution in A.'s favor, and advertised for sale, but the advertisement did not specify any place of sale. A sale took place, and the equity brought a fair price. The officer's return stated that he had advertised the place of sale, &c. C. having afterward obtained judgment and execution in his suit against B., brought an action against the sheriff for a false return. And it was held, 1. that the return made was false; 2. that it was so far conclusive, as that the equity passed by the sale, and could not therefore have been taken on C.'s execution; 3. that the action was maintainable; and 4. that the damages recoverable were the amount of C.'s judgment with interest from the service of the writ. (*Whitaker v. Sumner*, 7 Pick. Rep. 551.)

The sheriff may show the return false as against his deputy, in an action on the bond of the latter, to recover monies which the former had been compelled to pay

by reason of an escape suffered by the deputy. And though the return was in the hand writing of the sheriff, yet held, that he might prove that it was the custom for his deputies to deliver to him all process, on which he endorsed such returns as they directed, and that such custom was evidence from which the jury might infer the return to be the act of the deputy. (*Naylor v. Semmes*, 4 Gill. & John. 273.)

Returns of officers are usually conclusive as a protection in favor of third persons who are bound to act upon them, and have no other evidence furnished them of their authority. Thus, assessors in Massachusetts, in order to prove the meeting which appointed them competent to do so, need not go behind the record and show the meeting duly warned. The return is all they have to look to, and this cannot be contradicted in order to render their conduct illegal and themselves liable as trespassers. (*Thayer v. Stearns*, 1 Pick. 109, 112. *Saxton v. M'Nimms*, 14 Mass. Rep. 320.) So, doubtless, as to judges, justices, &c. who are in many cases furnished with no other evidence than a return, of their jurisdiction over the person. (See *Case v. Redfield*, 7 Wend. 398.) See this case, and others of a kindred character, cited *infra*, p. 1089.

2. *As to parties.* As between the parties to the process, or their privies, the return is usually conclusive, and not liable to collateral impeachment. This is a well established general rule, one necessary to secure the rights of the parties, and give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return. (Per Cur. in *Small v. Hogden*, 1 Litt. Rep. 16, 17. *Bean v. Parker*, 17 Mass. Rep. 601. *Slayton v. Inhabitants of Chester*, 4 id. 479. *Whitaker v. Sumner*, 7 Pick. 551, stated *infra*. *Caldwells v. Harlan*, 3 Monroe, 351. *Boynton v. Willard*, 10 Pick. 169. *Whiting v. Bradley*, 2 New-Hamp. Rep. 79, 81. *Hawks v. Baldwin*, Brayt. Rep. 85.) It is not clear that a party, even in chancery, can be allowed to aver and prove the falsity of a return fair upon its face, in a collateral mode, without a direct proceeding against the officer himself. (Said in *Sergeant of the Court of Appeals v. George*, 5 Litt. Rep. 198, 200, per Mills, J. See *Alshire v. Hulse*, 1 Wright's Rep. 169, 170.) In Massachusetts, the sheriff's return that dower had been set forth by three disinterested freeholders, is conclusive between the parties. If the persons were not freeholders, the sheriff is liable to the party injured for a false return. (*Easterbrook v. Hapgood*, 10 Mass. Rep. 313, 314.) On a motion to set aside a sale under an execution, on the ground that B. was the purchaser, and not C.; and that B. before the sale-bond was executed, gave up the purchase to C., and directed the sale to be returned in C.'s name, who accordingly gave a bond as principal, B. signing as surety; held, that the bond and the sheriff's return were conclusive as against the defendant in the execution, that C. was the purchaser. (*Small v. Hogden*, 1 Litt. Rep. 16, 17.) A return upon a writ of *habere facias possessionem*, has been held conclusive between the parties, that possession was delivered as stated in the return. (*M'Connel v. Bowdry's heirs*, 4 Monroe, 392, 399. *Smith v. Hornback*, 3 Marsh. Ken. Rep. 392, 3. *Tribble v. Frame*, 3 Monroe, 51.) And when the heir relies on the possession of the widow, in bar of an ejectment, such return is conclusive against both. (*M'Connell v. Bowdry's heirs*, *supra*.) In Maryland, held, that the sheriff's schedule of goods, returned as taken and delivered in an action of replevin, at the suit of R., might be read by the plaintiff, (one of the defendants in the replevin,) in an action against R., to prove R. in possession of the goods on the day after they were first taken. (*Allender v. Riston*, 2 Gill & John. 86.)

The general doctrine concluding parties by these returns, was held in *Trigg v. Lewis'* executors, (3 Litt. Rep. 129, 130, 1, 2.) There, the return on a venditioni exponas was adjudged conclusive, on scire facias, as against the executors of the plaintiff in the judgment (who sought to revive it,) that the sheriff had sold lands under the judgment, and so satisfied it *pro tanto*. It was further decided, that the fact of A., (whose name appeared in the sale-bond as one of the securities of the alleged purchaser of the land,) having obtained a decree in chancery for a perpetual injunction against all proceedings on the sale-bond, on the ground that he had never signed it, could not be alleged against the return. "It only proved that Lewis (the plaintiff in the judgment,) or his representatives, were precluded by a decree *in personam*, from further proceedings against one of the securities; but it did not prove as to the present plaintiffs in error, (the defendants in the judgment,) that this was rightly done; because the present plaintiffs were not parties thereto, and their rights could not be concluded by it. Moreover, the decision of the chancellor did not, and with propriety could not, destroy the return of the officer in a court of law." (Id. 132, 3.) It was set up too in this case against the return, that the executors of L., (the present plaintiffs,) had issued scire facias on the sale-bond, to have execution against the alleged purchaser and B. the other security; that the purchaser pleaded non est factum, and that the issue being found in his favor, a judgment was rendered, discharging him therefrom. Per Cur., (Id. 133)—"The same objections lie to these proceedings. The present plaintiffs (in error,) were not parties, and the return of the officer was not destroyed thereby, as between the original parties to the judgment." On the subject of controverting the return by allegations *en pais*, "to permit it," say the court, "would contravene a well settled principle. It is a general rule, that the acts of ministerial officers, as far as the rights of the parties affected thereby are concerned, must be taken as true, when brought into contest collaterally, and can only be impeached by direct proceedings, such as those which make the officer a party." (Id. 132.) The court admit that it would be competent to rebut or destroy the return by record evidence; (id;) and it might be shown that the return "had been annulled and set aside by the proper tribunal." (Id.) In *Wilson v. Hurst's ex'rs*, (1 Peter's C. C. Rep. 441,) the marshal's return of non est inventus on a ca. sa., was held to conclude the defendants in scire facias to revive the judgment, they being the legal representatives of H., against whom it was rendered. It was suggested that the *real* defendants in the case were the terre-tenants, and that the rule did not therefore apply. But the court refused to notice any parties save those who appeared as such upon the record. In Massachusetts, in entry *sur disseizin*, a sheriff's return to an execution, of an appraisement, and seizin delivered to the lawful attorney of the demandant, who was the judgment creditor, will conclude in respect to the facts stated, as against the defendant in the execution, and all claiming under him; (*Bott v. Burnell*, 9 Mass. Rep. 96;) "and all other persons, so far as it is evidence of formal proceedings, which are to avail against the parties subjected to the authority exercised therein. But it is not conclusive for any other purpose." (Id. 99.) So in Vermont. (*Stevens v. Brown*, 3 Verm. Rép. 420. *Eastman v. Curtis*, 4 id. 616. *Hathaway v. Phelps*, 2 Aik. Rep. 84. *Stevens v. Brown*, 3 id. 420.) And in Maine also. But it cannot be made to preclude evidence that the levy took place after the death of the judgment debtor, and so, that

the whole proceeding was void. (*Allen v. The Portland Stage Company*, 8 Greenl. 207.) It concludes as to the official doings under it. (*Id.*)

The rule above noticed, concluding the parties, applies to process by which the defendant is brought into court. The defendant cannot show the falsity of the return, as to the facts stated in it, constituting due service, by way of objection to the continuance of the suit; nor can he controvert it in any material part, save in action for a false return against the officer. (*Slayton v. Inhabitants of Chester*, 4 Mass. Rep. 478. *Wheeler v. Lampman*, 14 John. Rep. 481. *Hunter v. Kirk*, 4 Hawks' Rep. 277.) So as to a return of a constable on an attachment. (*Case v. Redfield*, 7 Wend. 398. *Stinson v. Snow*, 1 Fairf. Rep. 263.) But in Connecticut, a different doctrine prevails; and there, a return of an officer, on mesne as well as final process, is only prima facie evidence, even as between the parties. (*Watson v. Watson*, 6 Conn. Rep. 334. *Butts v. Francis*, 4 id. 424.) But conceded, that it is, in general, conclusive as against the officer making it. (*Williams v. Cheesebrough*, 4 Conn. Rep. 356.)

To the general rule, forbidding the impeachment of a return as between the parties, there are various exceptions. In Pennsylvania, a return to a fi. fa. of "debt and costs paid," made two years after the proper time and one year after a suit commenced, in which its effect was material, was held open to a collateral impeachment by a party. (*Weidman v. Weitzel*, 13 Serg. & Rawle, 96. *Williams v. Carr*, 1 Rawle, 420, 422, 3, S. P.) Indeed, it is laid down without qualification in a case subsequently decided, that an irregular and illegal return may be inquired into and impugned. (*Meredith v. Shewall*, 1 Pennsylv. Rep. 497.) Where a liberari facias was returned with an inquisition of extent, stating that the sheriff had caused the lands extended to be delivered, held, that it was competent for the plaintiff to show, and that too by the sheriff, that he did not deliver the lands, &c., and so the plaintiff's debt was not satisfied: for the office of the inquisition is only to determine the value of the land and the yearly rents and profits, &c.; the delivery of the land takes place after the inquisition, and is the act of the sheriff alone. In this case the sheriff had endorsed on the writ the fact of the proceedings having been stayed, which had been erased, and he was held competent to show also that such erasure was not *his* act. (*Id.*)

The return of a sheriff was said not to be conclusive in the following case: *A. B. and C.*, in Virginia, executed a forthcoming bond, to release the goods of *A.*, taken on a fi. fa. against *A. and B.* It was not stated in the bond whether *B.* signed as principal with *A.* or as surety. The sheriff's return stated that the bonds were taken of *A. and B.*, with *C.* as surety. Judgment was obtained on the bond, execution issued, and the money paid by *C.* On appeal from the decision of a motion made by *C.* to compel *A. and B.* to repay such money, it was deemed competent for *B.* to have contradicted the sheriff's return in the court *a quo*, so far as it went to show that the former signed as principal. (*Cunningham v. Mitchell*, 4 Rand. 189.)

In New-York, where a judgment is sought to be used between the parties as the foundation of an action or set-off, it is competent for the plaintiff in the judgment to contradict a return of satisfaction made on the execution issued upon the judgment. Accordingly, where an endorsement of part satisfaction appeared on the execution, held, that the party who sought to use the judgment as a set-off, might show that the amount so endorsed was the proceeds of property sold, which sale was subsequently set aside and avoided. (*Dubois v. Dubois*, 12 Wend. 416. See *Codwise v. Field*, 9

John. Rep. 263.) And though there be a return of levy, neither the plaintiff nor those under him are precluded from showing that the execution was not satisfied. (Little v. Delancey, 5 Binn. 266.) So, it seems, a return of satisfaction on an execution, not made by the sheriff in the course of his official duty, but in violation thereof, shall not estop the plaintiff; as if he take a note, receipting it as payment, and return satisfaction. (Orange Co. Bank v. Wakeman, 1 Cowen's Rep. 46; and see *id.* p. 47, note (a), and the cases there cited; Mumford v. Armstrong, 4 *id.* 553; Armstrong v. Garrow, 6 *id.* 465.) And in an action of assumpsit against the officer, held, that the plaintiff in a *ca. sa.* might show, that what was contained in the return thereon by the officer as to the execution being satisfied "by the special direction of the plaintiff," was false. (Townsend v. Olin, 5 Wend. 207, 209.)

In an action against the officer expressly for a false return, the plaintiff may of course controvert it. This is conceded in nearly all the cases cited *supra*; and, under such circumstances, the plaintiff may show the falsity of the return by any evidence that he can produce for that purpose, whether parol or written. (Goodall v. Stuart, 2 Hen. & Munf. 105, 112, per Tucker, J. Whitaker v. Sumner, 7 Pick. 551. See also Gardner v. Hosmer, 6 Mass. Rep. 327; Boynton v. Willard, 10 Pick. 169.)

But the defendant in the execution, it has been said, shall not be permitted in trover or trespass against the officer, to show the return false for the purpose of making him liable for his doings under the process in that form. The remedy, if any, is by an action on the case for a false return. (Sias v. Badger, 6 New Hamp. Rep. 393. See Livermore v. Badgley, 3 Mass. Rep. 487.) So, in trespass and false imprisonment against the plaintiff, for an arrest under a justice's execution, the defendant in the execution will not be allowed to show the return to the original summons false, though made by the plaintiff in the execution himself, he being a constable, and though the execution issued on his special application. The remedy is by an action for a false return. (Putnam v. Mann, 3 Wend. 202.)

3. *As to the officer.* The return will in general conclude as against the officer; and he will not be allowed to question its truth. (Purington v. Loring, 7 Mass. Rep. 388.) Accordingly, where an officer returned on a warrant of distress that he advertised the goods distrained 24 hours before sale, held, in an action against him for taking the goods, that he could not be permitted to show by parol that he in fact advertised them forty-eight hours before the sale. (*Id.*) And where a coroner returned upon a *ca. sa.* that he had received the amount thereof in full, "according to the special directions of the plaintiff," held, that in an action against him by such plaintiff to recover the amount of the *ca. sa.*, he could not be allowed to show that what he received were notes, and that they were taken, not in payment of the execution, but for his indemnity against a threatened prosecution for an escape. He cannot be heard to gainsay the truth of a return made under his oath of office. (Townsend v. Olin, 5 Wend. 207, 209.) See also Denton v. Livingston, 9 John. Rep. 98; Scott v. Seiler, 5 Watts, 235, 245; Williams v. Cheesebrough, 4 Conn. Rep. 356, 360; and see 1 Cowen's Rep. 47, note (a). The return of a sheriff to a *ca. sa.* of "satisfied," is evidence in an action against him by the plaintiff in the writ, that the former received the money before the return day; though the *ca. sa.* be not in fact returned and filed till after the return day. (Armstrong v. Garrow, 6 Cowen's Rep. 465.) In debt against the sheriff for an escape, his return on a *ca. sa.* of *cepi corpus et committitur*, was held to preclude him

from showing that he did not arrest the prisoner until three days after the return of the writ, as that would contradict his return. (*Shewel v. Fell*, 3 Yeates' Rep. 17; 4 id. 47. S. C. on appeal.) So, if the sheriff return "lands sold," or, "in custody," &c. he cannot, in an action brought against him, disprove and falsify such return. (*Id.*) This rule applies to the sheriff when sued for the misconduct of his deputy. (*Gardner v. Hosmer*, 6 Mass. Rep. 325.) And on the general principle above stated it has been said, that the sheriff is not a competent witness to impeach his return. (*Meredith v. Shewall*, 1 Pennsylv. Rep. 496.) But he is, to support it. (*Id.* *Cunningham v. Mitchell*, 4 Rand. 189.) In Vermont, where the officer was commanded to attach goods and chattels to the amount of \$20, and returned that he had attached all the hay, grain, oats, and peas, in the defendant's barn; held, that in an action against him, he was estopped from saying there was no such property there; and that the command in the writ connected with the return, were *prima facie* evidence that the property levied on was worth \$20; (*Barney v. Weeks*, 4 Verm. Rep. 146;) and this, even though the return state that he levied by directions of the plaintiff; and it is doubtful, as we have seen, whether the latter fact can be evidenced by the return. (*Id.* 146, 148; and see *supra*, p. 1084 and the cases there cited, as to this point.)

But this rule of conclusiveness as against the officer, has its exceptions. Thus, where an officer was sued for malicious prosecution, in procuring the plaintiff to be indicted for rescuing G. from his custody, and the plaintiff, to shew that the prosecution was utterly groundless and malicious, produced the writ on which G. was taken by the defendant, together with a return thereon signed by the defendant, stating that he had arrested G. and taken bail; held, that the officer might show, by way of rebutting the evidence thus derived, that the plaintiff did in fact rescue G. on the day of the date of the return; that G. died some time after and before he could be retaken; that before knowledge of his death came to the defendant, the plaintiff offered himself and another as bail for G.'s appearance, and that the defendant having agreed to accept such bail, made said return. (*Lewis v. Blair*, 1 N. Hamp. Rep. 68.) So where the officer is prosecuted for not seizing and selling property levied on by him under an attachment and returned as the property of the debtor, he may show, notwithstanding such return, that the property was not the debtor's. (*Fuller v. Holden*, 4 Mass. Rep. 498. *Learned v. Bryant*, 13 id. 224. *Tyler v. Ulmer*, 12 id. 163. *Whiting v. Bradley*, 2 N. Hamp. Rep. 83.)

And the return of an officer is not conclusive evidence against him, as to statements therein which must necessarily be mere matter of opinion. Accordingly, where an officer defended for taking goods, on the ground of a levy under an attachment returned by him as served on a particular day at 5 o'clock, held, that the precise hour becoming material, he might show the service to have been at an earlier hour. The moment of levy must be understood as matter of opinion only. (*Williams v. Cheesebrough*, 4 Conn. Rep. 356, 360, 1. See *Kittridge v. Bellows*, 4 N. Hamp. Rep. 424, 430, 1, stated *infra*.) So, where the sheriff returns that he has seized goods to the value of a *fi. fa.*; his statement as to their value must be regarded as mere matter of opinion, and will not conclude him on that point. (*Said*, per *Hosmer, C. J.*, in *Williams v. Cheesebrough*, *supra*; and see per *Kent, C. J.*, delivering the opinion of the court in *Denton v. Livingston*, 9 John. Rep. 96, 98, 9.) In *Clerk v. Withers*, (2 Ld. Raym. 1072, 6 Mod. 290,) *Holt, C. J.*, said, that the sheriff would be bound by the value returned. (But see *Sly v.*

Finch, Cro. Jac. 514. Also Clutterbuck v. Jones, 15 East, 78.) Clerk v. Withers. was adverted to in the above cases from the New-York and Connecticut reports, and by both the dictum of Holt, C. J., is substantially repudiated. One reason given by the latter, is, that when the sheriff levies on goods to the value of the debt, the defendant is discharged. But it may often happen that the property seized and returned as the value of the debt, may be found not to belong to the defendant, or may be found of much less value, by the fall of the market between the levy and sale, or by means of some concealed defect or infirmity; and the judgment ought not to be considered further satisfied as against the original defendant than the amount of the proceeds of the sale. (Denton v. Livingston, supra, per Kent, C. J.) As to the doctrine of satisfaction by levy, with respect to the defendant in execution, see Wood v. Torry, 6 Wend. 562; Ladd v. Blunt, 4 Mass. Rep. 403; Hoyt v. Hudson, 12 John. Rep. 208; Ex parte Lawrence, 4 Cowen's Rep. 417; Jackson v. Bowen, 7 id. 21; Ontario Bank v. Hallett, 8 id. 194; Mickles v. Haskin, 11 Wend. 125; Shepard v. Rowe, 14 id. 260; Sullivan v. M'Kean, 1 N. Hamp. Rep. 371.

Whether the return of an officer that he attached the property in dispute, is conclusive evidence against him, in trespass, that he *took* it, so as render him liable therefor, and preclude him, as against the defendant in the writ, from proving the contrary, is highly questionable. This has been considered, in Massachusetts, and though the court admit the general rule forbidding an officer to falsify his own return, yet they say, that evidence to show the officer did not remove the property would not expressly contradict the return, and they incline strongly to the opinion that such evidence would be admissible. (Boynton v. Willard, 10 Pick. 166.) And where an attachment is returned at the request of the owner of the property, in order to give preference to a favored creditor, certainly in such a case the officer could not be charged as a trespasser; for *volenti non fit injuria*. So if an officer returns an attachment without removing the property, leaving it in the debtor's possession at his request; he may prove these facts, it seems, in an action by the defendant in the writ. In an action of assault and battery against an officer, the return of an arrest would not be conclusive against him, for the debtor might have submitted to it without any force, and the officer may show this in his defence. (Id. p. 169, 170, per Wilde, J., delivering the opinion of the court.)

In actions brought by and against officers, their returns are sometimes important evidence for them. Thus, in trover or trespass by a constable for goods levied on by him, his return is prima facie evidence of the levy. (Cornell v. Cook, 7 Cowen's Rep. 310, 313. Loftin v. Huggins, 2 Dev. Rep. 10. Staunton v. Hodges, 6 Verm. Rep. 64. Lowry v. Cady, 4 id. 504, 5. Earl v. Camp, 16 Wend. 562, 569.) Otherwise, however, in Massachusetts, as against another officer claiming in virtue of a previous levy. (Merrill v. Sawyer, 8 Pick. 397, stated ante, note 165, p. 155, 157.) But, in New-York, not only is such return admissible in favor of the officer to prove a levy, but he may use it to identify the property levied on. (*Semble*, Spoor v. Holland, 8 Wend. 445, 7.) And where the endorsement of levy on an execution was general, e. g., 16,000 brick, the court said the officer might have amended his endorsement so as to have identified the brick, and that he should have so done. (Id. 447.) But where the process returned is void, the return, it seems, would not be evidence that the officer had taken possession of the property levied on. (Earl v. Camp, 16 Wend. 562, 569, 570.)

In an action by the sheriff to recover the purchase money of land sold by him, his own return is *prima facie* evidence that the defendant was the purchaser. (*Hyskill v. Givin*, 7 Serg. & Rawle, 369.) The court liken it in principle to the case of a conviction by a justice, which is evidence in his own favor; the only difference, they say, is, that the conviction, where the justice has jurisdiction, is conclusive; but that is because it is a judicial determination of the fact; the act of the sheriff is only ministerial. (*Id.* See ante, note 165, p. 157.) The jury, in such cases, owing to the liability to mistake on the part of the sheriff, as to who was the bidder, might require but slight proof to counterbalance the return. (*Id.* p. 371.) See *Salmon v. Rance*, 3 Serg. & Rawle, 314, per Tilghman, C. J., as to the mode of proving to whom land was *struck off* by the sheriff. A private memorandum book of the sheriff is not evidence; but the proper evidence, it seems, would be the oath of some person present at the sale. (*Id.*) In Tennessee, in an action by the sheriff against the purchaser under an execution, to recover the purchase money, the return of the sheriff (he having paid the money to the plaintiff in the execution) is admissible in favor of the sheriff, but open to impeachment. (*Nichol v. Ridley*, 5 Yerg. 63.) To what extent the force of this evidence shall go, however, is not very clearly defined by the case. It seems to have been regarded like a memorandum of sale within the statute of frauds. (*Id.* p. 65.) So, it seems, a return is evidence for an officer in an action by him to recover his fees. (*Huger's adm'r v. Osborne*, 1 Bay's Rep. 318.)

In actions brought against officers, their returns, regular on their face, will generally be *prima facie* evidence for them. (*Stanton v. Hodges*, 6 Verm. Rep. 66. *Hathaway v. Goodrich*, 5 *id.* 65.) This is conceded in most of the above cases, where parties have been allowed to impeach such returns in actions against officers. In all actions brought expressly for a false return, the *onus* lies on the plaintiff. (*Davis v. Johnson*, 3 Muf. 81. And see the cases cited *supra*, pp. 1089, 1090.) So, in trespass or trover, as we have seen, by the defendant in an execution, the officer's return has been deemed to operate conclusively in his favor. (*Sias v. Badger*, 6 N. Hamp. Rep. 393.) And where a constable served a summons issued by a justice in the constable's own favor, and the constable proceeded, took judgment, and obtained execution, whereon the defendant was arrested; held, that the return of the constable upon the summons was conclusive in his favor, in an action of trespass and false imprisonment against him for the arrest under the execution. The party injured should have brought his action for a false return. (*Putnam v. Mann*, 3 Wend. 202.) But in an action on the case against an officer for neglecting to leave a copy of the writ upon which he had attached property together with the return, with the town clerk, until late in the afternoon of the second day after the levy, whereby other creditors gained priority; held, that the officer's return of his having levied and left a copy, which return was dated on the day of actual levy, was not conclusive in his favor that he had left a copy on the day of levy. (*Kittridge v. Bellows*, 4 N. Hamp. Rep. 424.) And in an action for an escape, the officer's return of rescue is not conclusive in his favor. (*Adey v. Bridges*, 2 Stark. Rep. 189.)

4. *As to purchasers.* Several cases have incidentally occurred *supra*, showing in some degree the light in which a purchaser under an execution stands with respect to the officer's return thereon. This doctrine is different, in different states; and it may not be impertinent to cite a few of the local cases more directly. In several of the

states, a purchaser's title to real property may be derived under a statute extent, or title of record, and then the general rule is, that every thing essential to the title must appear on record. (*United States v. Slade*, 2 Mason, 75, per Story, J.) The doings of the officer, &c. must in such cases be returned, and the return must show that all the statute requisites for transferring the property have been complied with. (*Metcalf v. Gillet*, 5 Conn. Rep. 400. *Pendleton v. Button*, 3 id. 406. *Ladd v. Blunt*, 4 Mass. Rep. 402. *Williams v. Amory*, 14 id. 28. *Eastman v. Curtis*, 4 Verm. Rep. 616. See *Jackson, ex dem. Kane, v. Sternbergh*, 1 John. Cas. 155.) No defects in the return can be supplied by parol. (See the cases *supra*; also *Wellington v. Gale*, 13 Mass. Rep. 433; *Williams v. Brackett*, 8 id. 240; *Davis v. Maynard*, 9 id. 242.) Nor can such return, if fair upon its face, be invalidated, explained or altered, as against the purchaser, by parol. (*Boody v. York*, 8 Greenl. 272. See *Pitts v. Clark*, 2 Root's Rep. 221; *Davis v. Maynard*, 9 Mass. Rep. 243; *Purinton v. Loring*, 7 id. 246.) The return, though not made until long after the return day, yet if made and filed before it is offered in evidence, is sufficient evidence, in these cases, of title. (*Prescott v. Pettee*, 3 Pick. 331. *Welsh v. Joy*, 13 id. 577. *Ingersoll v. Sawyer*, 2 Pick. 276, 279. *United States v. Slade*, 2 Mason, 71. *Emerson v. Towle*, 5 Greenl. 197.)

Whether a return is necessary to the purchaser in making title to an equity of redemption sold under execution in Massachusetts, *quere*. (See *Ingersoll v. Sawyer*, 2 Pick. Rep. 276, 279, 280; *Welsh v. Joy*, 13 id. 477.)

In New-York, the title of a purchaser of lands under a *fi. fa.* does not depend upon the return of the officer; he need show no return; nor will it affect him though the return made be incorrect, irregular or insufficient. It is enough for him that the officer had authority to sell, and did sell to him and executed a deed. (*Jackson, ex dem. Kane, v. Sternbergh*, 1 John. Cas. 153. See *Ingersoll v. Sawyer*, 2 Pick. Rep. 279, 280.) A purchaser may, however, use the return in the deraignment of title, and though it do not particularly describe the lands, they may be identified by parol evidence. (*Ten Eyck v. Walker*, 4 Wend. 462.)

A doctrine similar to that of New-York, has been held in the supreme court of the United States, on the question arising whether a sale of real property by the marshal after the return-day, would be valid as in favor of a purchaser. "The purchaser," says Johnson, J., delivering the opinion, "depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return." (*Wheaton v. Sexton*, 4 Wheat. Rep. 503, 506.) As to the sheriff's right of selling after the return-day in North Carolina, see *Barden v. McKinne*, 4 Hawks' Rep. 279.

In Tennessee also, the rule has been laid down that the purchaser's title cannot be made to depend upon the return. The court cite the above cases from Johnson and Wheaton, and expressly adopt the principles there laid down to their full extent. (*Mitchell v. Lipe*, 8 Yerg. 179.) In this case the sheriff's return was relied on as against the purchaser, to prove that the property was sold subject to a deed of trust, as stated therein; but held, that the return was no evidence of the existence of such deed. (*Id.* 183.) The return, however, may be used by the purchaser as a link in his chain of title. (*Nichol v. Ridley*, 5 Yerg. 65.) A statute of that state requires

that before sale, the property shall be advertised in a particular manner, or the sale be void; and held, that a want of compliance with the statutory requisite might be shown to defeat the title of the purchaser; and parol evidence was received for such purpose even in contradiction of the officer's return. (*Loyd v. Anglin*, 7 Yerg. 428. *Trott v. Gordon*, 1 id. 469. *Rogers v. Jennings*, 3 Id. 308. *Mitchell v. Lipe*, 8 id. 181.) See *Whitaker v. Sumner*, 7 Pick. 551.

So in Louisiana, a sale under an execution, without the officer having advertised according to law, is void, and this may be shown to defeat the title of a purchaser. (*Delogny v. Smith*, 3 Mill. Lou. Rep. 418, 421. See 4 Mart. Lou. Rep. 513. 11 id. 609, 711.)

As to the sufficiency and force of returns with respect to purchasers of real estate in Maryland, see *Fenwick v. Floyd*, 1 Harr. & Gill. 172, 174. *Clark v. Belmar*, 1 Gill. & John. 443. *Williamson v. Perkins*, 1 Harr. & John. 449. *Fitzhugh v. Hellen*, 8 id. 206. *Thomas v. Turvey*, 1 Harr. & Gill. 172.

"The better opinion seems to be, that a purchaser of personal property sold under execution, may prove the levy and sale to have been legal, and will then be permitted to retain the property, whether the officer's return be true or false, formal or informal." (*Whiting v. Bradley*, 2 N. Hamp. Rep. 82. See also *Barden v. M'Kinne*, 4 Hawks' Rep. 279. *Titcomb v. Union Marine Ins. Co.* 8 Mass. Rep. 335.) But see *Hammatt v. Wyman*, 9 Mass. Rep. 138. *Howe v. Starkweather*, 17 Mass. Rep. 243. *Kimball v. Lopez*, 7 Lou. Rep. (Curry,) 173, 175, 6.) A purchaser may use the return as evidence for him in showing his title. (See *Pigot v. Davis*, 3 Hawks' Rep. 25, to 28.)

The following miscellaneous cases may be looked into as showing in general what is to be intended with respect to returns; how they are to be construed; their sufficiency, effect, &c., as adjudged by several courts. 2 Whart. Rep. 211. 2 Dana, 93. Id. 227. Id. 459. Litt. Sel. Cas. 424. 2 Bail. 505. Id. 492. 9 Mass. Rep. 243. 8 id. 240. 7 id. 246. 14 id. 315. 1 Pick. 109, 112. 13 id. 305. 4 Verm. Rep. 616. Brayt. Rep. 29. 1 Alab. Rep. 274. 4 N. Hamp. Rep. 29. 2 id. 347. 3 id. 310. id. 307. 14 John. Rep. 481.

5. *As to Amendments.* The returns spoken of, supra, when defective and insufficient for the purposes of evidence, are sometimes amendable. The doctrine on this subject, however, rests so much upon local rules of practice and judicial discretion, and is moreover so often modified to meet the varying circumstances of particular cases, that to attempt anything like a complete view of it as held and applied by the different courts in this country, would be wandering into details at once both perplexing and profitless. We shall, therefore, notice a few of the leading authorities, and content ourselves with a general reference to some of the others.

Amendments are sometimes allowed to be made by the officer himself, without permission of the court. In Massachusetts, the rule has been laid down that an officer can amend his return, without special permission, at any time before it is actually deposited in the clerk's office; for until then, the return does not become matter of record, and is under his own control. (*Webb v. Joy*, 13 Pick. Rep. 477. See *Spoor v. Holland*, 8 Wend. 442, 447.) Purchasers may apply to the court to have a return amended. (See *Fowble v. Raybergh*, 4 Hamm. Rep. 45. *Clarke v. Belmar*, 1 Gill.

& John. 443, 4, et seq. See *Owen v. Simpson*, 3 Watts' Rep. 87.) And parties also. (See *Williams v. Rogers*, 5 John. Rep. 162.)

The court will allow an amendment sometimes on motion of the officer and for his benefit; but where a long time had elapsed, and the officer then asked leave to amend in respect to the omission of an essential fact, which might have rendered him liable in an action, the court held that the amendment could not be allowed; that it would be unsafe to expose officers to so much temptation, &c. (*Thatcher v. Miller*, 13 Mass. Rep. 270. 11 id. 413, S. C. See *Emerson v. Upton*, 9 Pick. 170. *Kittredge v. Bellows*, 4 N. Hamp. Rep. 431. *Means v. Osgood*, 7 Greenl. 146, 7.) But there is no fixed rule as to time; and an officer has been allowed to amend his return several years after its date. (*Rucker v. Harrison*, 6 Munf. 181. *Fowble v. Raybergh*, 4 Hamm. Rep. 45.) In Pennsylvania, a sheriff may be permitted to amend his return, made under a mistake of fact, if the application be made within a reasonable time; but after action brought against him for an escape, issue joined therein, and the cause brought to trial, it was held he could not thus be allowed to relieve himself from responsibility. (*Scott v. Seiler*, 5 Watts' Rep. 235.) Where a sheriff levied upon property of A. supposing it to belong to B. the defendant, and after sale, made his return, and brought the money into court; and A. sued him therefor and recovered; the sheriff, on his own motion, was allowed to amend his return so as to set forth that no property was to be found; and held, that he might have leave to withdraw the money in court. (*Smith v. Daniel*, 3 Murph. Rep. 128.) An amendment of a return has been allowed after the officer's death, on motion of his representatives. (*Fowble v. Raybergh*, 4 Hamm. Rep. 45.)

The return cannot be amended, even by order of the court, so as to affect the rights of persons not parties to the suit, acquired before amendment made. Accordingly, where an officer returned on a writ that he had attached land of the debtor on a certain day, before which day a mortgage made by the debtor had been put on record; and the officer subsequently by leave of the court, amended his return so as to date his levy on the attachment before the record of the mortgage; held, that the amendment could not prejudice the mortgagee's title. (*Emerson v. Upton*, 9 Pick. Rep. 167. *Freeman v. Paul*, 3 Greenl. Rep. 260. See also *Putnam v. Hall*, 3 Pick. 445. *Means v. Osgood*, 7 Greenl. 146.)

The following references to local authorities will further illustrate the above doctrine as to amendments. Massachusetts: 1 Mass. Rep. 233; id. 109, 112; 8 id. 240; 10 id. 251; 11 id. 481; 9 id. 217. Virginia: 6 Munf. 181. Ohio: 4 Hamm. 45. New-Hampshire: 2 N. Hamp. Rep. 83; 4 id. 431. Maine: 7 Greenl. 146; 3 id. 260; id. 29; 6 id. 162. Pennsylvania: 2 Whart. Rep. 211; 3 Watts' Rep. 87; 5 id. 235. Whart. Dig. 2d ed. p. 18, et seq. South Carolina: 2 Bail. 492. New-York: Grah. N. Y. Prac. 2d ed. 649, to 670; 5 John. Rep. 162; 8 Wend. 442, 447.

5. *As to the mode of proof.* We find but few cases relating directly to the mode of proving a return. In general, however, an execution and return, when filed, become part of the records of the court, and may be proved in the same manner as other records, by office copies, certified copies under seal, exemplifications, &c. (See *Pigot v. Davis*, 3 Hawks' Rep. 25. *Gardner v. Hosmer*, 6 Mass. Rep. 327. *Nichol v. Ridley*, 5 Yerg. 63, 65. *Beattie v. Robin*, 2 Verm. Rep. 181. *Stevens v. Adams*, Brayt.

Rep. 29. *Welsh v. Joy*, 13 Pick. 477, et seq. *Jackson, ex dem. Kane v. Sternberg*, 1 John. Cas. 153.)

In New-York, the return of a constable on a justice's execution, may be proved by a duly authenticated transcript from the docket of the justice. (See 2 R. S. 269, § 246.)

In New-Hampshire it is said, that the "regular course for a sheriff who has sold goods under an execution, is, to make a return of his doings to the court from which the execution issued. But it is not uncommon with officers, in particular if the execution is not satisfied in full, to deliver the execution and return to the creditor or his attorney. If any suit is brought for taking the goods, the execution is sent to the clerk, and copies of the execution and return are procured, and these are the proper evidence of what was done by the officer." (*Sias v. Badger*, 6 N. Hamp. Rep. 394, 5.)

And where the officer was sued in trover for taking goods under an execution, which, together with the returns thereon, were traced to the hands of the agent of the defendant in execution, (the now plaintiff,) and it appeared that due notice had been given to produce them; held, that the officer might give parol evidence of the returns, &c. (*Sias v. Badger*, supra.) "It is but just under the circumstances," say the court, "to permit such secondary proof of the regularity of his (the officer's) proceedings as he may be able to make, and did the circumstances require it, the court would not hesitate to presume the proceedings to have been regular until the plaintiff should show the contrary." (*Id.*)

NOTE 742—p. 392.

An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute, 4 Ed. 1, will be presumed to have been taken under a competent authority, though the commission cannot be found. (*Rowe v. Brenton*, 8 Barn. & Cress. 765. 3 Mann. & Ryl. 164, S. C.) So, an old inquisition, *post mortem*, may be read in evidence, without producing the commission upon which it issued; but it is necessary to prove that such a commission did actually issue, which may be done *viva voce*. (*Anderton v. Magawlez*, (in error) 3 Bro. P. C. 588.)

NOTE 743—p. 392.

A copy of a copy of the decree is not admissible. (*Whitacre v. M'Ilhaney*, 4 Munf. Rep. 310. See ante, note 720, p. 1065, 6, and cases there cited.)

NOTE 744—p. 392.

Otherwise, however, it seems, where the decree purports to recite merely the *substance* of the bill and answer. (*Gresley's Eq. Ev.* 109, 110, and note (h).)

A decretal order, reciting the substance of a former decree, will not prove the latter. (*Wilson v. Conine*, 2 John. Rep. 280. *Winans v. Dunham*, 5 Wend. 47, 48.)

NOTE 745—p. 393.

The learned author of Gresley's equity evidence says, "It is not easy to see the ground of this, for the objection (that the bill and answer should be produced) applies to an exemplification just the same as to an examined copy, and their not being records does not appear a sufficient reason for a distinction; but it seems to have been held for law in a case in the exchequer, Sergeant Maynard boldly assuring the court that nothing was more common." (Gresley's Eq. Ev. 110.) The exchequer case referred to, is *Trotter v. Blake*, 12 Mod. 231.

To shew a matter *res judicata* in the court of chancery, an exemplification of the bill, answer and decree, is sufficient evidence in a court of law, without shewing an actual enrolment of the decree. (*Winans v. Dunham*, 5 Wend. Rep. 47. *Bates v. Delavan*, 5 Paige, 299, 303, 4.) See also ante, note 639, p. 923. ●

NOTE 746—p. 393.

Blower v. Hollis, 1 Crim. & M. 393. 3 Tyr. 351, S. C. *Gresley's Eq. Ev.* 108 to 110. *Rosc. Cr. Ev.* 157, 8.

NOTE 747—p. 393.

In *Gardere v. The Columbia Ins. Co.* (7 Johns. Rep. 514,) in an action on a policy of insurance, the plaintiff for the purpose of proving the fact that certain sugar insured had been condemned by the vice-admiralty court at Antigua, produced a copy of the decree duly authenticated. It was contended that all the proceedings previous to the decree ought to be shown; but the court held otherwise, saying, that if there was a doubt as to the sentence, by omissions or ambiguity appearing on the face of the record, it might be proper to require such proof. This could not exist here. The decree read in evidence explicitly states the fact material to be proved by the plaintiff. (Id. 519.) See also *Marshall v. The Union In. Co.* 2 Wash. C. C. Rep. 452. *Hourquebie v. Girard*, id. 213. The above cases show that the question, as to what portion of the proceedings should be produced, will depend materially upon the particular facts sought to be proved. On this subject, see ante, note 713, p. 1059.

As to the necessity of proving the proceedings in admiralty, anterior to the sentence of condemnation, where title is sought to be established under the latter, see *La Nereyda*, 8 Wheat. 108, 168, 9 per Story, J.

NOTE 748—p. 393.

See *Gresley's Eq. Ev.* 108, 9, 110.

NOTE 749—p. 393.

See ante, note 647, p. 929. *Gresley's Eq. Ev.* 108, 9.

NOTE 750—p. 393.

Where it may be used as such, and under what limitations, see ante, notes 642, 3, 4, 5, 6, 7, 8, p. 926, et seq.

In New-York, a defendant's answer to a bill of discovery charging him with having given a judgment to defraud his creditors, &c. or with being a party to a conveyance or assignment of any estate in lands, goods, &c. made with intent to defraud purchasers, creditors, &c. or charging any fraud affecting the right or property of others, shall not be read against him on an indictment for such fraud. (2 R. S. (new ed.) 103, §§ 44, 45, 46, 47.)

NOTE 751—p. 394.

The case of *Hennell v. Lyon*, cited in the text, has been regarded as going to the extreme of the principle upon which it is founded, and as being of questionable authority. (Per Garrow, B., and Hullock, B., in *Rees v. Bowen*, 1 M'Clell. & Younge, 391, 2.) See, however, *Studdy v. Sanders*, 2 Dowl. & Ryl. 349.

But there is a distinction between an answer of a party and his *affidavit* made in the chancery suit, and found on file. An examined copy of the latter will not be received, without stricter proof of identity than would be required in the case of an answer. (*Rees v. Bowen*, supra, p. 383, 391, 2.) *Semble*, that if the affidavit appeared to have been used by the party in chancery, it might be admitted. (*Rees v. Bowen*, supra. See *Highfield v. Peake*, 1 Mood. & Malk. 109, et seq.; *Rex v. James*, 1 Show. Rep. 397.)

In *Studdy v. Sanders*, (2 Dowl. & Ryl. 347,) an *office copy* of an answer in chancery was held admissible in the K. B. to prove a partnership between the defendants; and the clerk of the defendants' solicitor was deemed a proper witness to identify the defendants as parties to both suits, though he knew nothing except from his intercourse with them in a professional way in conducting the suit in chancery. *Quere*, whether it should not have been an *examined*, instead of an *office copy*, as the suits were in different courts. See ante, note 724, p. 1068.

NOTE 752—p. 394.

See *Jervis v. White*, 8 Ves. jun. 312, 313; *Roscoe's Cr. Ev.* 157; *Thompson v. Crosthwaite*, 2 Young & Jer. 512.

See *Gresley's Eq. Ev.* 185, n. (s), and post, note 756, as to proving depositions, &c. in these and the like cases.

NOTE 753—p. 395.

See ante, notes 658, 9, 660, and the cases there cited, on the subject of depositions with respect to the parties.

NOTE 754—p. 395.

It was not the practice in England to enroll the pleadings until 1636; they were left loose in the office and liable to be lost. (Gresley's Eq. Ev. 185.)

NOTE 755—p. 395.

See ante, note 658, p. 934, note 675, p. 940, for several cases where depositions, &c. have been used to contradict a witness. Also *Highfield v. Peake*, 1 Mood. & Malk. 109, 110, 111.

NOTE 756—p. 395.

See *Gresley's Eq. Ev.* 111; *Rosc. Cr. Ev.* 158; *Stoddart's lessee v. Manning*, 2 Harr. & Gill, 147.

Answers to old interrogatories (exhibited, 1 Eliz.) have been read upon proof that the interrogatories were searched for and not found. (*Rowe v. Brenton*, 8 Barnw. & Cress. 765. S. C., 3 Mann. & Ryl. 164.)

As to depositions taken under several statutes in the United States, see ante, note 42, p. 32, et seq.; also ante, note 664, p. 936, and the cases there cited. See likewise 4 Wash. C. C. Rep. 715, 14 Pick. 313, 5 Greenl. 9, for additional local cases; and further see 3 Barbour's Eq. Dig. p. 396, et seq.

When depositions are used as the foundation of an indictment for perjury, the authority under which they were taken must be proved with more strictness, perhaps, than in other cases. If the oath was administered under a special authority or commission directed to a particular person for that purpose, the commission, shown in some form, is indispensable. (See *Roscoe's Cr. Ev.* 672, 3. See, further, *Punshon's case*, 3 Camp. Rep. 96; *The Kiug v. Dudman*, 4 Barn. & Cress. 850; *Rex v. Hanks*, 3 Carr. & Payne, 419.) Otherwise it will not appear but that the oath was extrajudicial. (See the authorities, supra; also *Anonymous*, 3 Mod. 116; but see *Rex v. James*, 1 Show. 397.)

There are certain officers, however, who have a general authority to administer oaths. And in that case, the commission under which they acted need not be produced in order to fix the character of the oath. (*Roscoe's Cr. Ev.* 672, 3.) It will be sufficient to prove the officer such by acts and reputation. (Id. p. 7, 41, 673. See also ante, note 475, p. 627; notes 426, 7, p. 554, 5; and note 694, p. 1005, 4, and the cases cited; also *Dunlap v. Waldo*, 6 N. Hamp. Rep. 452.)

In New-Hampshire, on an indictment for perjury committed in a complaint for sureties of the peace, the original complaint in writing with the certificate of the magistrate before whom the complaint was taken were produced; the magistrate testified that the prisoner swore to the complaint before him on the day specified in the certificate; and this was held sufficient evidence of the oath, and of the identity of the party, without producing the justice's docket. Held, also, that the fact of the magistrate's being

such, might be proved by himself, and that even his having acted in that character was *prima facie* sufficient. (*State v. Hascall*, 6 N. Hamp. Rep. 352.)

The prisoner must be identified as the person taking the oath. (See *id.* ; also *Rosc. Cr. Ev.* 675, 6.) And it has been held that where the oath was administered under a special commission, the certificate of the commissioners in their return was not sufficient to identify him ; but that they should attend in person, or their clerk should attend for that purpose. (*Anonymous*, 3 Mod. Rep. 116. *Gresley's Eq. Ev.* 185, n. (s).) Note: the deposition in this case was not signed by the prisoner. Where it is so signed, doubtless proof of his hand writing would identify him, as in the case of an answer. (See *ante*, p. 394 of the text.) But still, the return of the commissioners would seem not to be sufficient to prove the oath taken ; otherwise, as to the return of a master, for he acts under oath and his return shall be presumed correct. (*Anonymous*, 3 Mod. 116, 117.)

In *Rex v. James*, (1 Show. 397,) perjury was assigned upon an affidavit in the common pleas made before a commissioner, a copy of which only was produced ; and the court held, that the affidavit having been used by the accused upon a motion in the common pleas, that was enough to identify him ; but that " a copy of an affidavit only, produced against a man, without proof that he made it, used it, or was concerned in the cause, would be insufficient." See *ante*, note 751, p. 1099.

When it becomes necessary to prove the official character of a person before whom depositions were taken in a foreign country, the certificate of an American consul residing in such country will not suffice. (*Stein v. Stein's curator*, 9 Lou. Rep. (Curry,) 377.) See *ante*, note 701, p. 1044, and the cases there cited.

In New-Hampshire, the certificate of a county clerk in New-York, under the seal of the county, has been held competent evidence to prove that a person who had acted as a justice of the peace in the taking of depositions in the latter state, to be used in the former, was in fact such. And the same thing might have been shown by the ordinary mode of proving official character, agreeably to the rule *ante*, note 475, p. 627. (*Dunlap v. Waldo*, 6 N. Hamp. Rep. 452.)

NOTE 757—p. 396.

See *ante*, note 654, p. 933. See also *ante*, note 656, p. 934.

As to the necessity of showing a case of disability in the witness to attend, in order to introduce his deposition taken under certain laws for securing oral testimony, see *ante*, note 655, p. 933 ; note 664, p. 936 ; note 667, p. 938. In New-York, where the deposition was taken *de bene esse*, (see *ante*, note 42, p. 33,) the witness being a woman in an advanced state of pregnancy, rendering it unsafe for her to attend the trial, this was held a case of sickness sufficient within 2 R. S. 399, § 39, to lay a foundation for reading her deposition. (*Clark v. Dibble*, 16 Wend. 601.)

NOTE 758—p. 396.

For a condensed view of the practice in respect to directing issues to be tried at law, as established in England, see *Gresley's Eq. Ev.* 401, et seq. The court of chancery,

in such cases, will often by its order suspend certain rules of evidence. (*Id.* 403.) The order frequently contains a direction "that the parties be at liberty to read the depositions taken in the cause of such witnesses, as upon the trial, shall be proved to be dead or unable to attend to be examined." (*Id.* See *Seton on Decrees*, §46.) This obviates the necessity of producing or proving the bill, answer, and other preliminary proceedings. (*Gresley's Eq. Ev.* 404.) See ante, note 656, p. 934.

NOTE 759—p. 396.

Highfield v. Peake, 1 Mood. & Malk. 109, 110, 111. *Littledale, J.*, in this case, seemed to think, that as the trial was of an issue out of chancery, it might be considered as a proceeding in that court, and therefore that an office copy of a witness's deposition in chancery might be read to impeach him. But see *Burnand v. Nerot*, 1 Carr. & Payne. 578, stated ante, note 724, p. 1063. The deposition, however, besides being an office copy, was also shown to be an examined copy, and therefore clearly admissible. As to office copies, see the note above referred to; also *Studdy v. Sanders*, 2 Dowl. & Ry. 347, stated ante, note 751, p. 1099.

The court of chancery goes further than other courts, and receives office copies though the cause be not the same. (*Gresley's Eq. Ev.* 102. See *Black v. Braybrook*, 2 Stark. Rep. 13, 14, per *Holroyd, J.*)

NOTE 760—p. 396.

While speaking of former judgments as evidence, and particularly with regard to their effect, ante, note 692, p. 946, et seq., we observed, that there was no difference in this respect whether the judgment was rendered by a court of general or inferior jurisdiction. In further confirmation of the doctrine there stated and illustrated, see the remark of *Cowen, J.*, delivering the opinion of the court in *Wilder v. Case*, 16 Wend. Rep. 583, 585, 6, in reference to a justice's judgment in New-York.

In respect to the character of the former judgment or proceeding which shall operate as a bar, we saw ante, note 692, p. 951, 2, also ante, note 589, p. 836, the effect of a *discontinuance* or *withdrawal*. An additional illustration connected with that subject, is *Rose v. The Turnpike Company*, (3 Watt's Rep. 46.) There, the turnpike company sued before a justice, in Pennsylvania, and judgment passed against them on the merits; whereupon they appealed to the common pleas and then discontinued their suit. Held, that by the discontinuance the judgment before the justice became absolute, and was a bar to any other action for the same cause.

We saw too, ante, note 588, p. 835, that a former suit which went off on the ground that it was prematurely brought, as that the debt was not yet due, or some preliminary to the right of action had not yet been observed, was no bar. See also ante, note 692, p. 952, 3. In Pennsylvania, where a corporation sued a defendant for the amount of his stock called for up to the time of suit brought, and the justice rendered judgment against the plaintiff on the ground that "it did not appear that a call had been made;" held, that the judgment was a bar to a new suit for the same stock. (*Rose*

v. The Turnpike Company, 3 Watts' Rep. 46.) The case was decided, it seems, on the principle that the demand was actually due when the first suit was brought, a call having been in fact made before that time, though the plaintiff neglected to prove it before the justice, and suffered judgment to pass against him without discontinuing or withdrawing his suit. Under such circumstances, the second suit was clearly barred. (See ante, note 592, p. 842.)

The effect of litigating a matter by way of defence or set off, was shown ante, note 692, p. 960, 1, 2, 3. A recent case in the supreme court of New-York, furnishes a valuable illustration under this head. It was this: C. and two others sued in a justice's court, for a breach of a special contract, whereby C. and his associates agreed to clear land for the defendant, who on his part agreed, among other things, to allow the plaintiffs to raise a crop of wheat on the premises. The plaintiffs averred that they were prevented from putting in the crop, and that the defendant broke the agreement in other particulars. The defence relied on was a former suit; and on the trial, after the plaintiffs had made out a prima facie right of recovery, the defendant proved that he had before sued these same plaintiffs in a justice's court for not clearing the land; that on the trial of such former suit, the now plaintiffs offered to prove, by way of *set-off*, the damage sustained by them in not being permitted to sow the wheat; which evidence being objected to, the justice ruled it inadmissible by way of *set-off*, but decided that it might be given by way of *defence* to the action. Testimony was accordingly introduced and submitted to the jury, who gave a verdict for the now defendant of \$15, upon which judgment was rendered. Under these circumstances, the supreme court held the former suit a bar, notwithstanding that the demand sued for was inadmissible in the former suit. For, "it is well settled that where a matter is improper by way of defence in a justice's court, (for example, by way of *set-off*), if a party will introduce it, and he goes into the investigation with a view to make it available, and it passes, and is submitted to the justice or a jury, it cannot be heard again." (Wilder v. Case, 16 Wend. Rep. 583, 4, 5.) To this general position, Cowen, J., who delivered the opinion, cites M'Lean v. Hugarin, 13 Johns. Rep. 184, Skelting v. Whitney, 3 Wend. 154, 157 and the cases cited at the latter page, also, Curtis v. Groat, 6 Johns. Rep. 168. He admits that if the demand had been rejected in the former suit on the objection being raised, it would not have been barred; and he refers to Phinney v. Earl, 9 Johns. Rep. 352, as sustaining that doctrine. See also S. C. and S. P., ante, note 692, p. 963, 965. But having been litigated, it was barred, whether allowed or disallowed, either in whole or in part. The opinion of Savage, C. J., in M'Guinty v. Herrick, 5 Wend. 245, is adverted to by him as seemingly maintaining a contrary doctrine, but no authorities; he says, were referred to by the C. J. there, and the point was not involved in the case. The only way in which the demand could have been saved from being barred by the former suit was, by the now plaintiff's stopping short there, the moment the qualified admission of it was announced by the justice. (Wilder v. Case, supra.)

That a former judgment is not evidence of facts merely to be inferred from it, and which are not directly covered by and necessary to uphold it, has been noticed in several instances. (See ante, note 587, p. 826; also note 692, p. 955.) This doctrine will be found very ably maintained and illustrated in a recent case in North Carolina. The action was trespass quare clausum fregit, by B. against H.; the latter re

lied on a former suit for trespass upon the same land, brought against B. by A. (under whose authority H. entered the premises,) as evidence of title in A. In the former suit it appeared that B. had pleaded not guilty, a licence, the statute of limitations, and an accord and satisfaction; and A. recovered damages for the trespass there complained of. The circuit court held, that the judgment was conclusive evidence of title in A., but the supreme court, on appeal, reversed the judgment, and held, that so far from being conclusive, the record of the former suit was not even *prima facie* evidence of A.'s title. (*Bennett v. Holmes*, 1 Dev. & Batt. Rep. 486. See *Richmond v. Hayes*, 2 Penning. Rep. 492.) "A judgment," says Gaston, J., delivering the opinion in *Bennett v. Holmes*, *supra*, "is conclusive as to what it directly decides; as the judgment is the fruit of the action, it must follow the nature of the right claimed, and the injury complained of." He then proceeds to show that in trespass, damages for an injury to the possession are the only thing demanded in the declaration; that the judgment concludes nothing upon the ulterior right of possession, much less of property in the land, unless a question of that kind be raised by plea and traverse thereon. For this, he quotes from the opinion of Lord Ellenborough in *Outram v. Morewood*, (3 East, 357,) and then proceeds: "In the record offered and received, there is no plea of *liberum tenementum*, or any allegation pleaded on either side, averring title in or to the premises, and therefore, the record was not evidence of any adjudication as to title." (*Id.* 487, 8.) See *ante*, p. 335 of the text.

NOTE 761—p. 396.

Although the distinction between proceedings of inferior courts and those of general jurisdiction is ordinarily useless, so far as the mere *effect* of them is concerned, yet an accurate observance of this dividing line becomes of the utmost consequence when we come to consider the *mode of proof*. For not only is the memorial of their proceedings differently kept generally, but different presumptions are indulged with regard to jurisdiction in the two cases, which renders the proof of judicial proceedings of inferior courts more difficult than those of the opposite character.

For instance, in regard to courts of general authority, jurisdiction will be presumed, until the contrary appear. But as to inferior courts, those who claim any benefit under their proceedings, are usually bound to show jurisdiction affirmatively. This doctrine will be found illustrated by several cases *ante*, note 694, p. 1013, et seq. See also the dissenting opinion of Bronson, J., in *Hoose v. Sherrill*, 16 Wend. 33, 36. *Commonwealth v. The Cheltenham and Willow Grove Turnpike Co.* 2 Binn. Rep. 257. *M'Clung v. Ross*, 5 Wheat. 116. *Francis v. Washburn*, 5 Hayw. Rep. 294. *Lipe v. Mitchell's lessee*, 2 Yerg. 400.

Jurisdictional facts may be proved, as we have seen, by recitals; (see *ante*, note 694, p. 1013, 1014, et seq;) or in the ordinary mode of establishing other parts of the proceedings.

As to the presumption which prevails after jurisdiction has been shown, see *ante*, note 694, p. 1014, and the cases there cited.

While speaking to the point of jurisdiction, and particularly with respect to jurisdiction as depending upon the time and place of doing the act, or holding the court, *ante*,

note 694, p. 1008, we noticed some cases going to show the consequence of a court's acting at a time when its authority in respect to the particular subject matter had ceased, or was suspended. And we there saw that where a court has its stated terms, and is open only at fixed periods appointed by law, if it send out a process in vacation which legally could only issue during term, such process is void. *Taylor v. Moffatt*, (2 Blackf. 305,) was cited for this position; and the difference between a court of chancery which is *always open*, and courts otherwise constituted, was there adverted to. In connection with this doctrine, the case of *Griswold v. Sedgwick*, (6 Cowen's Rep. 456,) ought to have been noticed. There it was held, that process, in the nature of an attachment for a contempt in not obeying an order, issued out of the equity side of the U. S. circuit court, and reciting the order as having been made on a day not necessarily *out of term*, was not absolutely void; but that the continuance of the term to that day would be presumed, unless the contrary were made to appear; the commencement and not the *duration* of the term being fixed by law. The process was tested on the 2d of February, and the order (for disobeying which it issued,) was recited in it as having been made on the 24th of February; it clearly appearing, however, from other parts of the process, that it had not issued until after the order and the defendant's contempt thereof, the court held that, so far as the above defects were concerned, the process was a good protection for acts done under it.

NOTE 762—p. 396.

In an action for a malicious arrest, on process out of the sheriff's court in London, it was held, that in order to prove the averment that the former suit was wholly ended &c., it was sufficient to show an entry in the minute book of "withdrawn," by the plaintiff's order, opposite to the entry of the plaint, and to prove that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff. (*Arundel v. White*, 14 East, 216.)

On an indictment against an innholder, the minutes of the court of sessions, in which, under the head of "Licences, September term, 1823," was entered merely the name of the defendant and the names of his sureties in the recognizance required by law, are admissible to prove the fact of a licence granted him to keep an inn, it being proved by the clerk who kept the minutes, that no extended record of the granting of such licences was kept by the court. (*Commonwealth v. Bolkom*, 3 Pick. Rep. 231.)

The minute-book of the consistorial court in England, is sufficient evidence of a decree for alimony pronounced in that court, without such decree being drawn up in form. (*Houlston v. Smyth*, 2 Car. & Payne, 21.)

NOTE 763—p. 396.

It is proper to observe that, as a general rule, the entries of a court in order to be capable of being used as evidence, must be *official*; i. e., such as it is authorized to make by law. The entry of a matter of fact, opinion or judgment, beyond their authority, is null and void. (See *Wolf v. Washburne*, 5 Cowen's Rep. 261, 265, 6.) This

was held, in Massachusetts, of an entry by the general sessions that a pauper was warned to depart out of a town; for, the court had only a statute authority to record the names of the persons warned, with the time of their abode in the town, and when the warning was given; all which are to be returned to them. They are not authorized to enter the proceedings, as, that the person was in fact warned. This therefore must be otherwise proved. (*Sutton v. Uxbridge*, 2 Pick. 436.)

We saw ante, note 694, p. 1012, several cases favoring the notion that every proceeding of a judicial character must be in writing. It is important to see how far this rule shall prevent the parties to the judgment of an inferior court from availing themselves of it, when, through the negligence of the court or magistrate, such judgment, though actually rendered, has not been reduced to writing, nor any memorandum made of it. This may probably, in most cases, be determined by reference to the statute or other regulation under which the proceeding was had; for if a writing is thereby made the exclusive evidence of the fact of the judgment having been rendered; in other words, if the court is so constituted as not to be able to signify its final decision except through some written memorandum, then doubtless it must be shown that a writing has, at least, once existed. Such seems to have been the view taken in respect to a justice's judgment in *Jones v. Walker*, cited in the note and at the page above referred to, from 5 Yerg. Rep. 431.

In *Meeker v. Van Rensselaer*, 15 Wend. 397, the point presented was, whether parol evidence had been properly received at the circuit, of the order of a board of health to abate a nuisance. No proof was given going to show that the board had not reduced their proceedings to writing; and *Savage, C. J.*, who delivered the opinion, appears to have treated the question as one resting for its solution upon the ordinary principles in respect to secondary evidence. He speaks of the board of health as a public body whose acts "should be proved by the highest and best evidence which the nature of the case admits of." (*Id.* p. 399.) He does indeed say, "that every proceeding of a judicial character must be in writing;" but he adds, "It is not to be presumed that minutes of their proceedings are not kept by such a body, and that determinations which seriously affect the property of individuals, were not reduced to writing, but rest in parol." (*Id.*) If that presumption had been rebutted, we are perhaps not warranted in regarding the case as in any measure settling, that the fact of an order having been actually made, could not be proved at all.

In the same note above referred to, in addition to the foregoing cases, we adverted to one or two others, going certainly very much to qualify if they do not absolutely deny the proposition that a mere parol judgment or decision cannot be proved. See *Felter v. Mulliner*, there cited from 2 John. Rep. 181; also *Young v. Overacker*, *id.* 191; *Hess v. Beekman*, 11 *id.* 457, 8.

This subject has been considered in the king's bench in England. There a defendant being sued in trespass, justified by plea under the judgment, &c. of a court baron; to which the plaintiff replied that there was not any memorandum of the judgment remaining in the court baron; and thereupon the defendant demurred, and had judgment. (*Dyson v. Wood*, 3 Barn. & Cress. 449.) *Abbott, C. J.*, was willing to concede, that giving the largest construction to the replication, it imported that no memorandum existed or was ever made; and if so, the steward might be guilty of a misdemeanor for his neglect; but such neglect, he says, ought not to deprive a party of his

judgment. "For the question, whether such judgment was given for him in such a court, is a matter of fact; the entry would merely give him a facility of proof which he would not otherwise have." Bayley, J., thought the replication bad in substance, because it did not appear that there was any distinct obligation in the officer of the court to take a written memorandum of all the proceedings there; "and even if that did appear, he said, 'the only effect would be, that if the officer neglected his duty he might be punished on that account.'" He denies, however, that the suitor could be thus deprived of the benefit of his judgment. Holroyd, J., stood more upon the particular form of the replication, which did not deny that a memorandum had been made. Littledale, J., dissented, considering the replication good upon general demurrer, though he conceded it would be bad on special demurrer. He regarded the replication as substantially denying that any judgment had ever existed.

NOTE 764—p. 396.

The mode of proving the proceedings, generally, of inferior courts, is usually provided for by the statutes upon which they depend for their authority. At all events, whether provided for or not by express legislation, it is very evident on looking into the reported cases, that the doctrine on this subject, as held by the various states of the union, is so far local in its character as to render it unsafe for us to attempt any thing like a detailed statement of it. We shall therefore only give a view of the New-York cases, and refer the student in a general way to some others.

The great body of the decisions in New-York, which relate to the text, have been made in reference to the proceedings of justices of the peace. The mode of proving these, as to civil cases, is in a great measure settled by statute. By the revised statutes every justice of the peace is required to keep a book, in which he shall enter the following particulars: 1. The titles of all causes commenced before him: 2. The time when the first process was issued against the defendant, and the particular process issued: 3. The time when the parties appeared before him, either without process or upon the return of process: 4. When the pleadings are made orally, a concise statement of the declaration of the plaintiff, the plea of the defendant, the further pleadings of the parties, if any, and the issue joined: 5. Every adjournment, stating on whose motion, and to what time and place: 6. The issuing of a venire, stating at whose request, and the time and place of its return: 7. The time when a trial was had, the names of the jurors returned summoned who did not appear, and the fines imposed on them, if any: 8. The names of the jurors who appeared and of the jurors who were sworn; the names of the witnesses sworn at the request of either party, stating at whose request; the objections, if any, made to the competency of a witness, and the decision thereon: 9. The verdict of the jury, and when received: 10. The judgment rendered by the justice, and the time of rendering the same: 11. The time of issuing execution, and the name of the officer to whom delivered; and if issued upon the application of any party, before the time when the same should regularly issue, such fact shall be noted, and the nature of the proof given: 12. The return of every execution, and when made; and every renewal of an execution made by him, with the date of such renewal: 13. The fact of his having given a transcript of the judgment, to be

filed in the clerk's office, and the time when the same was given: 14. The fact of a *certiorari* having been brought on any judgment rendered by him, and the time of the service of the same: 15. The fact of an appeal having been made from any judgment rendered by him, and the time when made. (2 R. S. 268, 9, § 243.) These entries are to be made under the title of each cause to which they relate; and the justice may enter, also, any other proceedings had before him in the cause which he shall think it useful to enter. (Id. 269, § 244.) The above provisions are directory, and intended to carry into effect the subsequent ones hereafter noticed. (3 Revisor's Rep. ch. 2, part 3, p. 79, note to § 242.)

Several provisions then follow as to the mode of proof under various circumstances. Thus, 1. *Where the proceedings of a justice are sought to be proved before himself.* Whenever it shall become necessary in an action before a justice of the peace to give evidence of a judgment or other proceeding had before him, the *docket* of such judgment or other proceeding, or a *transcript* thereof certified by him, shall be good evidence thereof, before such justice. (2 R. S. 269, § 245.) Under this section, the docket, to be admissible even as to the judgment, need not always contain an actual entry of it. That was held in the following case: Two suits were commenced by the same plaintiff, against the same defendant, and before the same justice, for parts of what was regarded as an indivisible demand. Both were tried on the same day; but after one was disposed of and judgment rendered for the plaintiff, the other coming on, the defendant availed himself of the first trial and judgment in bar; and though, at the time of the second trial, the justice had as yet made no entry of the first judgment in his docket, nevertheless it was deemed by the supreme court properly proved; for, say they, "he (the justice) had just pronounced judgment himself, and had it in contemplation of law before him on his docket." (Colvin v. Corwin, 15 Wend. 557.)

2. *Where the proceedings before a justice are sought to be proved elsewhere than before him.* A transcript from the docket of any justice of the peace of any judgment had before him; of the proceedings in the cause previous to such judgment; of the execution issued thereon, if any; and of the return to such execution, if any; when subscribed by such justice, and verified in the manner prescribed in the next succeeding section, shall be evidence to prove the facts stated in such transcript. (2 R. S. 269, § 246.) To entitle such transcript to be read in evidence, except before the same justice, there shall be attached thereto, or endorsed thereon, a certificate of the clerk of the county in which the justice resides, under the seal of the court of common pleas of such county, specifying that the person subscribing such transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county. (Id. p. 270, § 247.)

This transcript, authenticated as provided by § 247, is evidence in all courts. (Brotherton v. Wright, 15 Wend. Rep. 239.) It is evidence for the justice as well as others. (Maynard v. Thompson, 8 Wend. 393, 4, 5.) But where it is sought to be used for the purpose of proving a judgment, it must contain enough of the previous proceedings to show that the justice had jurisdiction. (Benn v. Borst, 5 Wend. 292.) It is good evidence, though made out by the justice after the expiration of his office; and this, even when offered as evidence for the justice himself. (Maynard v. Thompson, *supra*.) But it seems from the section as to the mode of authenticating the transcript, particu-

larly that part of it which requires the clerk to certify that the person subscribing the transcript was a justice, &c. at the *date of the judgment*, that it cannot be made evidence if given out before judgment. (See *Townsend v. Chase*, 1 Cowen's Rep. 115, 116.) The certificate of the clerk who is to authenticate the transcript within, § 247, must be that of the clerk of the county where the justice resided when he rendered the judgment. (*Maynard v. Thompson*, *supra*.)

As to the matters which may be proved by the transcript, they may, in some measure, be determined by the above sections directing what shall be entered in the docket, and what the transcript may contain. (See *supra*, § 243, 4, and 246.) The judgment may be proved by it, as well as such *proceedings in the cause previous thereto* as the justice is required specifically to enter; so also the execution and the return thereon. (See *supra*, pl. 2, § 246.) But the justice may also enter in his docket, besides the matters enumerated, "any other proceedings had before him in the cause which he shall think it useful to enter;" (see 2 R. S. 269, § 244, *supra*;) and how far this is to operate in giving him a discretionary authority in creating this species of evidence for himself or others, remains to be seen. This question was somewhat mooted under the act of 1824, where a certificate of a justice was sought to be made evidence of what transpired on the trial, in no way connected with the official doings of the justice himself; viz. whether the defendants claimed, on the trial, to have certain rent allowed them by the jury. Woodworth, J., delivering the opinion of the court, inclined to think the fact could not be proved in this way; that the certificate in this respect was extra-judicial. "It is not," said he, "the statement of a proceeding, or the evidence; but rather that the defendants urged by way of argument, that the rent should be allowed. The certificate of a justice must contain the process, pleading, evidence, verdict and judgment. Beyond these he is not called on to certify. If he goes further, his statements conclude no one." (*Wolf v. Washburne*, 6 Cowen's Rep. 261, 265, 6.) The above remarks of the learned judge, as to what the certificate *must* contain, we apprehend will not be found altogether correct, even with respect to a certificate under the statute then existing; and there are still stronger reasons against applying them, without large qualifications, to the transcript contemplated by the revised statutes. It is to be remembered too, that the question, as to how much of the justice's proceedings should be set forth in the certificate, was not presented; so far therefore as that point is concerned, the above quoted observations can be regarded as mere *obiter dicta*. The case, seems, however, to be a pretty direct authority for saying (if authority were wanting) that an unofficial entry of the justice shall not be made evidence in this mode; and perhaps, also, it is fairly inferrible from it that the docket, or a transcript, cannot be used to prove any thing beyond such facts as the justice is *called on* to enter. (See *Sutton v. Uxbridge*, 2 Pick. 436, stated *ante*, note 763, p. 1105, 6.)

The transcripts above spoken of, are not to be confounded with those given out by justices to be filed in the clerk's office, in order to create a lien upon real property pursuant to 2 R. S. 247, § 128. The latter differ from the former in several very essential particulars. For instance, the latter, after being filed in with the county clerk, becomes a judgment of record in the court of common pleas, for all the purposes of proceeding against real estate; (*Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Jones*, 9 Cowen's Rep. 192; *Arnold v. Gorr*, 1 Rawle, 223;) and may be proved by an exemplification, or as other

records of the common pleas are proved. (*Tuttle v. Jackson*, 6 Wend. 213, 221, 2, 3. S. C., 9 Cowen's Rep. 233, 238.) It need not be authenticated by the oath of the justice, nor by proof of his official character; (*Jackson v. Jones*, 9 Cowen's Rep. 182; *Tuttle v. Jackson*, 6 Wend. 221;) it need not show on its face that the justice had jurisdiction; (*Jackson v. Rowland*, 6 Wend. 666; *Jackson v. Tuttle*, id. 213: S. C., 9 Cowen's Rep. 233; *Jackson v. Jones*, id. 182;) and a very imperfect transcript, written in bad English, if intelligible in its essential parts, will answer. (*Jackson v. Browner*, 7 Wend. 388.) In the case last cited the transcript was as follows:—"Samuel Cooper vs. fretrick Browner. This 25 day of November, 1824. Summons returned bersonal served in a plea of— fifty dullows and issue gind, and the parties was rety for trial and witness swearnd and gudgmand fur the plaintiff on a former gudgmand fur twenty six dullows and twenty six cents. Damages \$26,26, corst of suit 72 \$26,98. I hereby sartify that the apove copy is a correckt and true copy of my pook," &c. Yet held sufficient. (Id. 389.) This transcript cannot be used as evidence of the judgment for the purpose of establishing a former recovery, or, indeed, for any purpose except that contemplated by the statute. (*O'Connel v. Seybert*, 13 Serg. & Rawle, 54, 57; and see the cases supra.)

3. *A justice's proceedings may be proved by his own oath.* (2 R. S. 270, § 248, first part of the section.) Accordingly, a plea of title being interposed before a justice, the cause was subsequently prosecuted in the common pleas, and on the trial, the justice was called and identified the pleadings before him; an objection was taken that the docket of the justice should be produced, which the common pleas overruled; and held well, by the supreme court; for the evidence embraced the pleadings only, and was therefore proper, particularly as they were produced in court. (*Brotherton v. Wright* 15 Wend. 287, 289.)

The above section, however, is not to be understood as sanctioning parol evidence of a justice's proceedings, without producing the proceedings or the docket. It was designed by the revisers and the legislature, merely to embody the spirit of the then existing adjudications, which disallowed parol evidence of a justice's proceedings, unless the absence of the higher evidence, (viz., the proceedings themselves or the docket) was accounted for. (*Boomer v. Lane*, 10 Wend. 525, 6, 7. *M'Carty v. Sherman*, 3 Johns. Rep. 429. *Posson v. Brown*, 11 id. 166. 3 Revisor's Rep. Supplement to chap. 2, 3d part, note to § 270.) Therefore, in identifying the pleadings, in a case like the above of *Brotherton v. Wright*, they must be produced; the fact of the suit in the common pleas being a continuation of that commenced before the justice, cannot be shown by the independent parol testimony of the justice. (*Webb v. Alexander*, 7 Wend. 281, 286.)

As a general rule, however, parties should resort to other modes of proof than those which require the personal attendance of the justice; for one of the objects of providing other and convenient modes, was to relieve justices from this burthen. (Per Nelson J., in *Heermans v. Williams*, 11 Wend. 638.)

4. *Where the justice is dead, absent, insane, or has vacated his office, or been removed.* In case of his death or absence, the proceedings of a justice may be proved by producing the original minutes of such proceedings, entered in a book kept by such justice, accompanied by proof of his hand writing; or they may be proved by producing copies of such minutes, sworn to by a competent witness as having been com-

pared by him with the original entries, with proof that such entries were in the hand writing of the justice. (2 R. S. 270, § 248.)

The original minutes of the justice, where he was dead, were held good evidence of a judgment, before the existence of the above provision; they being in his hand writing, and proof offered to verify them. (*Baldwin v. Prouty*, 13 Johns. Rep. 430.) See as to this doctrine in *Vermont*, *Story v. Kimball*, 6 Verm. Rep. 541, *infra*.

What is meant by the term "absence" in the above section, has not, we believe, as yet been judicially determined. In *Heermans v. Williams*, (11 Wend. 636, 638,) the section is quoted in a way to beget the impression at least, that a mere absence from the place of trial was contemplated. However, the case decides nothing in respect to this point. In general, the term, when used in excusing the introduction of secondary evidence, means, absence beyond the reach of the process of subpoena. (See *Cook v. Husted*, 12 Johns. Rep. 188. And post, as to proof of deeds, agreements, &c.) In Pennsylvania, it would seem, that they have no provision like the above, though they have a statute requiring justices to keep a docket; (*Welsh v. Crawford*, 14 Serg. & Rawle. 440, 441;) and there, where it was shown that a justice was absent from the county, and had been so for several weeks, his docket, obtained from his office during his absence, and proved to be in his hand writing, was held evidence; and this, though no subpoena had been taken for the justice, and though he was within reach of an attachment. This evidence was rejected by the common pleas, and the supreme court by *Rogers, J.*, who delivered the opinion, say, "The testimony was rejected because no subpoena was taken for the justice, who resided in the county, and was, at the time of the trial, within reach of an attachment. The court of common pleas, it would seem, had gone on the idea that no person but the justice himself could prove his docket. We do not consider this to be the law, as it would introduce a strictness in relation to the docket of a justice, which would be attended with great inconvenience in practice. Any person who knows the fact, may identify the docket, so far as to lay a foundation for its introduction to the jury, who must ultimately decide; or circumstances may be shown which afford a reasonable presumption that the book offered is the docket." As to the absence of the justice, it is further said: "No subpoena was issued for the justice, but this is accounted for by the fact that he was absent from the county. That he was then within reach of an attachment, we think of little consequence, as we consider the testimony of the justice not the only proof of the identity of his docket." (*Dennison v. Otis*, 2 Rawle, 10.) Though, where the justice was dead, the supreme court of New-York, in admitting the original minutes, with proof to verify them, seem to have regarded this species of evidence as secondary in its character. (See *Baldwin v. Prouty*, *supra*.)

The question whether, in order to admit the docket or a sworn copy, a case of absence must be shown, within the meaning of that term as used in reference to secondary evidence, will perhaps be better solved by considering what would be the rule independent of the provision under consideration. For, the revisors, in regard to the whole section we are upon, did not intend to alter the law as it previously stood under the adjudications of the supreme court, proceeding upon general principles. (§ Revisor's Rep. Supplement to chap. 2, 3d part, note to § 245.) And in this view, mere absence from the trial would seem to be enough. In Pennsylvania, it has been deliberately held, that sworn copies of the entries in a justice's docket are admissible as

primary evidence; that they fall within the rule as to public books, which ought not to be removed, and of which the law therefore permits copies, proved by oath, to be evidence. (*Welsh v. Crawford*, 14 Serg. & Rawle, 440.) Our own court also, appear to have held a similar doctrine as to sworn copies, previous to the above or any other express statute provision on the particular subject. (*McCarty v. Sherman*, 3 Johns. Rep. 429.) In Ohio, the same has been held as in the above Pennsylvania case. (*Peney v. Gilliland*, 1 Wright's Rep. 38.) So also, *semble*, in Alabama. (*Tubb v. Madding*, 1 Alab. Rep. 129, 130.) As to what shall be sufficient to authenticate an examined or sworn copy, where that mode is resorted to, see ante, note 719, p. 1065.

It is further provided, that a justice removing out of the town for which he was chosen, either before or after the expiration of his term of office, shall deposit all his official books and papers with the town clerk of such town. (2 R. S. 270, § 252.) So, if he shall be removed from office. (Id. § 253.) In every book of minutes delivered by him pursuant to the above provisions, in which he shall have kept the docket of any judgments, he is required to enter a certificate, to be subscribed by him, stating that the judgments entered in such book were duly rendered as therein stated, and that the amounts appearing by such book to be due on such judgments respectively, have not been paid to his knowledge. (Id. § 254.) So, if the justice shall die, or in any way his office become vacant, the town clerk may obtain his books and papers from any person to whose hands they shall come. (Id. p. 271, §§ 255, 6.) The entries contained in the book of minutes kept by any justice, and by him delivered to the clerk, shall in all cases be presumptive evidence of the facts stated in such entries, but may be repelled by contrary proof. (Id. § 257.)

If a justice, after having rendered judgment in any cause, shall die, become insane, remove out of the state, abscond or otherwise vacate his office, before issuing execution, debt may be maintained on the judgment, in which action the original docket of such judgment, kept by such justice, is declared presumptive evidence of the facts therein stated, but shall be liable to be repelled by contrary proof. (2 R. S. 272, § 265.)

5. *Secondary evidence.* "If in any action upon the judgment of a justice, it be established that the docket of a [the?] justice has been lost or destroyed, or that it cannot be produced after reasonable efforts to obtain the same, other proof of the fact of a judgment having been rendered may be given, and may be repelled as other facts." (2 R. S. 272, § 267.) The revisers reported this as above, except that the words "*other proof*" were substituted by the legislature for "*parol proof*," which latter were in the original: and they remark, that the section "seems necessary to provide for cases of not unfrequent occurrence." (3 Revisers' Rep. ch. 2, part 3, p. 83, 4, § 263, and note.) Surely, however, if legislation on the subject was in any sense "necessary," it should not have been circumscribed to an "*action upon the judgment*," but should have been general; for hundreds of instances may be supposed where the parties not only, but officers connected with proceedings of justices, as well as third persons, and the public, have a much deeper interest in proving them, than any individual can have in the solitary case contemplated by the above provision; instances too in which the docket is equally likely to be lost, destroyed, or otherwise incapable of being produced.

It is not to be supposed, however, that this provision was designed so to operate as to exclude secondary evidence where it was proper before; for, as we have

seen ante, note 723, p. 1067, 8, even records of the most solemn kind may, when lost, destroyed, &c., be proved by inferior evidence. In Vermont, where a justice of the peace has died without making any formal record, his minutes of a judgment made on the writ, if they shew a judgment rendered, and the amount, are receivable as evidence of the judgment. (*Story v. Kimball*, 6 Verm. Rep. 541.) If the higher evidence in such cases is beyond the reach of a party, the next best evidence is to be resorted to. (See *Baldwin v. Prouty*, 13 John. Rep. 430; and see our note cited above; also, *Posson v. Brown*, 11 John. Rep. 166; and per *Holroyd, J.*, in *Dyson v. Wood*, 3 Barn. & Cress. 449.) As to what presumption was indulged in respect to the fact of the justice's keeping a docket, previous to the statute requiring him to do so, see *Maynard v. Thompson*, 8 Wend. 393, 395, 6. Doubtless now, the presumption in all cases would be strong that he had kept one, as every officer is presumed to have obeyed the law. (See ante, note 371, p. 485, 6; also ante, note 298, p. 296, 7; and per *Littledale, J.*, in *Dyson v. Wood*, supra.) And independent of any statute, the material parts are presumed to rest in writing in some form. (See ante, note 694, p. 1012, 1013, and the cases there cited; also *Posson v. Brown*, supra. See likewise ante, note 763, p. 1061, 2.)

Even where no foundation is laid for secondary proof, a justice's proceedings may be proved by the verbal statement of the justice, unsworn, if it be not objected to; (*Lawrence v. Houghton*, 5 John. Rep. 129; *Blanchard v. Richly*, 7 id. 198, 9;) or by a mere unauthenticated certificate; (*Kellogg v. Mauney*, 2 id. 378.) And we have seen, supra, that where the proof is offered to the same justice before whom the proceedings sought to be shown were had, his docket, or a transcript certified by him, may be received as primary evidence.

But where the proof is offered before another justice, it is otherwise. There, the docket, or a transcript certified by him, would not, *per se*, be receivable as primary evidence; though an examined and sworn copy perhaps might. (See supra, pl. 4, p. 1111, 1112.) And, where a certificate of a justice's proceedings, authenticated only by proof of his hand writing, was received, though duly objected to, the supreme court held the objection well taken, and reversed the judgment on that ground. (*McCarty v. Sherman*, 3 John. Rep. 429.) So, where the justice was permitted to testify verbally to his proceedings, objection being taken. (*White v. Hawn*, 5 id. 351.) For, anterior to the statute we are considering, and when no express legislative direction existed requiring justices to keep a docket, the material parts, as we have above suggested, were presumed to exist in writing, and were to be produced when attainable; parol evidence could not be received till the higher evidence was shown beyond the party's reach. (*Posson v. Brown*, 11 id. 166. *Dygert v. Copernoll*, 13 id. 210. See *Brintnall v. Foster*, 7 Wend. 103, 4, 5.)

It may not be amiss, before concluding our remarks upon the proof of justices' judgments in New-York, to notice in a general way the effect of certain of the above mentioned modes of proof.

The *transcript*, spoken of supra, pl. 2, § 246, when properly authenticated, would seem, as a general rule, to be conclusive, and not open to contradiction by parol evidence. The revisers proposed the section with an addition, declaring the facts stated in the transcript liable to "be repelled by contrary proof." (Revisers' Rep. supplement to ch. 2, part 3.) But this was omitted by the legislature in its enactment; and under a former provision,

not materially different in this respect from the present, it was held, that the certificate of a justice's proceedings could not be assailed by parol evidence. (*McLean v. Hugarin*, 13 John. Rep. 184. *Brintnall v. Foster*, 7 Wend. 104, 5. See 1 R. L. (W. & V.) 398, § 21.) Yet as to a transcript under the act of 1824, sess. 47, p. 292, § 29, which is similar in its phraseology to the provisions above adverted to, the supreme court have said, that as in favor of the justice and plaintiff in the suit, when sued for property taken under execution, the certificate of the justice would be only *prima facie* evidence. (*Maynard v. Thompson*, 8 Wend. 393, 395.) The certificate in this case was given after the justice's term of office had expired.

The effect of the *docket*, when used as evidence, has been before adverted to under a previous head. Although not technically a record, it has been elevated by the supreme court to the dignity of a specialty, and is not liable to be contradicted by parol proof. (*Brintnall v. Foster*, 7 Wend. 103. *Pease v. Howard*, 14 John. Rep. 480. See ante, note 599, p. 836, 7.) As to parol evidence in explanation of it, and by way of supplying omissions in it, see *Dygert v. Copernoll*, 13 John. Rep. 210; *Jennings v. Carter*, 2 Wend. 446, 451, 2. See also ante, note 692, p. 971, 2. Parol evidence, by the justice, to show that a variance between the judgment and execution happened by mistake, is admissible. (*Borland v. Stewart*, 4 Wend. 568.)

The docket, moreover, is in certain cases declared liable to be repelled by contrary proof; e. g. where the docket has been deposited by the justice pursuant to 2 R. S. 270, §§ 252, 3, et seq. with the town clerk. (See *supra*, pl. 4, p. 1107.)

Whether the time when the entries of the justice were made on the docket, might not possibly have some weight in determining the credit to be awarded either the docket or a transcript, remains adjudicated. The legislature doubtless contemplated that the entries would be made at or about the time when the fact noted transpired, so that the docket should be a sort of diary of the proceedings in the cause. They indeed direct expressly in respect to certain judgments, that they shall be rendered forthwith and entered in the docket, and certain other judgments are to be rendered and entered in the docket within four days. (2 R. S. 247, § 124.) We have seen that the entries must be official; we have seen too, that a justice may make out a transcript after he has gone out of office, and use it as, at least, *prima facie* evidence even in his own favor. Can he make an entry in his docket, after that time, of a fact occurring before, which shall affect the parties or others as evidence? In Maine, it has been said that a justice of the peace does not act *judicially* in making up and completing his record; that in doing this he performs himself what other courts do by the agency of their clerks; that it is a mere ministerial act; and hence, he could make up his record when not in commission. (*Baker v. Page*, 2 Fairf. Rep. 377.) The decision of the justice in this case took place 1st August, 1829; he had made all the requisite entries on his docket previous to the judgment, and (for aught that appeared) at the proper time; but he did not complete his record till "prior to June, 1832." Yet the court seem to have regarded it as good evidence; conceding that, at the latter date, he was incapable of acting as a justice. (*Id.* 378, 380, 1.) As to entries made without the authority of law, or when the person making them had no power for so doing, see *Talbot v. Davis*, 2 Marsh. Ken. Rep. 606, 7. Also ante, note 763, p. 1100.

In actions where a justice's proceedings are sought to be proved, it frequently becomes a question, in what mode the party who seeks to avail himself of them, is bound to show the official character of the person before whom they were had, when that is not shown

by the certificate of the county clerk. The doctrine on this subject will be seen by reference to previous observations made in regard to proving official character generally. (*Ante*, notes 426, 427, p. 554, et seq. Note 475, p. 627, 8.) Several cases worthy of examination, will also be found *ante*, note 694, p. 1003, 4, pl. 6.

Where an action was on a justice's judgment, and the person before whom it was said to have been rendered, came forward and stated without oath, that the record produced in court was the original record of the judgment recovered before him, the amount of which had never been paid to him; no objection being made to the mode of proof, the supreme court regarded the evidence as *prima facie* sufficient to show the authority of the justice to render the judgment. (*Reed v. Gillett*, 12 John. Rep. 296.)

For reasons already suggested, we must be allowed to refer very generally to the cases in regard to the mode of proving a justice's proceedings in other states. It is proper to premise, however, that we take the rule noticed *supra*, p. 1108, to be almost universal, that these proceedings, or the material parts of them at least, are, in the first instance, presumed to exist in writing in some form or other; and therefore, that they cannot be shown by parol, until the absence of the higher and better evidence shall have been satisfactorily accounted for. (See *ante*, note 694, p. 1012, 1013, and the cases there cited. Also *ante*, note 763, p. 1101.)

We had occasion to notice some of the Pennsylvania cases, in the course of our observations upon the mode of proving justices' judgments in New-York. It has been seen by those cases, that a sworn copy of the entries in a justice's docket, is there admissible, and is entitled to the same credit as the original. (*Welsh v. Crawford*, 14 Serg. & Rawle, 440.) The transcript of the docket, however, not authenticated by any seal, is not evidence. (*Wolverton v. The Commonwealth*, 7 Serg. & Rawle, 273.) See *Keck v. Appleback*, 1 Pennsylv. Rep. 465. As to what the justice is required by statute to enter on his docket, see *Whart. Dig.* 2d ed. p. 473. (h.)

In Alabama, if the proceedings are lost, they may be proved by inferior evidence; e. g., the declaration being lost, a copy is admissible. (*Tubb v. Madding*, 1 Alab. Rep. 129.) The original papers may be used, but it is said the justice is not bound to produce them. Sworn copies are admissible, it seems, as primary evidence. (*Id.* 130.) The proceedings of justices in that state, save for forcible entry, are not strictly and technically records. (*Gayle v. Turner*, 1 Alab. Rep. 204, 5.)

In Connecticut, a justice's court is a court of record, and a party cannot be allowed to contradict what is expressly affirmed in the record. (*Holcomb v. Cornish*, 8 Conn. Rep. 375.) This is so, as it would seem, even with respect to a jurisdictional fact. (See *id.*, in connection with *Aldrich v. Kinney*, 4 Conn. Rep. 380, stated *ante*, note 551, p. 800.) The above case of *Holcomb v. Cornish*, was an action against a justice of assault and battery and false imprisonment, for acts done under a conviction of the plaintiff of profane cursing and swearing in the defendant's presence; and the record of conviction appears to have been held conclusive in the justice's favor on all points made out by it.

In Kentucky, it seems, justices are, by statute, to deliver out attested copies of their proceedings or records; and the ordinary principle that a copy, given out by an officer intrusted for that purpose, is evidence, without further proof, has been recognized as applicable to them. But the statute only extends to "records of justices

acting in their individual characters." Hence, a copy of a record of trial by two justices constituting an examining court, certified as a copy by one of the justices, without proof of its being an examined copy, is not receivable. (*Geobegan v. Eckles*, 4 Bibb, 5, 6, 7.)

In Ohio, a justice's court is a court of record. (*Adair's adm'r v. Rogers adm'r*, 1 Wright's Rep. 428.) He is required to keep a docket; and a transcript from it, duly certified, is admissible as primary evidence of unimpeachable verity. (*Id.* 429. *Peney v. Gilliland*, *id.* 38.) It has been held there, that parol evidence of a former recovery before a justice cannot be received, even, it seems, where the docket is shown to be lost or mislaid. (*Inman v. Jenkins*, 5 Hamm. 271.) The court appear to have gone upon the ground that some higher grade of evidence existed which should have been produced. (*Id.*) They have a statute in that state (somewhat similar to one which exists in New-York, adverted to *supra*.) requiring a justice, when his office becomes vacant, to certify his docket and deliver it over to his successor; (in N. Y. it is to be delivered to the town clerk;) this is viewed as *directory*, and if the justice neglects to certify and deliver over his docket, it is nevertheless admissible as evidence in the same way as before the statute. (*Pool v. M'Cullum*, 1 Wright's Rep. 432, 3, 4.)

As to the proof of a justice's judgment &c., in Vermont and Tennessee, see *Story v. Kimball*, 6 Verm. Rep. 541, stated *supra*, pl. 5. p. 1113. *Davis v. Bryan*, 7 Yerg. 88, 90. *Jones v. Walker*, 5 Yerg. 431.

In North Carolina, justices' courts are not courts of record, and whenever the judgments of these courts come in question, they may be impeached for lack of jurisdiction, notwithstanding, as it seems, any statements in the proceedings. (*Hamilton v. Wright*, 4 Hawks' Rep. 283.) "Such judgment (a justice's,) is the judgment of a court not of record; therefore cannot be established as a record, but is to be established as a public writing, not of record, by parol evidence. Parol evidence may be met by parol evidence; of course, when the judgment was proved, as in this case, parol evidence might be received to shew that the judgment, although proved, was confessed without the limits of the county." (*Id.* per Hall, J., at p. 286.) "The justice's judgment not proving itself, must therefore, be supported by proofs, and therefore may be shewn to be different from what, upon its face, it purports to be; it may be shown to be a perfect nullity." (*Id.* per Henderson, J., at p. 291.) "It is impossible to apply the rules of evidence, established in relation to the authentication of records of courts of justice, to the proceedings before magistrates. They cannot be decided by inspection; they have no seals; they keep no copies of their proceedings; and the knowledge of their official existence is necessarily confined to the county of their residence. No provision is made by law for the authentication of their judgment, except in one instance; and in the absence of such legislative provision, the enquiry must continue to be conducted, as it heretofore has been, by proof of the justice's hand writing, either by himself or others, and by proof that the judgment was given by him, then a justice, within the limits of his jurisdiction. (*Id.* per Taylor, C. J., at p. 285.) You cannot ask the justice what is meant by his entry of a judgment; it must speak for itself as it stands. But if the entry imports a judgment, it is proper to prove that the merits were gone into, by the justice or any other person who knows the fact, provided the testimony be consistent with the judgment. (*Ferrell v. Underwood*, 2 Dev. 111, 114.) See *ante*, note 692, p. 971, 2, as to explaining or contradicting these and similar entries.

NOTE 765—p. 397.

See ante, note 620, p. 864; also note 616, p. 858, 9; *Moore v. Smith*, 5 Greenl. Rep. 490, 494.

In New-York, it is provided by statute, that the probate of a will of personal property, taken by a surrogate having jurisdiction, shall be conclusive evidence of the validity of such will, until such probate be reversed on appeal, or revoked by the surrogate, as provided for, or the will be declared void by a competent tribunal. (2 R. S. 61, § 29.) As to the time, and proceedings, for obtaining a revocation of probate, see *id.* § 30, et seq. With respect to appeals, see 2 R. S. 66, § 55, et seq.

NOTE 766—p. 397.

See ante, note 618, p. 859; also ante, note 619, p. 860.

NOTE 767—p. 397.

See 3 Moore's Rep. 562, n. (a.)

Notice was given to the defendants, as executors, to produce the probate of their testator's will at the trial, which they refused to do: held, that a document purporting to be the original will, and produced by an officer of the ecclesiastical court of Chester, under the seal of that court, was admissible, as secondary evidence, to shew that their testator had acknowledged therein that he had received money in his lifetime for the use of the plaintiff. (*Gorton v. Dyson*, 3 Moore, 558.) It appeared that the defendants had acted on the document produced as the will of their testator. (Per Richardson, J., *id.* 561. S. C. 1 Brod. & Bing. 219. Gow. 78.)

In New-York, each surrogate is required by statute to record in his books, all wills proved before him, and all letters testamentary or of administration, and all letters appointing a collector, with all things concerning the same. And the records of such wills and letters, and transcripts thereof, duly certified by the surrogate having the custody of such records, under his seal of office, are declared evidence in all courts, so far as respects personal estate, in the same manner as if the originals were produced and proved. (2 R. S. 80, § 58.)

In Massachusetts, a probate court is not, technically, a court of record; yet, it has been said, that it ought to have a perfect record of all its orders and decrees; for this purpose the office of register was constituted: and, it seems, such orders and decrees are provable there, by properly authenticated copies. (*Chase v. Hathaway*, 14 Mass. Rep. 222, et seq.) As to the necessity of preserving a written memorial of the proceedings of these courts, and the form thereof, see ante, note 620, p. 869, 870. The same doctrine with that laid down in *Chase v. Hathaway*, supra, has been adopted in New-Hampshire. And parol evidence to prove the decision of a judge of probate was, in that state, held inadmissible. (*Judge of Probate v. Briggs*, 3 N. Hamp. Rep. 309.) it is provable by a copy of the record. (*Farnsworth v. Briggs*, 6 *id.* 561.)

NOTE 768—p. 397.

See *Harrison v. Rowan*, 3 Wash. C. C. Rep. 580, 2, per Pennington, J.

In New-York, the surrogate has authority to take proof of wills of real estate; (2 R. S. 57, § 7, et seq. ;) the will, the proofs, and examinations taken by him, are to be recorded in a book, and the record signed and certified by the surrogate. (Id. 58, § 14.) The will so proved, is to have a certificate of such proof endorsed thereon, signed by the surrogate, and attested by his seal of office, and may be read in evidence without further proof thereof. And the record of the will, and the exemplification thereof by the surrogate having the legal custody, shall be received in evidence, and shall be as effectual in all cases, as the original will would be, if produced and proved, and may, in like manner, be repelled by contrary proof. (Id. § 15.)

Sections 14 and 15, above mentioned, relate to cases where the subscribing witnesses, or such of them as would be sufficient to prove the will on a trial at law, are produced before the surrogate. (See id. § 12, 13.) If the witnesses are dead, insane, or reside out of the state, other proof is to be taken. (2 R. S. 59, § 16.) This is to be signed, certified and recorded, by the surrogate, in the same manner as where the witnesses are produced, and the will is to be deposited with the surrogate. (Id. § 17.) The record of the proofs and examinations taken pursuant to the two last sections, and the exemplifications of such record, by the surrogate having the legal custody, shall be received as evidence upon any trial, or controversy concerning the same will, after proof that the lands in question have been uninterruptedly held under such will for the space of twenty years before the commencement of the suit in which such trial or controversy shall be had; and shall be of the same force and effect, as if taken in open court, upon such trial or controversy. (Id. § 18.)

As to exemplifications of the record of wills, proved before the judge of the former court of probate, and recorded prior to the 1st of January, 1785, see id. § 20.

Further, with respect to the power of the surrogate, in N. York, in regard to wills of realty, and the effect of his decision thereon, see ante, note 620, p. 861, et seq.

In several of the states, beside New-York, the surrogate's, or other court, coming in the place of the English ecclesiastical court, has power to take proof of wills in respect to the realty. This depends upon statute regulation, which sometimes defines the effect of the probate as evidence. Where the effect is left undefined, it would probably be the same as it is in regard to the personalty. Such will be seen to be the doctrine by consulting several cases cited ante, note 616, p. 853, 9; note 620, p. 861, 2: In addition to which, the following cases may be referred to, as showing the local views of some of the state courts on the same subject. *Donaldson v. Winter*, 1 Mill. Lou. Rep. 137. *Stanley v. Kean*, 1 Tayl. Rep. 93. *Darby's lessee v. Mayer*, 10 Wheat. 465.

NOTE 769—p. 398.

Cox v. Allingham, 1 Jacob's Rep. 514.

In Virginia, by statute, the certificate of probate, or of administration, attested by the clerk, enables the executor to act, and may be given in evidence in any court of

that state, and will be as effectual as any probate, or letters of administration, made out in due form. (*Dickenson v. M'Cfaw*, 4 Rand. Rep. 158, 160.)

So also in Vermont, as to a certificate of administration attested by the register. (*Seymour's adm'r v. Beach*, 4 Verm. Rep. 493.)

In New-York, exemplified copies, or certified transcripts under seal, of letters of administration, are competent evidence without accounting for the originals. There is no difference between the records of surrogate's courts, and those of any other court, in this respect. (*Jackson v. Robinson*, 4 Wend. Rep. 436, 442. 2 R. S. 80, § 58. See *Dale v. Roosevelt*, 8 Cowen's Rep. 348, 9.) All letters testamentary, letters of administration, and letters appointing any collector, are to be in a particular form, signed by the surrogate or officer granting the same, and sealed with the seal of the surrogate, or that of the common pleas of the county, when granted by the first judge, or by the district attorney. (2 R. S. 80, § 55.) Such letters, issued by any officer having jurisdiction, are declared conclusive evidence of the authority of the persons to whom the same were granted, until reversed on appeal, or revoked as provided for. (*Id.* § 56.) An order of the court of chancery, directing letters to issue on certain conditions being performed by the applicant, which order was made on appeal from the surrogate, has been held to afford no evidence that letters have actually issued. (*Dale v. Roosevelt*, 8 Cowen's Rep. 334, 348, 9, per Spencer, senator. See *Hoskins v. Miller*, 2 Dev. Rep. 360, 1, 2. *Spencer v. Cohoon*, 1 Dev. & Batt. Rep. 27.)

In New-Hampshire, a certified copy of the record from the register's office, containing nothing more than a mere memorial of the appointment of an administrator, was received as competent evidence of the date of the appointment. The letters, it is said, are only a copy of this record, drawn up in a more formal manner, and are no better evidence. (*Farnsworth v. Briggs*, 6 N. Hamp. Rep. 561, 2, 3.)

The same, or a very similar doctrine, prevails in North Carolina. (*Hoskin's adm'r v. Miller*, 2 Dev. Rep. 360, 1, 2.) In this case, the original minutes of the appointment were read, and it was objected, among other things, that in order to prove the fact of the appointment, the letters themselves should be exhibited. The court, however, held otherwise, saying, that the letters contained nothing distinct from the record, but are a mere copy of it, with the addition only of a certificate that they are a copy, verified by the seal of the court. (*Id.*)

In Kentucky, a transcript of the order, granting administration, is full proof of the fact of the appointment of the administrator. (*Owings v. Beall*, 1 Litt. Rep. 257, 259.)

In South Carolina, an administration may be proved by the record-book of the ordinary, without producing the letters, or accounting for their absence; and the record-book may be proved by any person acquainted with it, or with the signature of the ordinary, without calling the ordinary himself. (*Browning, adm'r, v. Huff*, 2 Bail. 174.) This book is regarded the same as the book of acts of the spiritual court of England, and the letters, as nothing more than a certificate by the ordinary of his having granted administration, &c. (*Id.* 179.)

All the foregoing cases assume that the letters themselves would be evidence; and if granted by a court of competent jurisdiction, they would be conclusive as to the fact of appointment. But they may be shown to be forged, or may be impeached for lack of jurisdiction in the court granting them. (See *Owings v. Beall*, 1 Litt. Rep. 259,

260. See also ante, note 620, p. 863.) But the force of the letters cannot be abated by reason of mere error or irregularity in the appointment, not amounting to want of jurisdiction. (See ante, note 620, p. 864.) Nor need a party, in order to show an administrator's right to act as such, produce or prove any of the proceedings preliminary to the appointment. The fact of appointment by order of the court, is conclusive on all points of mere irregularity, and the latter can only be made available in a direct proceeding in the same court to annul or set aside the appointment. This is so, whether the appointment itself or the letters be used. (*Id.* *Browning, adm'r, v. Huff*, 2 Bail. 174. *Spencer v. Cohoon*, 1 Dev. & Batt. Rep. 27.)

A copy of letters testamentary, granted by the parish court of New-Orleans, was proved by the oath of the clerk and register of the court of probates, to be a true copy of the original, and that he could not send the original, which was on file in such court; and by the supreme court of the U. S., held that, under such circumstances, the copy was the best evidence of which the nature of the case was susceptible. (*Owings v. Hull*, 9 Pet. Rep. 608, 626.)

The mode of proving letters testamentary, and of administration granted in other states, is, in Tennessee, provided for by their local legislation. There, a transcript certified in a particular mode from the records of the court of another state, containing a last will and testament, together with the qualification of the executors, has been held sufficient evidence of a grant of letters testamentary, to authorize the executors to sue. (*Smith v. Mabry*, 7 Yerg. 26, cited wrongly, ante, note 621, p. 875, as *Smith v. Smith*.)

Several other states have their peculiar enactments on this subject. Letters of administration, &c. granted in another state, may be proved by a copy certified under the constitution and laws of the United States. Where a copy of letters testamentary from a probate court in Massachusetts, was offered as evidence in Indiana, and the certificate of the clerk wanted the seal of the court or officer granting the letters, held, that the copy was inadmissible. (*Allen, adm'r, v. Thaxter*, 1 Blackf. 399.) As to proving these and similar proceedings of probate courts of neighboring states under the constitution and acts of congress, see further *ex parte Povall*, 3 Leigh, 816.

NOTE 770—p. 399.

See *Bellinger v. The People*, 8 Wend. 595, 598, 9. See ante, notes 668, 669, 673, 675, 677, p. 938, et seq.

NOTE 771—p. 399.

In New-York, the revised statutes provide, that the records and judicial proceedings of any court in a foreign country, shall be admitted in evidence in the courts of this state, upon being authenticated as follows:

1. By the attestation of the clerk of such court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed:

2. By a certificate of the chief justice or presiding magistrate of such court, that the person attesting such record, is the clerk of the court, or that he is the officer in whose custody such record is required by law to be kept; and in either case, that the signature of such person is genuine: and,

3. By a certificate of the secretary of state, or other officer of the government under whose authority such court is held, having the custody of the great or principal seal of such government, purporting that such court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the signature of the clerk or other officer; having the custody of such record, and also verifying the signature of the chief justice or presiding magistrate. (2 R. S. 396, § 26.)

Copies of such records and proceedings in the courts of a foreign country, may also be admitted in evidence upon due proof,

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of such original;

2. That such original was in the custody of the clerk or other officer, legally having charge of the same: and,

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be. (Id. § 27.)

It is declared, however, that these provisions shall not prevent the proof of any record or judicial proceeding of the courts of any foreign country according to the rules of the common law in any other manner than that pointed out above; nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as prescribed by the statute. (Id. § 28.)

The different modes of authenticating foreign judgments, independant of any legislative provision on this subject, have been laid down by Marshall, C. J., as follows: 1. By an exemplification under the great seal. 2. By a copy, proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These he pronounces the usual, if not the only modes of authenticating foreign judgments. (*Church v. Hubbard*, 2 Cranch, 187, 238. See also *Mahurin v. Bickford*, 6 N. Hamp. Rep. 567, 570. *Vandervoort v. The Columbian Ins. Co.* 2 Cain. Rep. 155, et seq.)

If these modes of authentication be all beyond the reach of the party, other testimony, inferior in its character, will, it seems, be received. (*Church v. Hubbard*, supra, per Marshall, C. J. See *Hadfield v. Jameson*, 2 Munf. Rep. 53. *Young v. Gregory*, 3 Call, 446. Also per Washington, J., in *Wood v. Pleasants*, 3 Wash. C. C. Rep. 201, 203, quoted ante, note 702, p. 1049.)

But where it does not appear that there is any insuperable impediment to the use of either of these modes, the courts will not presume such impediment to have existed. (Per Marshall, C. J., in *Church v. Hubbard*, supra.)

In *Church v. Hubbard*, supra, the proceedings sought to be proved, were a sequestration of a vessel and her cargo at Para: A paper certified to be a true copy from the originals, by the secretary of state for foreign affairs at Lisbon, under his seal of arms, was offered; accompanying it was an *English* copy, certified by the American consul at Lisbon, to be a true translation of the *Portuguese* original: The whole was admitted by the circuit court, and on error to the supreme court, the decision was held erroneous. The copy was not authenticated in either of the modes above mentioned;

nor was any excuse given for not complying with the general rule. In respect to the certificate of the secretary at Lisbon, the learned C. J., says: "If it be true that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified; but the certificate offered to the court, is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing." (Id. p. 238, 9.) He further observed as to the certificate of the American consul to the translation: "Admitting the *originals* in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to be read on the certificate of the consul. Interpreters are always sworn, and the translation of a consul not on oath, can have no greater validity than that of any other respectable man." (Id.)

The same doctrine was laid down in the supreme court of New-York, on the like question arising. Thompson, J., who delivered the opinion, says, that the regulation of transmitting decrees, &c. at Para to Lisbon, &c., should have been shown in some authentic way, and then the document would appear to come through the proper channel, and, if duly authenticated, might be competent *prima facie* evidence of what it contains. He further observes, "This document cannot be considered an exemplification of a judgment. That should be under the great seal; this is only under the seal of arms of the secretary of state: neither is it a sworn copy of the original, and it cannot be received as an office copy, it not appearing that the secretary of state has officially the custody of records of this description." (Vandervoort v. The Columbian Ins. Co. 2 Cain. 155, 163, 4.) The same view was taken by the learned judge of the certificate of translation, as that presented in Church v. Hubbard, supra. (Id. 164.)

The rule above advanced, that the copy must be authenticated by the person having the official custody of the original, has been directly held in New-Hampshire. There, a copy of a Vermont justice's judgment (which the court treated as strictly foreign,) was offered in evidence, authenticated by the certificate of the clerk of the county court. It was said in argument, that the justice had gone out of office, and that his original records were deposited with the county clerk. But per curiam: "The case does not show this, and if it had done so, that alone would not be sufficient. Had it been made to appear that under the laws of Vermont, the records of this magistrate had been deposited in the office of the county clerk, and that he is the proper officer to give out copies, perhaps a copy having his attestation duly authenticated, might have been held sufficient. (Mahurin v. Bickford, 6 N. Hamp. Rep. 567, 570, 1.) See further, Talcott v. The Delaware Ins. Co. 2 Wash. C. C. Rep. 449. Thomas v. Tanner, 6 Monroe, 52, 53, 4, stated infra.)

The seal of a foreign court, not acting under the law of nations, does not prove itself, but when used to authenticate a record, must be proved. (Delafield v. Hand, 3 John. Rep. 310. Griswold v. Pitcairn, 2 Conn. Rep. 90, 1. Story's Conf. of Laws, 531, 2. 4 Cowen's Rep. 526, note. De Sobry v. De Laistre, 2 Harr. & John. 192, 218. Ex parte Povall, 3 Leigh, 816.) And the seal, not only, but the signature of the judge or officer authenticating the record, must be proved. (See Lincoln v. Battelle, 6 Wend. 484; Gardere v. The Columbian Ins. Co. 7 John. R. 519; Chew v. Keck, 4 Rawle, 171; Catlett v. The Pacific Ins. Co. 1 Paine's Rep. 613, 614.) And in such

cases, where the machinery of the court is resorted to for the purpose of authenticating its record, if such court have no seal by which the copy can be clothed with the form of an exemplification, that fact should be proved, or the copy will be inadmissible. (*Talcott v. The Delaware Ins. Co.* 2 Wash. C. C. Rep. 449.)

In *Packard v. Hill*, (7 Cowen's Rep. 434,) a copy of a judgment rendered at Havana was offered and received as good evidence on being authenticated as follows: it was shown to have been signed by the clerk of the court, who was the keeper of its records; that his signature validated all its proceedings; that the court had no seal; that the seal used to the certificate, was the seal of the royal college of notaries; and that the copy was authenticated in the usual way of authenticating records to be sent to foreign countries. (*Id.* 443.) See S. C., 2 Wend. 411; 5 id. 375, 387, 391.

In *assumpsit* upon a foreign judgment, a witness testified that he applied to the reputed clerk of the court for the copy of the record of the judgment, that he assisted the clerk in comparing the copy with the record and in affixing the seal of the court to the copy, and saw the clerk attest the copy by putting his name to it. The verification of the record was held sufficient. (*Buttrick v. Allen*, 8 Mass. R. 273.)

There is an exception to the above doctrine as to proving the seal, in favor of courts of admiralty, which being courts of the law of nations, the courts of other countries will judicially take notice of their seal, without proof of its authenticity. (*Story's Confl. of Laws*, 531. *Thompson v. Stewart*, 3 Conn. Rep. 171. *Gardere v. Columbian Ins. Co.* 7 John. Rep. 517. *Lincoln v. Battelle*, 6 Wend. 484. *Yeaton v. Fry*, 5 Cranch, 335, 343. *Anthony's N. P.* 40, n. (a.) *Dunlap v. Waldo*, 6 N. Hamp. Rep. 453. *Contra*, see *Catlett v. The Pacific Ins. Co.* 1 Paine's Rep. 594, 613.) Accordingly, where the record of a decree of the court of vice admiralty in Bermuda, purporting to be certified by the deputy-registrar, under the seal of the court, was offered in evidence, with no other proof authenticating it, it was held admissible. (*Thompson v. Stewart*, 3 Conn. Rep. 171.) In *Yeaton v. Fry*, (5 Cranch, 335,) copies of the proceedings in the vice admiralty court of Jamaica were held admissible in evidence, when certified under the seal of the court by the deputy registrar, whose official character was certified by the judge of the court, and that of the latter certified by a notary public.

The public national seal of a kingdom, or sovereign state, is also noticed judicially by the courts of other countries, and is the highest evidence and most solemn sanction of authenticity, in relation to judicial proceedings, known in the intercourse of nations. (*Per Gould, J.*, *Griswold v. Pitcairn*, 2 Conn. Rep. 90. *Per Swift, Ch. J.*, *id.* 89. *Anonymous*, 9 Mod. 66. *United States v. Johns*, 4 Dall. 416. *Church v. Hubbard*, 2 Cranch, 187. *Story's Confl. of Laws*, 530. *Lincoln v. Battelle*, 6 Wend. 475, 484. *Dunlap v. Waldo*, 6 N. Hamp. Rep. 453. *Ex parte Povall*, 3 Leigh 816. *State v. Carr*, 5 N. Hamp. Rep. 369, 370.) Accordingly, in Connecticut, a record of the supreme court of Copenhagen was allowed as evidence where there was no certificate that it was a copy; but only the signature of *Colbiornsen*, below the great seal of Denmark, without any addition showing his official character. And *Swift, C. J.*, delivering the opinion, said, "this court does not know the form of making up, attesting or certifying their record. If it appear to be a judicial proceeding under the great seal, it is to be presumed that all the formalities required by their law have been complied with. This appears to be the record of a judgment rendered in a court of the kingdom of Denmark, under the great seal of the king. This seal proves itself, and the court is

bound to take judicial notice of it." (*Griswold v. Pitcairn*, 2 Conn. Rep. 85, 89, 90.) The annexation of the great seal will be presumed to have been done by a person having custody thereof, and competent authority to do the act. (See *United States v. Amedy*, 11 Wheat. Rep. 406, 7; *United States v. Johns*, 4 Dall. 415, 416; also, 1 Bald. Rep. 613, 614.)

But when a civil war rages in a foreign nation, and one part separates itself from the old established government and forms itself into a distinct government, the courts of the respective United States must view such newly constituted government as it is viewed by the legislative and executive departments of our general government; and before it is recognized by them as an independent government, its seal cannot be allowed to prove itself; but it may be proved by such testimony as the nature of the case admits. (*United States v. Palmer et al.* 3 Wheat. Rep. 610. *The Estrella*, 4 Wheat. Rep. 298. See S. P., *United States v. Hutchings*, 2 Wheel. Crim. Cas. 545. 1 Bald. Rep. 616.)

Proceedings in St. Domingo, during the short period in which the possession of the island had passed from France to England, were, under the particular circumstances of the case, held sufficiently authenticated by the private seal of the governor. (*Hadfield v. Jameson*, 2 Munf. R. 53.) What is sufficient to authenticate, in the courts of this country, the sentence or act of a foreign tribunal or government, after a destruction of such government by revolution or conquest, see *id.*

The proceedings of a foreign court may be proved by a sworn copy. (*Lincoln v. Battelle*, 6 Wend. 475. *Hill v. Packard*, 5 id. 387, per Allen, senator. *Id.* p. 391, per Beardsley, senator. See also *id.* p. 385, per Walworth, Ch.; 1 Stark. Ev. 191, 6th Am. ed.; per Lord Ellenborough in *Collins v. Mathew*, 5 East, 475; *Baldwin v. Hale*, 17 John. Rep. 272, 3.) But not by an office copy. (See *Appleton v. Lord Braybrooke*, 6 Maule & Sel. 34; 2 Starkie's Rep. 6, 7, S. C.)

How far a copy of foreign judicial proceedings may be said to be authenticated by the acts and conduct of the party against whom it is sought to be used, has been sometimes made a question. In an action on a policy of insurance, a paper purporting to be a copy of a decree of the English court of appeals in prize causes condemning the property insured as prize, was offered by the plaintiffs as evidence generally for the jury. The document was not under seal, but was one of the papers exhibited by the agent of the plaintiffs to the defendant's broker, as one of the preliminary proofs of loss. At the time it was so exhibited an endorsement was made upon it, stating the day of its exhibition, and that it was the decree of condemnation. Held, that it was not evidence of any thing contained in it; but that it might be used to show the fact of its exhibition to the underwriter, when such fact should become material. (*Thurston v. Murray*, 3 Binn. Rep. 326.) In *Delafield v. Hand*, (3 John. Rep. 310,) the plaintiff offered in evidence a translation of the proceedings of a tribunal at Havre; he showed that the same translation had been put into the hands of F., a broker, by L., in certain suits brought by L. against him on policies of insurance on the same vessel, for the same voyage, in order to enable F. to adjust the loss in those cases. The suits by L. were for himself and the present defendant, who was master and owner of one third; and the present suit was for monies which the plaintiff had been compelled to pay in the former, and which, as was contended, the present defendant was himself responsible for. The court held that the putting of the document into F.'s hands by L., as

above mentioned, did not preclude the present defendant from objecting to its authenticity. "It does not appear from the testimony," say the court, "that such a privity exists between L. and the defendant, as to conclude him from making the objection. L. was not his authorized agent; besides, if that were the case, I cannot discern why a delivery of a paper in one cause should be deemed to conclude a person from objecting to its authenticity in another action." (*Id.* 314, 315.) Further as to when the conduct of the party or his agent, in respect to papers, shall be said to conclude him from objecting to their authenticity, see *ante*, note 690, p. 945; also *Senat v. Porter*, 7 T. R. 153; *Gorton v. Dyson*, 3 Moore, 558.

The judicial proceedings of the several states of the American Union, as among each other, we have already seen, stand upon a different footing from the proceedings of courts strictly foreign. By the 4th article of the constitution of the United States, power is expressly conferred on the federal legislature, to prescribe, not only the effect of such proceedings, but the mode of authenticating or proving them. (See *ante*, note 636, p. 896.) Pursuant to this authority, congress, by a law of May 26, 1790, (2 L. U. States, 102,) has provided, "That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." By an act of March 27, 1804, (3 L. U. S. 621, § 2,) the above provision is extended to the records and judicial proceedings of the respective territories of the United States, and countries subject to the jurisdiction thereof.

The particular proceedings contemplated by the above mentioned statutes, will appear by several cases, *ante*, note 636, p. 898, to 900. As to chancery proceedings of another state, see *id.* 900; also *Barbour v. Watts*, 2 Marsh. (Ken.) Rep. 292, 3, there wrongly cited from 1 Marsh. The probate of a will in another state, has been held a judicial proceeding, which may be authenticated under the act of congress. (*Balfour v. Chew*, 5 Mart. Lou. Rep. N. S. 517. *Johnson v. Rannels*, 6 *id.* 621. *Ripple v. Ripple*, 1 Rawle's Rep. 386. *Ex parte Povall*, 3 Leigh, 816. See *ante*, note 619, p. 860; also note 620, p. 874, 5.) So as to letters testamentary; (*Allen adm'r v. Thaxter*, 1 Blackf. Rep. 399; see *ante*, note 620, p. 875, 6.) And insolvent proceedings had under the laws of Louisiana. (*Craig v. Brown*, 1 Peter's C. C. Rep. 352.)

If the court whose doings are sought to be proved, is so constituted that it cannot comply with the requisitions of the act of congress for lack of a clerk, or other requisite, its proceedings cannot be authenticated in this mode; and hence may be proved as if such court were strictly foreign. (*Kean v. Rice*, 12 Serg. & Rawle, 203, 208. And see *ante*, note 836, p. 898, et seq. and cases there cited.) And even with regard to those proceedings coming within the act of congress, the better opinion is, that the mode of authentication prescribed by it is not to be considered as excluding different modes of proof; but other evidence, good according to established principles independent of the act of congress, may be resorted to. (*Kean v. Rice*, 12 Serg. & Rawle, 203. *Baker v. Field*, 2 Yeates' Rep. 532. *Ellmore v. Mills*, 1 Hayw. Rep. 359. *Poindexter's ex'rs v. Barker*, 2 *id.* 173, 4. *Ex parte Povall*, 3 Leigh's Rep. 816, 817. *Contra*, see *State v. Twitty*, 2 Hawks' Rep. 441, 2, 3.) Accordingly, in Pennsylvania, a proceeding of justices of the peace of New-Jersey, condemning a vessel, &c., for

gathering claims and oysters contrary to a local statute, was held sufficiently proved when authenticated as follows: The original record was produced, signed by the justices; a witness testified to its identity as the original, and proved the signatures to it to be the genuine hand-writing of the justices; and that they were at the time justices of the peace; evidence was also given that the court had no seal. Tilghman, C. J., delivering the opinion, after noticing the mode of authentication adopted, said, "I really do not see how it, (the record of condemnation) could have been proved in a more convincing manner." (*Kean v. Rice*, 12 Serg. & Rawle, 203, 204, 206.) Further as to the Pennsylvania mode of proving a judgment of a neighboring state not certified according to the act of congress, see *Baker v. Field*, 2 Yeates' Rep. 532. In Virginia, a copy of a Louisiana probate of a will, not authenticated according to the act of congress, was held sufficiently authenticated according to common law rules, when certified under the hand and seal of the judge of probate, and his official character attested by the governor's certificate, under the seal of the state; stating that full faith and credit was due to the signature of the judge as such. (*Ex parte Povall*, 3 Leigh, 816.) See ante, note 619, p. 860, 1; also note 620, p. 874, 5. In Indiana, letters of administration granted in another state, certified by the clerk of the court without the seal, have been held not sufficiently authenticated. (*Allen v. Thaxter*, 1 Blackf. Rep. 399.)

A record of a territorial court, not provable, as was held, under the act of congress, was decided to be properly authenticated, in Kentucky, on an issue of noli tuel record, by the attestation of the clerk under the seal of the court, with a certificate of the governor under the great seal of the territory, certifying that the person attesting the record as clerk, was the clerk of the court, and that his attestation was in due form. (*Haggin v. Squires*, 2 Bibb's Rep. 334, 5.)

A record of a court of the United States, (e. g. the circuit court of the U. S. for the district of Massachusetts,) has been held, in New-York, not to be within the act of congress; and where a copy of such record was offered in the supreme court of the latter state upon issue joined on the plea of noli tuel record, the authentication was held sufficient, though it was merely certified by the clerk as a copy under the seal of the court; and the court say, "The mode of certifying the record in the present case, being the ordinary mode used in Massachusetts, instead of the technical exemplification, we are of opinion, as it is also under the seal of the court, that it is sufficient." (*Peppoon v. Jenkins*, 2 Johns. Cas. 119.) See also a similar case decided in the same way and upon the same ground, where the copy offered and received, according to the report, was an *office copy*. (*Jenkins v. Kinsley*, Col. Cas. 136.) Quere, however; for the circuit court of the U. States in relation to the supreme court of N. York, has been regarded as the court of another government; (*Baldwin v. Hale*, 17 Johns. Rep. 272, 3; *Griswold v. Sedgwick*, 1 Wend. 131;) and clearly, therefore, mere office copies of their judgments, &c., are not competent evidence. See ante, p. 387, of the text, and note 724. But examined copies are receivable; (*Baldwin v. Hale*, supra;) indeed, they are admissible, in cases of judgments, &c. strictly foreign in their character. (See supra, p. 1124.) Where the copy of a record of the district court of the U. S. sitting at Baltimore, was offered in the circuit court of the U. S. at Philadelphia, authenticated by the clerk, under the seal of the court, the same was held sufficiently proved; and the court seem to have taken judicial notice that the seal was

the proper seal of the district court. (*United States v. Wood*, 2 Wheel. Cr. Cas. 325, 326, 328.) The copy in this case was on three distinct sheets of paper, not attached or connected together; and the court in respect to an objection on this ground say, "it is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is, in sheets unconnected by some fastening. But if the court, upon inspection, is satisfied (as we are in this case) with the verity of the record, that is sufficient." (*Id.* 326, 328) See further as to proving a record of the circuit court of the U. S., *Levering v. Dayton*, 4 Wash. C. C. Rep. 698, stated ante, note 732, p. 1072, 3.

In *Barbour v. Watts*, (2 Marsh. Ken. Rep. 290,) the plaintiff offered a paper purporting to be a decree in chancery of another state; it was certified by the clerk with the seal of the court annexed: a witness was called who swore, that the clerk was clerk of the court at the date of the certificate; that he, the witness, had read the original decree, but it was upwards of a year ago; that he could not repeat its contents, and had not compared this with the original; but having seen the original, and frequently examined the copy since, he had no doubt this was a true copy. The court declined deciding whether, if the witness had sworn that he had compared the copy with the original, and that it was a true one, it could be given in evidence; for his testimony fell far short of this: and as it lacked the certificate of the presiding judge requisite to render it evidence under the act of congress, they rejected it altogether. (*Id.* 292.)

In New-Hampshire, Massachusetts, New-York and Ohio, it has been held with respect to the judgments and proceedings of justices of the peace of neighboring states, that they were incapable of being proved, except in the common law mode; for justices' courts do not possess the requisite machinery for complying with the act of congress. (See *Robinson v. Prescott*, 4 N. Hamp. Rep. 450. *Mahurin v. Bickford*, 6 id. 567. *Warren v. Flagg*, 2 Pick. Rep. 448. *Silver Lake Bank v. Harding*, 5 Hamm. Rep. 544, 547. 1 Wright's Rep. 430. *Thomas v. Robinson*, 3 Wend. 267.) In Connecticut, however, it has been laid down, that in those states where a justice of the peace holds a court of record; where he is the sole justice, and has no clerk, and no seal, he may certify that he is the presiding magistrate and clerk of the court, that there is no seal, that the attestation is in the usual form, and then subscribe it as a justice of the peace. And this, it is said, would be a literal compliance with the act of congress, and entitle the copy of the record so certified, to be admitted in evidence with "full faith and credit, &c." But a copy authenticated only by the certificate of the justice, stating that it is a true copy of the files and records remaining in his office, is not sufficiently proved, either at common law, or according to the act of congress. (*Bissell v. Edwards*, 5 Day's Rep. 363.) In Vermont, though in *King v. Van Gilder*, (1 D. Chip. Rep. 59,) it was held, that a Massachusetts justice's judgment was not within the act of congress; yet that case has been since overruled; and in *Starkweather v. Loomis*, (2 Verm. Rep. 573, 4,) the supreme court say that "when the subject came to be examined upon principle, and in connexion with the statutes that give large jurisdiction to justices of the peace, this court have felt constrained to decide, that though a justice of the peace has no clerk, yet, when the law requires him to keep records, he must be considered his own clerk; and if he has no appropriate seal, he may use a common seal, or possibly certify that he has no seal attached to his

office as an excuse for his omitting to attach one to his copies of his record." In *Blodget v. Jordan*, (6 Verm. Rep. 580,) the same doctrine was recognized. There, the plaintiff, in debt on a New-Hampshire justice's judgment, produced a copy of the justice's proceedings, attested by the justice. (See the form, *id.* 581, 2.) The defendant also offered another copy of the justice's record, nearly the same as the one used by the plaintiff, except that there was added to it, "this entry appealed to," and a certificate of the justice that these words appeared on his docket, that the word "appealed," appeared to have been blotted, that they were in his hand-writing, but why placed there he could not tell; that he had no knowledge of there having been an appeal save from what appeared on his docket, and that the copy used by the plaintiff was made in haste, and as far as it differed from the defendant's copy, it was incorrect, &c. This latter certificate was attempted to be used in order to show that the judgment had been appealed from; but the court held it "no evidence at all." They further held, that if an appeal was granted, the fact must appear from the record, and could not be proved by parol. (*Id.* p. 585.) In Kentucky also, a justice's judgment of another state may be proved according to the act of congress. (*Scott v. Cleaveland*, 3 Monroe's Rep. 62.)

In Ohio, a justice's judgment of a neighboring state (which as we have mentioned *supra*, is not there proveable under the act of congress) may be established by an examined copy; (*Silver Lake Bank v. Hardin*, 1 Wright's Rep. 430;) or a transcript, properly authenticated. (*Silver Lake Bank v. Harding*, 5 Hamm. Rep. 546.) Where, in debt on the judgment of a Pennsylvania justice, to which nul tiel record was pleaded, a transcript was offered, with a deposition of the justice of his being such, and of his having rendered the judgment on the day of the date thereof, and that he had no clerk and no seal, but acted as his own clerk; held, that it was not sufficiently authenticated. (*Silver Lake Bank v. Hardin*, 1 Wright's Rep. 430.) The courts there have invariably required other evidence of the person who certifies the transcript being a justice than his own certificate; usually the certificate of the clerk of the county court, and the seal of the court. (*Silver Lake Bank v. Harding*, 5 Hamm. Rep. 545, 6.) And the transcript of a justice's judgment of another state, certified by him, and attested by the prothonotary, has been held a competent authentication. (*Kuhn v. Miller's adm'rs*, 1 Wright's Rep. 127.) But the presiding judge of the court of common pleas has no authority to attest a justice's judgment. (*Id.*)

In New-York, where the like doctrine prevails in respect to the construction of the act of congress as in Ohio, it was held, that where a justice's judgment of a neighboring state is sought to be proved, the statute conferring jurisdiction upon the justice must be shown, in addition to the ordinary proof of his proceedings. (See *ante*, note 637, p. 906, and the cases of *Thomas v. Robinson*, 3 Wend. 267, *Sheldon v. Hopkins*, 7 *id.* 435, there stated.) This is laid down in these cases as a rule applicable to all proceedings of *inferior courts* of neighboring states. (See *ante*, note 637, p. 905, 6, and the cases there cited; also, *Betts v. Bagley*, 12 Pick. 572, 581. *Mahurin v. Bickford*, 6 N. Hamp. Rep. 569; and *ante*, note 619, p. 860, 1.) Since the above decisions, however, the New-York legislature, with a view of obviating in some degree the inconveniences arising from the doctrine thus established, as well as prescribing a uniform mode of proof to which resort might be had in these cases, have provided as follows: "A transcript of the docket of any justice of the peace of any town, city or county, in any *adjoining* state, of any judgment had before him; of the proceedings in

the cause before such judgment; of his jurisdiction in said cause; of the execution issued thereon, if any, and of the return of the said execution, if any; when subscribed by such justice, and verified in the manner prescribed in the next succeeding section, shall be presumptive evidence to prove the facts stated in such transcript." (L. N. Y. of 1836, p. 658, sess. 59, chap. 439, § 1.) "To entitle such transcript to be read in evidence, there shall be attached thereto a certificate of the said justice that the said transcript is in all respects correct, and that he, the said justice, had jurisdiction of said cause; and also, a further certificate of the clerk or prothonotary of the county in which said justice resided at the time of rendering said judgment, under the seal of the court of common pleas of said county, specifying that the person subscribing such transcript, was, at the date of such judgment, a justice of the peace of said county, and that the signature thereto is in his own proper handwriting." (Id. § 2.) "Such judgment and proceedings, and the authority to render such judgment may also be proved by the justice who rendered such judgment, by producing his docket, or a copy of the said judgment, in court, and appearing and being sworn and examined as a witness, to the truth and correctness thereof, and of his authority to render said judgment." (Id. § 3.) "Nothing in this act contained shall be construed to prevent the introduction of evidence to controvert any and all parts of the proof in relation to the validity of said judgment, so rendered in any adjoining state." (Id. § 4.)

In New-Hampshire, the ordinary rules as to the mode of proving foreign judgments apply to the case of a justice's judgment of a neighboring state; and where the plaintiff, in debt upon a Vermont justice's judgment, produced what purported to be a copy of such judgment, certified as a true copy by the clerk of the county court, the authentication was held insufficient. (*Mahurin v. Bickford*, 6 N. Hamp. Rep. 567.) It was suggested in the argument that the copy was certified by the clerk of the court in whose office the records of the magistrate were deposited, he being no longer in office; in respect to which the court said, "the case does not state this, and if it had done so, that alone would not be sufficient. Had it been made to appear that under the laws of Vermont the records of this magistrate have been deposited in the office of the county clerk, and that he is the proper officer to give copies, perhaps a copy, having his attestation duly authenticated, might have been held sufficient. 2 Caines 163." (Id. p. 570, 1.) See *Thomas v. Tanner*, 6 Monroe, 52, 3, 4, stated *infra*, p. 1130, pl. 1.

Where a state court is required by its own laws, independent of the legislation and constitution of the federal government, to give full local effect to the judicial proceedings of another state, this renders it proper and necessary to give effect to a rule of evidence accompanying and making part of such proceedings, and providing for the mode of proving them. Accordingly, in Massachusetts, in the case of a New-York insolvent discharge, which, by the law of the latter state, was declared conclusive evidence of the facts and proceedings therein contained, (see *ante*, note 705, p. 1055,) held, that it must have the same effect in the former state. (*Betts v. Bagley*, 12 Pick. 572, 581.) The usual jurisdictional facts being proved, all others necessary to give validity to the discharge, are proved by the discharge itself. (Id.) And quere; may not the jurisdictional facts be proved by the recitals in the discharge, except perhaps the official character of the officer granting it? (see *ante*, note 694, p. 1016;) the latter was proved *aliunde* in the above case. And see S. C., *ante*, note 694, p. 1020.

When the mode of authentication prescribed by the act of congress is adopted, the following particulars are to be attended to.

1. *The attestation of the clerk.* The clerk must, in general, be the clerk of the court in which the judgment was rendered. (*Kirkland v. Smith*, 2 Mart. Lou. Rep. N. S. 497, 8. *Scott v. Blanchard*, 8 id. 306.) But where the records of a former territorial judge of probate were, on the admission of such territory into the union, transferred to the clerk of the county court, held, in Kentucky, that a transcript attested by such clerk, and conforming in other respects to the act of congress, was properly authenticated. (*Thomas v. Tanner*, 6 Monroe, 52, 53, 4.) It appeared on the face of the transcript that a part of the proceedings, viz. the probate of a will of J. T., was had before the territorial probate court, and that the other part, viz. the letters of administration, were, since the change of government, granted by the county court: the whole was probably, (though the case does not expressly so state,) certified in the usual way of authenticating the records of the county court. It was objected that the law authorizing the transfer, and constituting the county clerk a certifying officer of the transferred records, should be proved; but the court decided otherwise, giving full credit to the certificates &c., and presuming every thing right and according to the local law. (Id. and see ante, note 619, p. 860, 1.)

The clerk's attestation is to be in the form prescribed for the court whence the record comes, and not in that adopted by the court where it is sought to be used. (See infra, pl. 3, p. 1132, 3.)

In South Carolina, where, in debt on a judgment obtained in a county court of Virginia, against the defendant as bail of J., a copy of the judgment against J. and the defendant, purporting to be authenticated under the act of congress, was produced, but the certificate of the clerk merely stated the same to be a correct transcript of the judgment against J., without mentioning the defendant; held, that such certificate did not authenticate the proceedings against the defendant. (*Lindenberger v. Rosseau*, 2 Const. Rep. So. Car. (Treadway, 743.)

The clerk's certificate need not expressly state that the transcript is a copy of the whole proceedings. His certificate that the transcript is truly copied from the record of the proceedings of the court, and it appearing to be a complete record, is enough. (*Mudd v. Beauchamp*, Litt. Sel. Cas. 142.) Where the clerk certified as follows, viz. "that the foregoing is truly taken from the record of the proceedings" of his court, and this was accompanied by the certificate of the judge, as required, held, that the document so authenticated must be presumed to contain a full copy of all the proceedings in the case, and so was admissible. (*Ferguson v. Harwood*, 7 Cranch, 408, 410, 412.)

2. *The seal of the court, if there be a seal.* The seal, if there be one, is indispensable. (*Allen v. Thaxter*, 1 Blackf. 399.) If the court have no seal, that fact should appear, either in the certificate of the clerk or that of the judge. (*Kirkland v. Smith*, 2 Mart. Lou. Rep. N. S. 497. *Alston v. Taylor*, 1 Hayw. Rep. 395, note. *Craig v. Brown*, 1 Peters' C. C. Rep. 352, 3.) Where the clerk's certificate of a Louisiana record had the seal of the then late territory of New-Orleans affixed to it, the clerk certifying that no seal had as yet been provided for the state, the court said: "In this case the seal affixed is stated to be that of the territory of Orleans, not of the court; and it is further stated that no seal has been provided for the state; but from the impression of the seal,

it would seem that it had belonged to the court before the territory was erected into a state; in which case it might well continue to be the seal of the court, under the new form of government, although no new provision for that purpose had been made. There are strong reasons for believing that the circumstance which has given rise to this objection, (viz. as to the seal,) has proceeded from an inaccuracy of expression in the clerk." No decided opinion, however, was given on the point, the authentication being fatally defective in other particulars. (*Craig v. Brown*, *supra*.)

The seal of the court must be annexed to the certificate of the clerk; its being annexed to the certificate of the presiding judge will not answer. (*Turner v. Waddington*, 3 Wash. C. C. Rep. 126.)

And the same credit, it seems, is to be given to the seal, as is given, in England, to the seals of their own courts. (Per Parker, J., in *Dunlap v. Waldo*, 6 N. Hamp. Rep. 450, 453.)

3. *The certificate of the judge, chief justice, or presiding magistrate, &c.* The certificate under this branch of the requisition should be, according to the words of the law, by *the judge*; i. e. the judge of the court in which the judgment was given. The use of the definite article implies the idea of a judge, who alone constitutes the court. If the court has more than one member, none can certify but the *chief or presiding one*. And the certificate should contain *intrinsic* evidence that the person certifying was a judge of the court in which the judgment was rendered; and not only so, but that he was the sole, chief, or presiding judge, as the case may be. (Per Martin, J., delivering the opinion of the court in *Kirkland v. Smith*, 2 Mart. Lou. Rep. 497, 8.) See also *Stephenson v. Bannister*, 3 Bibb's Rep. 369, 370, stated *infra*. And, it seems, defects in this respect cannot be supplied *aliunde*. (*Id.* *Kirkland v. Smith*, *supra*.) If, however, the record offered in evidence shows that the person certifying is chief justice, the certificate, it has been said, will be sufficient, though the fact of his being the chief or presiding judge is not stated in his certificate. (*Mudd v. Beauchamp*, Litt. Sel. Cas. 142.) Quere however; for it ought to appear that the presiding judge possesses that character at the time of giving the certificate; (*Stephenson v. Bannister*, 3 Bibb's Rep. 370, stated *infra*;) and how can this fact appear save from the certificate?

The chancellor is *the* judge of the court of chancery, for the purpose of authenticating proceedings of his court under the act of congress. (*Scott v. Blanchard*, 8 Mart. Lou. Rep. N. S. 306.)

Where the judgment sought to be proved was rendered in the supreme court of the county of Jefferson, Mississippi, as appeared from the clerk's certificate, and the judge who certified, was *the judge of the first judicial circuit*, the authentication was decided to be incomplete. *Non constat*, say the court, that the judge who certifies or attests, presides in the court in which the judgment was rendered. (*Kirkland v. Smith*, *supra*.)

In Kentucky, a record of the court of the district of Union, South Carolina, attested by the clerk, with the seal of the court annexed, and the certificate of two judges stating it to be in due form, one of them stating himself to be the judge "that presided, and one of the judges of the superior courts of law of said state," and the other stating himself to be the senior "judge of the courts of law of said state," was held to be insufficiently authenticated. (*Stephenson v. Bannister*, 3 Bibb's Rep. 369.) "It cannot be admitted," say the court, "that, under this act, any judge of any court of the

same state may certify a record. It must be the judge, if there be but one, or if there be more, then the chief justice or presiding judge or magistrate of the court from whence the record comes, and he must possess that character at the time he gives the certificate. If this be the correct construction of the act, (and it is clearly susceptible of no other,) it is obvious that neither of the judges who have certified the record in question, has given to himself the character which would authorize him to authenticate the record by his certificate. The statement in the first certificate that the judge who gave it, was the judge 'that presided,' implies rather that he was not, than that he was the presiding judge of the court from whence the record came, at the time he gave the certificate; and the statement 'that he was one of the judges of the superior courts of law,' certainly cannot import that he was a judge, much less the sole judge, chief justice, or presiding judge, of that court. The certificate of the other judge, 'that he was the senior judge of the courts of law' of his state, so far from implying that he possessed the character which would authorize him to give such a certificate, does not even indicate that he had any relation to the court from whence the record came. Cases no doubt may occur, as was supposed in the argument, in which no judge can with truth or propriety, except at particular times, be denominated the judge, chief justice, or presiding judge or magistrate of a particular court; as where different judges constitute the same court at different times, by rotation, an instance of which is to be found in the organization of the general court of this state. But it does not follow that any judge of a court thus organized may certify a record when he is not the judge, chief justice or presiding judge, because he had been before, or might be thereafter possessed of that character. The only inconvenience that results from cases of that kind, is the delay that in some instances must occur in waiting until some judge is qualified by his situation to give the requisite certificate. This inconvenience, though perhaps of more frequent occurrence, is not greater than may be produced in other cases by the absence, death, resignation or removal of a judge; and these are cases evidently not provided for by the act of congress. Whether they were not foreseen, or were intentionally omitted, cannot be certainly told, nor is it material, for in neither case is it competent for a court to supply the defect. But were it admitted in the cases that are put, where there is no judge at the time the record is authenticated possessing the character of the judge, chief justice, or presiding judge, that any judge who, by the organization of the court, might in rotation become possessed of that character, would be authorized to certify the record, still we could not know that the court from whence the record in this case comes, was so organized. The laws of a sister state are clearly not matters of law here, of which the courts must be presumed to have a knowledge. From the nature of things, they must be mere matters of fact, and must be proved like other facts by competent testimony; but of the laws of South Carolina upon this subject, no evidence was produced in the court below, and none can be admitted in this court which was not produced in the inferior court. We are therefore of opinion that the record was correctly rejected as evidence in the court below." (Id.)

It is indispensable that the judge should state in his certificate, that *the attestation of the clerk is in due form*. These words in the certificate mean, that the attestation is in the form adopted, by positive law or practice, for authenticating similar records in the state whence the record comes. The intention of congress was, not that the at-

testation should be according to the form used in the state where it was offered, or to any other form generally observed; but according to the form prescribed for the court where the proceeding was had; and the certificate of the presiding judge is the only evidence which can be received of such form having been complied with. (*Craig v. Brown*, 1 Peters' C. C. Rep. 352. *Smith v. Blagge*, 1 John. Cas. 238, 9. *Tipton v. Mayfield's curator*, 10 Lou. Rep. (by Curry), 189, 193. *United States v. Wood*, 2 Wheel. Crim. Cas. 323. *Conklin's Treat.* 256. *Drummond v. Magruder*, 9 Cranch, 122, 125. *Barbour v. Watts*, 2 Marsh. Ken. Rep. 292. See *Henthorn v. Doe*, 1 Blackf. 160; *id.* 164, note (2).) Hence, a mere certificate verifying the hand-writing of the clerk is not enough. (*Craig v. Brown*, *supra*.) No evidence can be received, contradictory to the certificate, for the purpose of showing that the attestation is not in due form. (*Ferguson v. Harwood*, 7 Cranch, 408, 412. *Conklin's Treat.* 256.)

The judge's certificate should also show, it seems, the official character of the clerk; viz., that he is clerk of the court whose proceedings are sought to be authenticated. (*Barbour v. Watts*, 2 Marsh. Ken. Rep. 292. *Scott v. Blanchard*, 8 Mart. Lou. Rep. N. S., 303, 306.) Contra, see *United States v. Wood*, 2 Wheel. Crim. Cas. 323.

In Alabama, a decree of the justices of the county court of Cumberland, Virginia, was held to want all the ingredients required by the act of congress, when authenticated as follows: "I do certify that the foregoing is a true copy, taken from the records of the clerk's office of the county of Cumberland. In testimony whereof I have hereunto set my hand, and caused the seal of my office to be affixed, the 22d day of August, 1821, in the 46 year of our foundation. Virginia, Cumberland county, sct.: I, John Woodson, presiding justice of the peace, do hereby certify that the foregoing attestation is in due form. Given under my hand, this 23d day of August, 1821, John Woodson." The official seal was attached to the clerk's certificate. (*Allen v. Ex'r of Allen*, 1 Alab. R. 249.)

We noticed, ante, note 711, p. 1058, the mode of trial, where a domestic record is put in issue by the plea of nul tiel record. It was there seen also, that a judgment of a court of the United States, when put in issue by the like plea, must be tried by a jury. So too in England, as to an Irish judgment. (*Collins v. Mathew*, 5 East, 473. See S. C., 2 Smith's Rep. 25.)

It is otherwise, however, when the judgment of a court of record of a sister state is put in issue by the plea of nul tiel record. Such issue, is in general, to be tried by the court, and not by the jury. (*Hall v. Williams*, 6 Pick. 227, 239. *Carter v. Wilson*, 1 Dev. & Batt. Rep. 362, 365. *Curtis v. Gibbs*, 1 Penningt. Rep. 399, 405, per Pennington, J.)

The above cases of *Hall v. Williams*, and *Carter v. Wilson*, concur, that the trial is to be by inspection of the authenticated copy. Is this so where the record is not authenticated under the act of congress, but in the common law mode, as by a sworn copy, &c.? or, must the trial then be by jury? Some cases would seem to contemplate that the trial is to be by the court, only where the statute mode of proof is resorted to. (See *Hall v. Williams*, *supra*, in connection with *Collins v. Mathew*, 5 East 473, 4, 5, per Lord Ellenborough, S. C., 2 Smith's Rep. 25.) But we have seen by several decisions cited at p. 1125, 6, of this note, that the act of congress does not operate to exclude other modes of authentication; and many cases cited ante, note 636, p. 897, et seq., will be found, in which it has been expressly held, and that too upon demurrer, that nul tiel record, and not nil debet, was the proper answer to an al-

legation of the judgment of a court of record in a sister state. If, then, the question whether the trial is to be by the court, or by the jury, is to depend upon the particular mode of authentication adopted, how shall the pleader determine whether to conclude his plea to the court, or the country? He surely cannot anticipate in that stage of the proceedings that his adversary will resort to the statute instead of the common law mode; nor can his adversary, on the other hand, be deprived of his election to adopt which mode he pleases. This practical difficulty, it seems to us, shows, that in all cases, the trial is to be by the court, irrespective of the mode of proof; and that when the common law mode is adopted, the evidence to authenticate the copy is to be addressed to the court, and its sufficiency passed upon by them as preliminary to the act of inspection.

The rule in New-York, however, is different; for there, as we have seen, the trial of the issue of *nul tiel record* must, in all cases, be by jury. (See *ante*, note, 711, p. 1053; *Grab. N. Y. Prac.* 765, 2d ed.) And a decree of a court of chancery of another state, it seems, is an exception to the above general doctrine; for "orders in chancery are not of record to be tried by the record, but by a jury." See *Evans v. Tatem*, 9 Serg. & Rawle, 252, 261; *Doughty v. Fawn*, Yelv. 226; *Co. Litt.* 260; *Hunt v. Lyle*, 6 Yerg. 412; 8 id. 143; *Elliott v. Ray*, 2 Blackf. 31; *M'Kim v. Odom*, 3 Fairf. 94.)

In note 636, at pp. 900, 1, 2, 3, we discussed the question as to how the court before which the judgment of a neighboring state is sought to be proved, shall ascertain the local law upon which its effect depends. Several cases were there examined, and, among others, some at pp. 901, 2, 3, going to favor the notion that such law must be judicially recognized by the court which is to award to the judgment "full faith and credit." Such also will be found to be the bearing of *Ripple v. Ripple*, (1 Rawle, 386,) and *Thomas v. Tanner*, (6 Monroe, 53,) cited *ante*, note 619, p. 860.

The recent case of *Carter v. Wilson*, (1 Dev. & Batt. Rep. 362,) speaks on this subject, though rather unsatisfactorily, and without laying down any rule with respect to it. The point presented was, whether the replication of *nul tiel record*, to a plea of a former judgment of another state, is to be tried by the jury or the court. That was determined in accordance with the general doctrine stated *supra*; viz., that the trial was to be by the court; and Ruffin, C. J., who delivered the opinion, said: "Whatever difficulties the courts of one state may find as to the mode or means of ascertaining the effect of orders, or the operation of the adjudications of the courts of another state, it is now deemed settled law, that it is not the province of the jury. No issue can be made upon such a record, which will bring that question before the jury. It may be that the courts must take judicial notice of the laws of the sister states to this purpose and to this extent, aiding themselves with such lights from books, or the the professors of the law of the state from which the record comes, as they can obtain. It may also be, that, from necessity, a new rule of evidence must be adopted, whereby testimony may be taken, and addressed on this point to the court, and not to the jury. But since the case of *Mills v. Duryee*, 7 Cranch's Rep. 484, reviewed and affirmed in *Mayhew v. Thatcher*, 6 Wheat. Rep. 129, *nul tiel record* is the only plea or replication when a record of another state is declared on or pleaded in bar; and it is put upon the footing, not of a foreign judgment, but that of a domestic forum." (Id. 365.)

We noticed several cases, *ante*, note 636, p. 899, directly favoring the notion, that though the mode of authentication prescribed by the act of congress was not pursued,

still the judgment of a neighboring state when proved in any other legitimate mode, is within the constitution, and entitled to *full faith and credit*. Accordingly, in Pennsylvania, where a record of justices of New-Jersey was proved in the common law mode, and not at all in compliance with the act of congress, it was held conclusive under the constitution, even with respect to their construction of the law of the latter state under which they acted. (*Kean v. Rice*, 12 Serg. & Rawle, 203, 208. See also *Carter v. Wilson*, 1 Dev. & Batt. Rep. 362.) But see *Baker v. Field*, 2 Yeates' Rep. 592.

NOTE 772—p. 399.

See ante, notes 695, 6, 7, 8, p. 1025, et seq.

NOTE 773—p. 399.

As to the proof of the reference, or submission, where the action is brought upon an award, made under a rule of court, see *Still v. Halford*, 4 Camp. Rep. 17, cited ante, note 727, p. 1069; also *Watson on Arb. & Aw.* 223. No. 31, Law. Lib. Phil.

If the submission be by writing to which there is an attesting witness, he must be called to prove it, or his absence duly accounted for. (*Watson on Arb. & Aw.* 223. No. 31, Law. Lib. Phil. See also *infra*, as to proof of deeds, agreements, &c.)

NOTE 774—p. 400.

This, it is believed, is the general rule, where a party sets up an award, either as the foundation of an action or otherwise. Jurisdiction, or the power of making the award, must be shown; and that depends upon the submission, which such party is bound to establish. (See ante, note 695, p. 1027.)

The submission by all the parties must be proved. Accordingly, if the submission of the plaintiff be not shown, the action on the award will fail. So, as to the defendant. (*Dilly v. Polhill*, 2 Strange, 923. See 2 Wms. Saund. 61, (h.) note 2.) In debt by A. and B. against C. on an award, where the declaration alleged that the submission was by A. and his wife, and B. on the one side; and by C. and D. jointly and severally on the other; held, that the plaintiff must prove the submission of all. As to the submission of D., the court say, that C. might never have consented to submit unless D. joined. (*Ferrer v. Oven*, 1 Mann. & Ryl. 222, 227.) And the submission must be a valid and binding one; accordingly, where a suit in chancery between M. and divers infants, plaintiffs, and P. and T. defendants was, on the consent of the attorneys for the respective parties, ordered to be submitted to arbitrators; held, in an action on the award against P. and T., that inasmuch as the attorneys had no sufficient authority, as such, to consent to the submission on the part of the infants, the submission was not mutual, and consequently the award was bad. (*Biddell v. Dowse*, 6 Barn. & Cress. 255.) See this case, as to the power an attorney has to submit for an

infant or his next friend. As to agreements to submit, made by infants themselves, see ante, note 695, p. 1034; and see that note generally in respect to the validity of awards as depending upon the agreement or act of submission.

The submission must, ordinarily, be proved to have been to those who made the award; and an umpire cannot be called in, nor can the arbitrators in any measure delegate their power to others, unless authority to that effect be conferred by the submission. (See ante, note 695, p. 1030.)

If the submission were to two persons by name, and to a third to be appointed by the two, the formal act of appointing the third, according to the submission, must be duly proved. It cannot be established by a statement of the fact in the award; nor inferred from the three having acted together. (*Still v. Halford*, 4 Camp. Rep. 18, 19. *Watson on Arb. & Aw.* 224. No. 31, Law. Lib. Phil.) But the parties may, by their acts before the arbitrators, preclude themselves from disputing the authority of the third person thus called in; as where the latter acted with the arbitrators from the first, and the parties appeared before them, went through with the investigation, and made no objection; held, that the award was good. (*Rison v. Berry*, 4 Rand. Rep. 275, 279. *Underhill v. Van Cortlandt*, 2 John. Rep. 339. See S. C. 17 John. Rep. 405.) And in England, where the parties appeared before an umpire appointed without authority, and submitted themselves to his jurisdiction as if he had been properly chosen, held that an award made by him was good. (*Matson v. Trower*, 1 Ry. & Mood. 17.) A similar doctrine has been recognized in Maine. (*Norton v. Savage*, 1 Fairf. Rep. 455, 6, 7.)

As to what may be shown by the defendant, in an action on the award, see ante, notes 695, 6, 7, p. 1025, et seq.

NOTE 775—p. 400.

In New-York, an award of the Onondaga commissioners respecting lands, may be proved by an exemplification filed in the clerk's office of that county. (*Jackson ex dem. Woodruff v. Tibbits*, 2 Wend. 592.)

NOTE 776—p. 401.

The general rule is, that the party seeking advantage from a foreign law, or the law of another state of the Union, must prove its existence; for the courts of one state or country are not bound, ex officio, to notice the local regulations of another. (*Strother v. Lucas*, 6 Peters' Rep. 673. *Talbot v. Seeman*, 1 Cranch, 38. 1 Bald. Rep. 615. *Church v. Hubbard*, 2 Cranch, 187, 236, 7. *Haven v. Foster*, 9 Pick. 112, 130. *Raynham v. Canton*, 3 id. 293, 296. *Brackett v. Norton*, 4 Conn. Rep. 517, 520, 1. *Smith v. Blagge*, 1 John. Cas. 238. *Legg v. Legg*, 8 Mass. Rep. 99. *Hebron v. Marlborough*, 2 Conn. Rep. 18. *Lincoln v. Battelle*, 6 Wend. 482. *Fremoult v. Dedin*, 1 P. Wms. 431. *Ocean Ins. Co. v. Francis*, 2 Wend. 64. S. C. 6 Cowen's Rep. 64. *Brush v. Scribner*, 11 Conn. Rep. 388, 407. *Hempstead v. Reed*, 6 Conn.

Rep. 486. *Sterling v. Plainfield*, 4 id. 116. *Wilson v. Smith*, 5 Yerg. 379, 398, 9. *Greenwade v. Greenwade*, 3 Dana's Rep. 497. *Cone v. Cotton*, 2 Blackf. 82, 84. *Stout v. Wood*, 1 id. 71. *Elliott v. Ray*, 2 id. 82. *Thomas v. Robinson*, 3 Wend. 267. *State v. Jackson*, 2 Dev. 568. *Ripple v. Ripple*, 1 Rawle's Rep. 386. *Talbot v. David*, 2 Marsh. Ken. Rep. 609. *Stephenson v. Bannister*, 3 Bibb, 371. *Thompson v. Ketchum*, 8 John. Rep. 189. *Warner v. The Commonwealth*, 2 Virg. Cas. 95. *Dennison v. Hyde*, 6 Conn. Rep. 508. *Wirnwig v. Pawling*, 5 Gill & John. 508.)

The jurisprudence of the several states of the Union is not viewed as *foreign*, in any sense, in the courts of the United States. Hence, the supreme and circuit courts of the U. S., are to take judicial notice of the public laws of the several states, whenever they are called upon to consider and apply them, without their being formally proved. (*Owings v. Hull*, 9 Peters' Rep. 607, 625.) See *Hinde v. Vattier*, 5 id. 398; also *infra*, p. 1144.

The legislation of the federal government, likewise, is not to be regarded as foreign, by the courts of the several states of the Union: and therefore such courts are bound, ex officio, to notice all public acts of congress, (even including those which relate exclusively to the affairs of the District of Columbia,) without their being proved. (*Canal Company v. Rail Road Company*, 4 Gill & John. 1, 63. *Owings v. Hull*, 9 Peters' Rep. 625. *Young v. Bank of Alexandria*, 4 Cranch. 384, 388.) See *infra*, p. 1144.

Laws of one state, when operative in another, may be judicially noticed by the courts of the latter. Accordingly, in Indiana, where lands lying within that state, were conceded to be subject to the legislation of Virginia for certain purposes, held, that the courts there might take judicial notice of the Virginia laws, made in respect to such lands, without their being specially proved. (*Henthorn v. Doe*, 1 Blackf. 157, 161 to 164.)

Where no judicial notice can be taken of a foreign law, or the law of a neighboring state, as the case may be, and no proof is given in relation to it, the court will usually decide according to its own laws. (See the cases *supra*; also *Brown v. Gracey*, 2 Dowl. & Ry. 41, n (a).) And this, for the obvious reason, that the court not being judicially informed as to any other law, has no rule of decision save the laws of its own sovereignty. (*Allen v. Watson*, 2 Hill's Rep. 319, 322. *Sherrill v. Hopkins*, 1 Cowen's Rep. 103. *Legg v. Legg*, 8 Mass. Rep. 99. *Holmes v. Broughton*, 10 Wend. 75. *Mason v. Wash*, Breese's Rep. 16, 17. *Harper v. Hampton*, 1 Harr. & John. 710.)

In Louisiana, the same general doctrine has been laid down, viz., that if the court has no means of information as to what the law of another country or state is, it will act upon its own laws. (*Arayo v. Currell*, 1 Mill. Lou. Rep. 541. *Croizer v. Hodge*, 3 Mill. Lou. Rep. 357, 8.) But, if such country once constituted part of the same kingdom or government with that where the court sits, and they were governed by the same laws, the court will take judicial notice of the laws which prevailed in both before their separation, as matter of public history, and presume them unchanged till the contrary be shown. (Id. See *S. P. Malpica v. M'Kown*, 1 Mill. Lou. Rep. 248, 255.) Hence, on a question as to the laws of Mexico, the courts in Louisiana take judicial notice of the laws which were common to both before their separation, and decide according to such laws, until it be affirmatively shown that they have been changed by subsequent legislation. (*Arayo v. Currell*, 1 Mill. Lou. Rep. 523, 540, 1.

Malpica v. M'Kown, id. 254, 255, 6.) "It is not understood by us," say the court, "that the separation of the countries renders the laws in existence at the time they divide, foreign to each other. The act of political separation does not destroy the knowledge possessed in both, that they were subject to the same law, and what that law was. Any change made in it after the countries became independent of each other, any new statute passed in either, would certainly come under the general rule. Because it was at no time common to both. But those laws which were, stand on quite a different footing. The rule, like every other in regard to evidence, is founded on good sense. Courts require proof of the laws of another country, because they do not judicially possess the means of knowing them. But when they do possess judicial knowledge of them, there seems no object in requiring evidence of that which is already known. We have looked into the jurisprudence on this head, and do not discover that the different states of the Union require proof that the common law prevails in each. Or that it has ever been deemed necessary to establish by testimony, that the same system governs in England. It is true they require proof of British statutes, which never were in force within their own state, but this is in the distinction already alluded to." (*Malpica v. M'Kown*, supra; see also the same doctrine, in *Arayo v. Currell*, supra.) Further, see *Berluchaux v. Berluchaux*, 7 Lou. Rep. (Curry,) 543, 4.

In New-York, the rule has been laid down, that the courts of that state cannot take judicial notice of any of the laws of sister states, or of another country, at variance with the common law. (*Holmes v. Broughton*, 10 Wend. 75, 78.) It seems that there, as well as in Massachusetts, the common law will be presumed to prevail in certain states, viz., Rhode Island, Vermont, &c.; and that on a common law question, such law will be assumed to be the same as that of the state where the court, which is to adjudicate upon the matter, sits. (See *Id.* *Walker v. Maxwell*, 1 Mass. Rep. 103. *Pearsell v. Dwight*, 2 id. 34. *Thurston v. Percival*, 1 Pick. 415, 417.) So, *semble*, in Indiana. (*Cone v. Cotton*, 2 Blackf. 82, 84. *Stout v. Wood*, 1 id. 71.) See, on this subject, in Tennessee, *Wilson v. Smith*, 5 Yerg. 597, 8, 9.

In Kentucky, where a note made in Maryland was alleged to be usurious, and there was no proof showing what the law of Maryland was on that subject, held, that the court could not pronounce the note usurious. (*Greenwade v. Greenwade*, 3 Dana's Rep. 495.) "It is clear," say the court, "that the laws of Maryland govern the contract. If usurious or void in whole or in part, it must be made so by the laws of that state and not by the laws of Kentucky. The *lex loci* governs the contract, and by this test it must be tried. Each state has its own peculiar statutes on the subject of interest, as well as usury. In some of the states a greater rate of interest may be reserved by special contract on the loan of money, than is collectable on ordinary bonds or notes, and in others a much higher rate of interest may be legally reserved, than is sanctioned by the laws of Kentucky; and in others there are no prohibitory statutes against usury. What may be the legal rate of interest in Maryland, and whether any, and if any, what law existed in said state against usury when this contract was made, this court cannot judicially know. These are facts to be averred and proven like other facts." (*Id.* 497.) See *Hosford v. Nichols*, 1 Paige's Rep. 220, 225, 6.

In New-York, where infancy was interposed as a defence to a note made in Jamaica, and the defendant proved that he was under 21 years of age when it was executed, held, that the onus lay with him to show further, that by the law of Jamaica the defence was good. For these questions depend upon municipal regulations. (*Thompson v. Ketcham*, 8 John. Rep. 189, 193. *Male v. Roberts*, 3 Esp. Rep. 163.)

As to the mode of proving the *written laws* of a foreign country, the general rule is, that the best evidence of which the nature of the case is susceptible must be produced; in other words, no testimony shall be received, which presupposes better testimony attainable by the party who offers it. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority, that the law respects it not less than the oath of an individual. (*Church v. Hubbard*, 2 Cranch. 236, 7, per Marshall, C. J., delivering the opinion of the court. *Story's Conf. of Laws*, 529, 530. *Lincoln v. Battelle*, 6 Wend. 482. *Francis v. The Ocean Ins. Co.* 6 Cowen's Rep. 429. *Dougherty v. Snyder*, 15 Serg. & Rawle, 87.) In general, authenticated copies of written laws are expected to be produced. (*Story's Conf. of Laws*, 529. *Robinson v. Clifford*, 2 Wash. C., C. Rep. 1, 2. *Packard v. Hill*, 2 Wend. 411. *Chanoine v. Fowler*, 3 Wend. 173, 177.) But see *Trimby v. Vignier*, 6 Carr. & Payne, 25, where Bosanquet, J., expressed an opinion that, under certain circumstances, as if a foreign statute had received a thorough local construction by repeated judicial decisions, a professional witness of the foreign country might be asked, what was the law on that subject. So, it seems, as to the construction of, and practice under the written laws of another state, or country; (*Wilson v. Smith*, 5 Yerg. 399;) and the acts of the courts, where the law exists, may be resorted to for the same purpose. (*Seemle*, *Ripple v. Ripple*, 1 Rawle's Rep. 389.)

A copy of a foreign statute may be authenticated under the great seal of the country whose law is thus sought to be proved. (*Dougherty v. Snyder*, 15 Serg. & Rawle, 87. *Story's Conf. of Laws*, 530.) A sworn copy is also admissible. (*Lincoln v. Battelle*, 6 Wend. 482. *Church v. Hubbard*, 2 Cranch, 236, 7. *Dougherty v. Snyder*, 15 Serg. & Rawle, 87.) But a copy of a foreign edict or statute, merely certified by a consul residing in the country whose laws are sought to be proved, is not admissible. (*Church v. Hubbard*, 2 Cranch, 236, 7. *Lincoln v. Battelle*, 6 Wend. 482.) And a book purchased at a bookstore in Havanna, purporting to contain the royal charter establishing the court of consulado, was held inadmissible in New-York to prove the laws regulating such court. (*Packard v. Hill*, 2 Wend. 411. S. C. in error, 5 Wend. 375. See *Smith v. Elder*, 3 John. Rep. 105.) In *Chanoine v. Fowler*, (3 Wend. 173,) for the purpose of proving the commercial code of France, the French consul at New-York was introduced, who produced a book purporting to contain the code; it was not the official edition of the laws of France, but the witness stated that it was conformable to that edition; he also stated that it was an exact copy of the laws furnished by the French government to its consul at New-York; and so the parties agreed to consider it. The supreme court held, that the commercial code of France, being a written law, could not be thus proved. See *Richardson v. Anderson*, cited in the text, p. 402; also *Lacon v. Higgins*, 3 Stark. Rep. 178, S. C. 2 Dowl. & Ry. 38, cited in the text, at p. 403. In Pennsylvania, a printed copy of the Irish statutes, with the oath of an Irish barrister, that he re-

ceived them from the King's printer, in Ireland, and that they are good evidence there, has been admitted to prove the laws of Ireland. (*Jones v. Maffet*, 5 Serg. & Rawle, 523.) The libel and sentence of condemnation of a vessel in a foreign country, are not evidence to prove a statute of such country, the violation of which was the foundation of the sentence. (*Francis v. The Ocean Ins. Co.* 6 Cowen's Rep. 404. S. C. 2 Wend. 64. See *Walpole v. Ewer*, 2 Cond. Marsh. on Ins. 762.)

The confession of a defendant that a ship carried contraband goods, and that she was seized in consequence; and the testimony of the captain that the goods were contraband by the laws of Great Britain, were held sufficient proof of the revenue law of Great Britain, under which the ship was seized. (*Smith v. Elder*, 3 John. Rep. 105.)

Sometimes too, the acts of the government where the court sits, in relation to a particular law of a foreign country, may serve to authenticate the law so far as to render it evidence. On this principle, where marine ordinances of a foreign country had been promulgated as such in the United States, by the act of the department entrusted with foreign intercourse, held, that they might be read in evidence in the admiralty courts of the Union, without further authentication. (*Talbot v. Seeman*, 1 Cranch. 37, 8.) See *S. P. Radcliffe v. The United Ins. Co.* 7 John. Rep. 38, 50, 1.

In applying the rule requiring the best evidence to the case of foreign statutes, &c. courts will be guided by circumstances; and they will not require any species of evidence which the institutions and usages of the country, whose laws are sought to be established, do not admit. And, in general, where the usual evidence of a written law is not attainable, inferior evidence may be received. (*Church v. Hubbard*, 2 Cranch, 237, 8. *Consequa v. Willings*, 1 Peters' C. C. Rep. 225, 229. *Seton v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 175, 6, 7. *Raynham v. Canton*, 3 Pick. 296. *Lincoln v. Battelle*, 6 Wend. 482.) It is not to be presumed, however, that any civilized nation would refuse those acts for authenticating instruments or documents, which are usual and necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict or law of a foreign sovereignty, by the seal of the nation, would be rejected, unless the fact should appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy. (*Church v. Hubbard*, 2 Cranch, 237, per Marshall, C. J.) Hence, before inferior evidence can be received, the party seeking to avail himself of the foreign law, must show that the primary evidence is unattainable; as, that he applied for an authenticated copy and it was refused, &c. (*Id.* *Seton v. The Delaware Ins. Co.* 2 Wash. C. C. Rep. 175, 6, 7. *Story's Conf. of Laws*, 529.)

The cases cited *supra*, p. 1036, 7, of this note, are many of them direct authorities to show, that the laws of one state of the Union, when sought to be used in the courts of another, will not be judicially noticed, but must be proved. It is hardly necessary to observe, that though this rule embraces the unwritten laws of the several states, as well as their written or statute laws, it applies to the latter with peculiar force. (See *ante*, note 553, p. 802.) The rule results as a corollary from the position, universally maintained, that the several states, so far as the effect of their respective legislation is concerned, are entirely foreign to each other. The qualifications of the general doctrine will be seen by reference to several cases, *supra*, p. 1037, et seq., cited in our observations upon the point of judicial notice as to laws, &c. of other states and countries.

The several states, however, in respect to the mere mode of proving their *written* laws, do not stand precisely in the same relation to each other, as countries strictly foreign, and having no sort of political connexion. In pursuance of the 4th article of the constitution of the United States, empowering congress to prescribe the manner in which the acts, records, and proceedings, of one state, shall be proved in another, (see ante, note 771, p. 1125,) it has been provided, "that the acts of the legislatures of the several states, shall be authenticated by having the seal of their respective states affixed thereto." (2 L. U. States, 102, § 1.) By a subsequent law, the above provision was extended to the acts, &c. of the several territories of the United States and the countries subject to the jurisdiction thereof. (3 L. U. States, 621. See ante, note 771, p. 1125.)

The act of congress above referred to, does not require the attestation of any public officer, in order to authenticate copies of the legislative acts of the several states; but the seal of the state, affixed by an officer having the custody thereof; to a copy of the law sought to be proved, will be conclusive evidence of the existence of such law; no other formality is necessary; and in the absence of all evidence to the contrary, it must be presumed that the seal was annexed by an officer having competent authority to do the act. (United States v. Amedy, 11 Wheat. Rep. 392. United States v. Johns, 4 Dall. Rep. 412; S. C., 1 Wash. C. C. Rep. 363. Henthorn v. Doe, 1 Blackf. Rep. 157. State v. Carr, 5 N. Hamp. Rep. 367. Warner v. The Commonwealth, 2 Virg. Cas. 95.)

The act of congress has been held to exclude other modes of authentication. (State v. Twitty, 2 Hawks's Rep. 441. See Craig v. Brown, 1 Peters' C. C. Rep. 352. Canal Company v. The Rail Road Company, 4 Gill. & Johns. 1, 63.) But, we apprehend, the contrary doctrine more generally prevails. The seal of the state, when properly affixed, is the highest, and, indeed, is conclusive evidence of the existence of the statute. (See ante, note 771, p. 1125; also the cases above cited.) But other evidence, competent, independent of the act of congress, may still be received. (State v. Carr, 5 N. Hamp. Rep. 367, 370. Kean v. Rice, 12 Serg. & Rawle, 203. Ellmore v. Mills, 1 Hayw. Rep. 359. Taylor v. Bank of Illinois, 7 Monroe, 576, 585, 6.) Accordingly, in several of the states, printed books containing the statutes of other states have been held admissible, and *prima facie* sufficient, to prove such statutes.

Thus, in Massachusetts, a volume purporting on its face to contain the laws of a sister state, is admissible. (Raynham v. Canton, 3 Pick. 293, 296, 7.) The court concede that, in England, it does not seem to be settled as to *foreign* laws, that they may be thus established. But, they say, the connection, intercourse and constitutional ties, which bind together the several states, require that this species of evidence should be sufficient until contradicted. (Id.) The law being proved to exist in this mode, it must be presumed to exist, until proved by as good evidence to have been repealed. (Id. p. 297.) This proof of its existence cannot be contradicted "by the testimony of one who may have merely resided a short time in the country, nor by that of any citizen or subject." (Id.)

In Vermont, an act incorporating the Bank of Troy in New-York, was offered to be read from a printed volume of the laws of New-York, purporting to have been published by authority of the legislature; the act was declared to be a public one, and the court said: "If such act be proved agreeably to the act of congress, the courts

are bound to admit it; they may admit it although not so proved. Let the act be read from the printed book." (State v. Stade, 1 D. Chip. Rep. 303.)

The same doctrine prevails in Kentucky. (Taylor v. The Bank of Illinois, 7 Monroe, 585, 6, 7.)

In Pennsylvania, the printed statute books of another state, purporting to have been published under the authority of such state, are received as evidence of its laws. And it makes no difference, it seems, whether the law intended thus to be proved, be public or private. (See Kean v. Rice, 12 Serg. & Rawle, 203; Thomas v. Musser, 1 Dall. Rep. 462; Biddis v. James, 6 Binn. Rep. 321.)

The same doctrine prevails in Virginia. (Taylor's adm'r v. The Bank of Alexandria, 5 Leigh, 471, 476.)

So also in North Carolina. (Poindexter's ex'rs v. Barker, 2 Hayw. Rep. 173.)

In South Carolina, Prince's Digest of the laws of Georgia, purporting to have been compiled and published under the authority of the legislature of the latter state, has been held admissible to prove the statute law of Georgia. (Allen v. Watson, 2 Hill's Rep. 319. Lee's adm'r v. Ware, 1 id. 313.) In both cases the admissibility of this evidence was put upon the ground of its being commonly known, by the bar and bench of South Carolina, that Prince's Digest is received in Georgia as authority for the statute law of that state. And it is admitted, that there might be some danger if such modes of proof were indiscriminately adopted, to establish the laws of foreign states or countries.

In New-York, the statutes of another state, it seems, must be proved by an exemplification; and the printed statute book of such state is not evidence. (Packard v. Hill, 2 Wend. 411, 412, 413. See S. C. in error, 5 id. 175; also Duncan v. Duboys, 3 Johns. Cas. 125, 6; and supra, p. 1139 of this note.)

As to the mode of ascertaining the local law or usage, in giving effect to a judgment of a neighboring state, sought to be used as evidence in the courts of another, see ante, note 636, p. 900, 901, 2; also ante, note 771, p. 1134.)

The *unwritten* laws, customs, and usages, of a foreign country, or of another state of the Union, may be proved by parol evidence. Mr. Story, in his commentaries upon the conflict of laws, says: "The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath." (Story's Conf. of Laws, 530. See also Kinny v. Van Horne, 1 John. Rep. 335, 394; Woodbridge v. Austin, 2 Tyl. Rep. 364, 367; Robinson v. Clifford, 2 Wash. C. C. 1, 2; Livingston v. The Maryland Ins. Co., 6 Cranch, 274; Lincoln v. Battelle, 6 Wend. 482; Bagley v. Francis, 14 Mass. Rep. 453; Willings v. Consequa, 1 Peters' C. C. Rep. 225, 229; Brush v. Wilkins, 4 John. Ch. Rep. 506, 520; Chanoin v. Fowler, 3 Wend. 177; Wilson v. Smith, 5 Yerg. 398, 9; Taylor v. Swett, 3 Mill. Lou. Rep. 33, 36; M'Rae v. Mattoon, 13 Pick. Rep. 53.) The unwritten law of a foreign country, or another state, may also be proved by books of reports and cases decided. (Raynham v. Canton, 3 Pick. 293, 296. M'Rae v. Mattoon, 13 id. 58. Dougherty v. Snyder, 15 Serg. & Rawle, 87. Latimer v. Eglin, 4 Dess. Eq. Rep. 26, 32. Brush v. Scribner, 11 Conn. Rep. 407.) So, by public history; (Dougherty v. Snyder, 15 Serg. & Rawle, 87, per Duncan, J.;) and by the public documents of the country. (Semble, Wilson v. Smith, 5 Yerg. 398, 9.) Sometimes, it is said, certificates of persons in high authority have been allowed as evidence. (Story's

Conf. of Laws, 580. See *In Re Dormoy*, 3 Hagg. Eccl. Rep. 767.) See *Leland v. Wilkinson*, 6 Peters' Rep. 317.

A question has occasionally arisen, whether, in the absence of proof on the particular subject, a foreign law, sought to be established, should be presumed written, so as to exclude parol evidence. In *Livingston v. The Maryland Ins. Co.*, (6 Cranch, 274,) parol evidence was admitted in the circuit court to show the laws of Spain, relative to the trade of our colonies in America, and particularly of Peru; and the supreme court, on error brought, held, "that as the laws and regulations by which this trade was regulated, are not proved to have been in writing, but may have depended on instructions to the governor, they might be proved by parol." (Id. 280.) In *Dougherty v. Snyder*, (15 Serg. & Rawle, 84, 87,) the rule was laid down as universally applicable, that the party objecting to parol evidence of a foreign law, must show it to be a written one, or the objection will not avail. The above case of *Livingston v. The Maryland Ins. Co.*, was cited as maintaining this doctrine, and *Duncan, J.*, delivering the opinion of the court, said, it could make no difference whether the law in question was a law regulating trade, or a law on any other subject. But where parol evidence was offered to prove the regulation of Cuba, prohibiting the exportation of specie, the court rejected the evidence, saying: "This is a commercial regulation of the government, and a subject of pure municipal arrangement. The law must be presumed to be written, and therefore it should be produced; or evidence given that it was not in the party's power to obtain a certified copy of it." (*Seton v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 175, 6.) In *Robbinson v. Clifford*, (id. 1, 2,) a similar doctrine was held, the court presuming from the very nature of the law that it was written.

A party offering parol evidence of the unwritten laws of another state or country, is not bound to show, as a preliminary, that no statute exists with regard to the particular subject. (*Newsom v. Adams*, 2 Mill. Lou. Rep. 153, 4.)

There is some seeming diversity among the cases upon the question, whether, since foreign laws and the laws of neighboring states are to be proved as facts, they are to be proved as facts to the jury, (if the case is a trial at common law,) or as facts to the court. Lord Mansfield, in *Moyston v. Fabigas*, (Cowp. Rep. 174,) said: "The way of knowing foreign laws is, by admitting them to be proved as facts; and the court must assist the jury in ascertaining what the law is." Mr. Justice Story advances the opinion, that laws requiring to be thus proved, are to be proved to the court; for all matters of law are properly referrible to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign law, to be applied to the matters in controversy before them. "The court are therefore to decide what is the proper evidence of the laws of a foreign country; and where evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand." (Story's Conf. of Laws, 528.) This doctrine was held in Maryland. (*De Sabry v. De Laistre*, 2 Har. & John. 219.) In *Thrasher v. Everhart*, (3 Gill. & John. 234,) it was conceded by the court to be the general rule, that foreign laws are facts to be found by the jury; but held, that the rule was not applicable to a case where the laws are introduced to enable the court to determine whether a written instrument is evidence. In such case the evidence always goes in the first instance to the court, which, if the evidence be clear and un-

contradicted, may, and ought to decide, what the foreign law is, and act accordingly. If what the foreign law is, be matter of doubt, the court may decline deciding it, and may inform the jury, that if they believe the foreign law attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence; if not, they should reject it. (*Id.* 242, 3.) In North Carolina it has been laid down, that the existence of a foreign law is a question of fact, the proof of which is for the jury. But when established, the meaning of the law, its construction and effect, is the province of the court. It is matter of professional science, and as the terms of the law are taken to be ascertained by the jury, there is no necessity of imposing on them the burthen of affixing a meaning on them, more than on our own statutes. It is the office of reason to put a construction on any given document, and therefore it naturally arranges itself among the duties of the judge. (*State v. Jackson*, 2 Dev. Rep. 563, 566.) See also *Consequa v. Willings*, 1 Peters' C. C. Rep. 229, per Washington, J. As to the doctrine on this subject in New-York and Connecticut, see *Francis v. the Ocean Ins. Co.*, 6 Cowen's Rep. 429; *Bracket v. Norton*, 4 Conn. Rep. 517. See further, per *Bosanquet, J.*, in *Trinby v. Vignier*, 6 Carr. & Payne, 25.

We have seen *supra*, p. 1137, that the laws of the several states are to be judicially noticed in the courts of the federal government, without being formally proved. This, probably, is confined to the public laws of the states. In the case of private laws some proof would doubtless be requisite. (*Leland v. Wilkinson*, 6 Peter's Rep. 317.) A mere certificate, without producing the law will not answer. (*Id.*) Even in the case of a private act, however, a book printed by the public printer of Virginia, by order of the legislature, agreeable to a general act of assembly, was held sufficient evidence. (*Young v. The Bank of Alexandria*, 4 Cranch, 384, 387, 8. *United States v. Johns*, 4 Dall. 412 415. 1 Wash. C. C. Rep. 363, S. C.)

The circuit court of the U. S., in deciding on titles to real property in the different states, act upon the same evidence which would be admissible in the state courts where the property lies. Hence, in the circuit court of the district of Ohio, the book called the Ohio land laws, published by authority of law in that state, was admitted to prove title to lands lying there; it appearing that the state courts of Ohio had adopted the book as evidence to the same extent. (*Hinde v. Vattier*, 5 Peters' Rep. 398, 400, 1.)

We also saw *supra*, p. 1137, that the several states are bound to take judicial notice of the public acts of congress. In respect to private acts however, the rule is otherwise. (*Wright v. Patton*, 10 John. Rep. 300.) In Virginia, the printed copies of acts of congress, distributed to the executives of the several states to be distributed among the people, are evidence in such cases. (*Taylor v. The Bank of Alexandria*, 5 Leigh, 471.) Whether such is the law in New-York, *quere*. At any rate, it seems, where the party against whom the law is sought to be used, is the individual for whose benefit it was passed, the printed statute book will be evidence. (*Duncan v. Dubois*, 3 John, Cas. 125, 6.)

Where the copy of a statute of another state introduced in evidence, does not exhibit the date, or time of its passage, and such time becomes material, the defect cannot be supplied by parol. (*State v. Jackson*, 2 Dev. Rep. 563, 565.) But it is not necessary that the time of its passage should be made to appear by the caption of the act. It may be collected from other parts of it, or by inference from its provisions. (*Id.*)

The duration of a statute of another state will be presumed, when once shown to exist, until proved by as good evidence, to have been repealed. (*Raynham v. Can-*

ton, 3 Pick. Rep. 293, 297.) The repeal of such statute cannot be shown by parol; but must be proved by the statute itself, if it contain an express limitation, or by a repealing statute. (Id. State v. Jackson, 2 Dev. Rep. 563, 565.) See United States v. Johns, 4 Dall. Rep. 415. Further, as to evidence of repeal, see Albertson v. Robeson, 1 Dall. Rep. 9.

NOTE 777—p. 402.

In England, the certificate of Welsh judges, with respect to the practice in their courts is admissible evidence to show such practice. (Broughton v. Randall, Cro. Eliz. 502, 3. See per Lawrence, J., in The King v. Mawbey, 6 T. R. 633, 9.)

NOTE 778—p. 402.

A copy of public documents, transmitted to congress by the President of the United States, and printed by the printer to congress, may be used to prove a letter contained among such documents, addressed by the British secretary of state to the American ambassador, without further authentication. "A greater strictness of proof, in respect to such public matters of state, and when they are introduced collaterally, and not as matter of fact in issue, would be inconvenient, and is not now, in practice, required." (Radcliffe v. The United Ins. Co. 7 John. Rep. 38, 50, 51.) See Talbot v. Seeman, 1 Cranch. 37, 8.

NOTE 779—p. 406.

The printed journals of congress have been allowed to be read, in Pennsylvania, without other proof of their authenticity. (Commonwealth v. De Longchamps, Oyer and Term. Phil. 1784, M. S. Whart. Dig. 280, pl. 112. 2d ed.)

The votes of assembly in that state, have been admitted to prove the time of the notification of the repeal of an act of assembly by the king and council; but not answering the purpose fully, the minutes of the council were sent for, and read without opposition. (Albertson's lessee v. Robeson, 1 Dall. Rep. 9.)

In New-York, the senate journals, proved by the clerk to have been printed by the printer to the senate, and laid upon the tables of members, have been received as *prima facie* evidence. (Root v. King, 7 Cowen's Rep. 613, 636.)

And a printed copy of public documents, proved to have been transmitted to congress by the president of the United States, and printed by the printer to congress, has been holden admissible without other authentication. (Radcliffe v. The United Ins. Co. 7 John. Rep. 38, 50. See ante, note 778, p. 1145.)

NOTE 780—p. 408.

In New-York, the newspaper notice, to be effectual, must be given, it seems, in a newspaper printed in the city or county where the partnership business is carried on; Vol. I^o

or in some other way public notice is to be given. The reasonableness, of it, may, perhaps, become a question of fact in the particular case. (Per Van Ness, J., in *Ketchum v. Clark*, 6 John. Rep. 144, 147, 8.) But where the facts constituting notice are ascertained, it is a question of law whether the notice be reasonable or not. (*Mowatt v. Howland*, 3 Day's Rep. 353.)

Notice by advertisement in the newspaper has very generally been held to serve, in respect to all persons who had no previous dealings with the firm, (*Id.* *Lansing v. Gale & Ten Eyck*, 2 id. 300. *Nott v. Douming*, 6 Lou. Rep. (Curry,) 680, 683. *Graves v. Merry*, 6 Cowen's Rep. 701. *Martin v. Walton*, 1 M'Cord's Rep. 16. *Mowatt v. Howland*, *supra*. *Shaffer v. Snyder*, 7 Serg. & Rawle, 503, 4.) Others, however, must have special notice. (See the above cases; also *Kelly v. Hurlburt*, 5 Cowen's Rep. 534, 536.) But in South Carolina, where the plaintiff, (a banking company,) had had previous dealings with the defendants, (a firm,) and it was proved that notice of dissolution had been given by the defendants in a newspaper taken by the bank; held, that this was equivalent to express notice. (*Bank of South Carolina v. Humphreys*, 1 M'Cord, 388.) In another case, in the same state, it was proved that notice was given of dissolution by advertisement in a newspaper under date of April 13th, 1813; the note upon which the plaintiffs prosecuted was dated May 15th, 1815, and was signed, "Wm. Walton, & Co., per John Walton," (one of the firm;) it also appeared that the defendants, as a firm, were indebted to the plaintiffs, at the time the note was given, in a large amount: and although the plaintiffs showed that they had had previous dealings with the defendants, in their partnership character, yet held, that the jury, under these circumstances, might well find that the plaintiff knew of the dissolution. (*Martin v. Walton*, 1 M'Cord, 16.) In respect to the general proposition that mere newspaper notice is enough as to those who have had no previous dealings with the firm, but that others must have special notice, Mr. Justice Colcock, delivering the opinion of the court, in the case last cited, says: "All that is meant in laying down the rule is this, that public notice in the gazette shall be conclusive on those who have had no dealings with the co-partnership. But as to such as have had dealings, it shall not be so considered, unless, under circumstances, it appear satisfactorily to the jury, that it operates as notice to the party. The rule cannot mean any thing so absurd as that one who had had dealings with a co-partnership may not read their notice in a newspaper, as well as one who never had such dealings. Reason would seem to say in such a case, that after the long established practice of advertising the dissolution of co-partnerships, those who would be most affected by such dissolutions, would be most apt to look to the usual source of information." (*Id.* p. 18.)

With respect to a *dormant partner*, he is protected by an actual dissolution, without any notice being given. (*Kelly v. Hurlburt*, 5 Cowen's Rep. 534. *Carter v. Whalley*, 1 Barn. & Adol. 11. *Armstrong v. Hussey*, 12 Serg. & Rawle, 315.)

As to notices in the newspapers of the formation and dissolution of special and limited partnerships in New-York, see 1 R. S. 764, et seq., and particularly, §§ 9 and 24, at pp. 765 and 737.

NOTE 781—p. 410.

It seems that an examined copy of the returns made annually of parish registers, under the 70th canon of 1603, is not receivable unless the original register is proved to be lost. Otherwise, however, if the returns were made under the statute, 52 Geo. 3. c. 146, §§ 6, 7. (*Walker v. The Countess of Beauchamp*, 6 Carr. & Payne, 552.) Proof that the proper officer, on being applied to for a copy or extract from the original register, told the applicant there was none, is not sufficient to let in secondary evidence. The fact should be proved by the oath of the officer. (*Id.*)

NOTE 782—p. 410.

See post, note 786, p. 1148.

There is a distinction as to the proof of marriage between criminal cases, such as bigamy, &c., and mere civil cases. In Massachusetts, in a civil action, (e. g. assumption to recover for necessities furnished to the wife of the defendant, or on questions as to the wife's settlement,) a record of marriage solemnized by a minister or justice, founded on a certificate duly made, is legal evidence of the marriage. (*Millford v Worcester*, 7 Mass. Rep. 48.) But except in prosecutions of a criminal nature, as bigamy, &c., marriage generally is provable by cohabitation, reputation, acknowledgement of the parties, reception in the family, and other circumstances from which a marriage may be inferred. (*Fenton v. Read*, 4 John. Rep. 52, 54. See ante, note 469, p. 622, §. *Kibby v. Rucker*, 1 Marsh. Ken. Rep. 331.)

The marriage may be proved in all cases by persons present at the ceremony. Indeed this species of evidence is considered better proof of the marriage than the record. And on an indictment for adultery, the record is not, *per se*, enough, without proving the identity of the parties by witnesses who were present. (*Commonwealth v. Norcross*, 9 Mass. Rep. 492.) So also, *semble*, on libels for divorce where a second marriage of the defendant, during the life of his first wife, is sought to be proved. (*Ellis v. Ellis*, 11 id. 92.) The same general doctrine as to the necessity of calling witnesses who were present at the ceremony, in order to identify the parties in cases of indictment for adultery, seems to prevail in Maine. (*Wedgwood's case*, 8 Greenl. Rep. 75.) Further as to proof of marriage in New-York and Massachusetts, see ante, note 700, p. 1043, 4; also ante, note 415, p. 543.

In prosecutions for bigamy, the confession of the party has been held not enough, *per se*, to prove the first marriage. (*The People v. Humphrey*, 7 John. Rep. 314.) In such cases, a marriage in fact must be proved. (*Id.*) The same doctrine has been laid down as to proving the marriage of the plaintiff in actions of *crim. con.* (*Id.* *Morris v. Miller*, 4 Burr. 2057, 2059. *Kibby v. Rucker*, 1 Marsh. Ken. Rep. 331.) But this has been said to be the only *civil* action, in which proof of an actual marriage, as contradistinguished from acknowledgments of the parties, cohabitation, &c., is requisite. (See *Morris v. Miller*, supra. *Birt v. Barlow*, Doug. 171, 2. 2 Stark. Ev. 251, 6th am. ed.) These confessions however, in Pennsylvania, are not excluded as incompetent; but there the defendant's positive and unequivocal acknowledgment,

made after the fact of the seduction, and consequently against his own interest, may be given in evidence to prove the marriage. (*Forney v. Hallacher*, 8 Serg. & Rawle, 159. See also Bull. N. P. 27. 2 Stark. Ev. 6th am. ed. 251, 2, n. (c).) The same doctrine has been laid down in that state, as to the proof of marriage in prosecutions for bigamy. (*Commonwealth v. Murtagh*, Ashm. Rep. 272.) In this case, the relaxation of the English rule intended to be allowed, was thus pointed out by King, President, delivering the opinion: "I consider that confessions and acknowledgments of a prior marriage are only evidence of the fact; that these confessions and acknowledgments derive their force from the time, manner, and circumstances under which they are made, and that connected with these, they may exhibit the most conclusive or the weakest testimony which can be offered of the fact. It is for intelligent jurors, aided by experienced courts, to weigh and discriminate their relative forces." (Id. 275.) So also, *semble*, in Maine. (See *Cayford's case*, 7 Greenl. 57.) In Connecticut the rule is the reverse; and neither cohabitation, reputation, confessions, nor all combined, are sufficient to convict; nor are they even admissible; a marriage in fact must be proved. This was directly held, on an indictment of the defendant for incest with his legitimate daughter, where the prosecution is bound to make out a marriage between the prisoner and such alleged daughter's mother. (*The State v. Roswell*, 6 Conn. Rep. 446.) Such testimony has been rejected in that state in many instances, upon indictments for bigamy, adultery, and in actions of *crim. con.* (See id. 449; Swift's Ev. 140; Swift's Dig. 501.) In vindication of the rule as held there, Daggett, J., delivering the prevailing opinion says: "The cohabitation of persons as husband and wife, without any marriage, is too frequent to need comment; and confessions of marriage in all such cases, whether a marriage in fact has taken place or not, may be expected, to justify the conduct and screen the offenders from censure and punishment. Unlike confessions in ordinary cases, made against one's interest, these are not unfrequently prompted from the most selfish motives. Besides, a man or woman may verily suppose a marriage to have been consummated, when no lawful marriage ever took place. Ignorance of the law on this subject may be presumed in many cases, and confessions of a marriage made without a knowledge to constitute it such." (*The State v. Roswell*, supra, p. 451. But see the dissenting opinion of Peter's, J., id. 451, 2, 3, and the several English cases cited and reviewed by him.) In Massachusetts, upon an indictment against two for lascivious cohabitation, one being married, confessions as to the fact of their marriage is not sufficient to convict. (*Commonwealth v. Littlejohn*, 15 Mass. Rep. 163.)

Such is the doctrine as held by several courts in respect to *domestic* marriages. From the very nature of the case it should seem that when applied to *foreign* marriages, it ought to admit of some relaxation. Accordingly in Maine, a foreign marriage is held sufficiently proved in prosecutions for lewd cohabitation, adultery, or bigamy, by the prisoner's confession. (*Cayford's case*, 7 Greenl. 57.) So also in Virginia. (*Warner v. The Commonwealth*, 2 Virg. Cas. 95.) As to the English rule on this subject, see Roscoe's Crim. Ev. 236, et seq.

NOTE 782—p. 410.

See *Birt v. Barlow*, Doug. 171, et seq., and *Commonwealth v. Norcross*, Ellis v. Ellis, and *Wedgwood's case*, cited in the next preceding note.

NOTE 784—p. 410.

In England, a register of *baptisms*, stating also the day of *birth*, cannot be used to prove the latter. (See *Rex v. Clapham*, 4 Carr. & Payne, 29, stated ante, note 464, p. 616. See also *S. P.*, *Burghart v. Angerstein*, 6 id. 690, per Alderson, B.) An entry of baptism in 1820, (the marriage having taken place in 1813,) reciting that the party was "said to be born in 1795," is not admissible either as evidence of non-age, or in order to prevent the suspicion of the suppression of evidence. (*Dains v. Donovan*, 3 Hagg. Eccl. Rep. 301.)

NOTE 785—p. 411.

The fleet book has once been received on a question of pedigree, though with great reluctance. (*Lawrence v. Dixon*, Peake's Rep. 136.)

NOTE 786—p. 411.

In respect to registers of marriage, birth and death, as evidence, several cases were introduced ante, note, 464, p. 616; see also ante, note 468, p. 622.

A bishop's register is, in England, evidence of facts stated in it. (*Arnold v. The Bishop of Bath*, 5 Bing. 316. *S. C.*, 2 Moore & Payne, 559.) But a register of burials kept by the Wesleyan Chapel, has been there repudiated as incompetent. (*Whit-tuck v. Waters*, 4 Carr. & Payne, 375. See *S. C.*, stated ante, note 459, p. 615.) See also as to registers of dissenting chapels, ante, note 464, p. 616. A register of the births of dissenter's children, kept at a public library, is not evidence. (*Ex parte Taylor*, 1 Jac. & Walk. 463.)

A sworn copy from the register book of the burials in Christ Church, (Philadelphia,) has been received in evidence to show the fact of the death of a person and the time. (*Lewis v. Marshall*, 5 Peters' Rep. 470, 475, 6.)

In Louisiana, the register of baptisms and births, is evidence, and, it seems, when shown to exist, precludes parol testimony. (*Duplessis v. Kennedy*, 6 Lou. Rep. (Curry) 231, 242. *Fletcher v. Cavalier*, 4 Mill. Lou. Rep. 267.) An alteration in such baptismal register, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of *birth*, though the alteration be not accounted for. Otherwise, however, if the document were offered to establish the *legitimacy* of the person named. (*Fletcher v. Cavalier*, supra.) A register of burials is also evidence there; and where a register of baptisms proved that a child was christened by the name of

"Francisco Antonio," and a register of burials attested the interment of a person named "Francisco," and no question was raised in the inferior court on the point of variance; held, that on appeal, the appellate court must consider the one whose death was attempted to be proved, to be the person whose death, according to the pleadings, it was important to establish. (*Celis v. Oriol*, 6 Lou. Rep. (Curry,) 403.)

In Pennsylvania, a copy of the register of marriages, baptisms, and burials, kept in a parish in the island of Barbadoes, certified to be a true copy by the rector of the parish, and proved by the oath of a witness, taken before the deputy secretary of the island and notary public, (his hand-writing and office being proved,) has been received as good evidence of pedigree. (*Kingston v. Lesley*, 10 Serg. & Rawle, 383.) And a copy of a register of births and deaths of the people called Quakers, kept in England, proved to be a true one before the lord mayor of London, has also been allowed as evidence in Pennsylvania, to prove the death of a person. (*Hyam v. Edwards*, 1 Dall. Rep. 2.) By a statute in that state, the register kept by any religious society of births, marriages and deaths, is declared good evidence. The act is silent as to the mode of proof; and therefore the common law mode, which is by a sworn copy, or the production of the original, must be resorted to. A certified copy under the seal of the corporation or religious society, is not admissible. (*Stoever v. Whitman's lessee*, 6 Binn. 416. See S. C., ante, note 464, p. 616.)

In Maine, a book was produced by a town clerk, which had been received by him from his predecessor in office as an official record; it purported to contain a record of births and marriages in such town, but contained no title or attestation of its character, nor any certificate showing by whom the entries in it were made; and held, that it was proper *prima facie* evidence to prove the age of a person named in it. (*The Inhabitants of Sumner v. The Inhabitants of Sebec*, 3 Greenl. 223. See *Martin v. Bunby*, 2 Harr. & John. 249.) A copy from the records of the town is there admissible. (*Wedgwood's case*, 8 Greenl. 75.)

In New-York, sworn copies of such registers, when the original is of a public nature, have been held admissible. (See *Jackson, ex dem. Bogert, v. King*, 5 Cowen's Rep. 237, stated ante, note 464, p. 616. See also *Jackson, ex dem. Miner, v. Boneham*, 15 John. Rep. 226, stated in the same note.) See, as to records of marriages, in New-York, ante, note 700, p. 1043.

In North Carolina, a registry of births, marriages, and burials, kept pursuant to the statute, is legal evidence of marriages, births, &c., especially on questions of pedigree. And the court lay it down as a general rule, that a book kept by public authority is necessarily evidence of the facts recorded in it. (*Jacock's lessee v. Gilliam*, 3 Murph. Rep. 47, 52.)

As to records of marriages in Massachusetts, see ante, note 415, p. 543, also note 700, p. 1043, 4, and the cases cited.

In the case of *Jackson, ex dem. Miner, v. Boneham*, supra, a sworn copy of the records of the town of Stonnington, Connecticut, was held admissible in New-York, on a question of pedigree. In Ohio, where the defendant, on a trial in ejectment, offered the deposition of the town clerk of New Milford, (Connecticut,) to prove the correctness of a copy of the records of that town, showing the time of the defendant's birth, the court held, that it must be further shown that the record copied was kept under the authority of law; that a sworn copy of a private paper is nothing without proof of the original be-

ing executed; and until it was proven that the paper copied by the clerk in this case as a record, was legally entitled to that character, it was inadmissible. (*Richmond v. Patterson*, 3 Hamm. Rep. 368.)

Further, in respect to registers of marriage, in the United States, see *ante*, note 782, p. 1147, 8.

NOTE 787—p. 412.

A succinct statement of the law of congress, relative to the registry of vessels, will be seen by reference to 3 Kent's Comm. 141, et seq., together with an able commentary upon it.

The register is not a document required by the law of nations as expressive of a ship's national character; (*Cheminant v. Pearson*, 4 Taunt. Rep. 367;) but is of local or municipal regulation, and the object of it has been said to be, to show the character of the vessel, and entitle her to the advantages secured by law to the vessels of our own country. (*Sharp v. The United Ins. Co.* 14 John. Rep. 204, per Spencer, J.) Transfers of ships, it seems, in England, are declared void unless certain formalities prescribed by the registry acts are pursued. But there is no corresponding provision in the act of congress. (*Colson v. Bonzey*, 6 Greenl. 474, 477. See also *Bixley v. The Franklin Ins. Co.*, 8 Pick. 86, 88, 9. *Birbeck v. Tucker*, 2 Hall's Rep. N. Y. C. P. 121. *Ring v. Franklin*, id. 1. *Wendover v. Hogeboom*, 7 John. Rep. 308.)

The effect and competency of the register of a vessel as evidence, has been considered in several cases in the courts of this country. Our laws recognize the possibility of the register's existing in one name while the ownership is in another. The ownership and character of a vessel, are matters *in pais*. The register is not an exclusive test of either. Hence, on an indictment for piracy, the character of the vessel plundered may be shown without any effort to produce her certificate of registry. (*United States v. Furlong*, 5 Wheat. 184, 199.) In an action to recover back a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register which was in the name of other persons, was held not even *prima facie* evidence to prove that the plaintiff was not owner. (*Sharp v. The United Ins. Co.* 14 John. Rep. 201.) So where a person purchased a vessel, and took immediate possession, but it was agreed that no bill of sale was to be executed till the purchase money was all paid, held, that the vendor was not liable for repairs made to the vessel by direction of the master on the credit of the purchaser; and this though the register still stood in the name of the vendor. That circumstance the court say did not in any manner determine the ownership. (*Leonard v. Huntington*, 15 John. Rep. 299.) And so, in Massachusetts, where the register was relied on by underwriters in an action on a policy of insurance for the purpose of showing that two of the insured had no legal or insurable interest in the vessel. (*Bixley v. The Franklin Ins. Co.* 8 Pick. Rep. 86.) In Connecticut, however, though the register of a vessel is not conclusive of ownership, yet where a person by such a register made on his own oath appears to be the unconditional owner, held, by four judges against three, that it must be considered as a declaration to the world that he is owner; and he becomes

liable, of course, for necessary disbursements in repairs and supplies, procured by the master during the voyage. (*Starr v. Knox*, 2 Conn. Rep. 215.) The register cannot be rendered evidence of ownership in favor of the person who procured it to be made, though it may be against him. (*Ligon v. Orleans Navigation Company*, 7 Mart. Lou. Rep. N. S. 692.) In an action against owners of a vessel for a violation of a contract made by the plaintiffs for the transportation and delivery of goods with the master, a copy of the register, which purported to have been made on the oath of all the defendants that they were the owners, was held good evidence of their being such; and this on proof merely that the copy was a copy of the record in the custom house, though the witness could not say whether the record was the original or a copy. (*Hacker v. Young*, 6 N. Hamp. Rep. 95.) It is *prima facie* evidence in these and similar cases, but is not conclusive. (*Colson v. Bonzey*, 6 Greenl. Rep. 474. *Cox v. Reid*, 1 Carr. & Payne, 602. *Hussey v. Allen*, 6 Mass. Rep. 163.) The register is used as evidence in showing a fulfilment of warranty as to the character of the property in actions upon policies of insurance. (*Catlett v. The Pacific Ins. Co.* 1 Wend. 561.) And in such cases it has been said, that proof that there was a register, is *prima facie* evidence of its being on board during the voyage. (*Id.* 578. See *Ludlow v. The Union Ins. Co.* 3 Serg. & Rawle, 133.)

The register may be proved by a sworn copy. (*Coolidge v. The New-York Firemen Ins. Co.* 14 John. Rep. 308, 315. *United States v. Johns*, 4 Dall. Rep. 415. *Hacker v. Young*, 6 N. Hamp. Rep. 95.) A copy certified by the collector in whose office it is recorded is not evidence. He is not authorized to certify, nor entrusted to give out copies. (*Coolidge v. The New-York Firemen Ins. Co.* 14 John. Rep. 308. See *United States v. Johns*, 4 Dall. 415; *Woods v. Courter*, 1 id. 141.) A copy produced from the treasury department of the U. S., (where the original is required to be filed after a vessel is condemned,) certified by the register of the department, whose official character was attested by the secretary of the treasury, under the seal of the department, has been held competent evidence in the case of a condemned vessel. (*Catlett v. The Pacific Ins. Co.* 1 Wend. 561.)

The commission of a vessel or person, granted by a foreign government, may be proved by the commission itself under the seal of such government. (See *The Estrella*, 4 Wheat. 298.) The seal in general proves itself; but otherwise as to the seal of a new government, unacknowledged by the United States. (*Id.*) The fact that the person or vessel was in the employ of such unacknowledged government may be shown without proving the seal. (*Id.* *The United States v. Palmer*, 3 id. 634, 5.) Where the commission has been lost, its previous existence on board may be shown by parol evidence. (*The Estrella*, 4 Wheat. 298.)

NOTE 788—p. 414.

See *Rundle v. Beaumont*, 4 Bing. 537; S. C., 1 Moore & Payne, 396.

The log-book of certain vessels, is, in the United States, made evidence by act of congress of the fact of desertion by a seaman. (See *Ing. Abr.* 612, § 2.) It is, however, never conclusive, but only *prima facie* evidence, and may be rebutted. (*Jones v. The Brig Phoenix*, 1 Peters' Adm. Dec. 201. *Malone v. The Mary*, id. 140.

Thompson v. The Ship Philadelphia, id. 210. **Douglass v. Eyre**, 1 Gilpin's Rep. 147 152, 3, 4. **Orne v. Townsend**, 4 Mason, 541.) The log-book, in general, ought not to be admitted to establish any facts save such as are contemplated by the act of congress. (*Jones v. The Brig Phoenix*, supra.) It is in no sense, *per se*, evidence, except in certain cases provided for by statute. It does not import legal verity; and in every other case is mere hearsay not under oath. It may be used against persons, however, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But it cannot be received as evidence for such persons, or others, except by force of a statute rendering it so. (*Per Story, J.*, in *United States v. Gilbert*, 2 Sumn. Rep. 77, 78.)

On an indictment of several seamen for a revolt, and confining the master, they defended on the ground (among others) that the master was insane. To rebut this, the prosecutor offered the log-book, kept by the master during the period of his alleged derangement, in which, as he said, he made entries every night; held, that it was inadmissible. (*United States v. Sharp*, 1 Peters' C. C. Rep. 118, 119.)

An entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted on; it is necessary, in order to show that no consent was given, and no release was intended by receiving the delinquent again on board, as well as to ascertain the fact of desertion generally with greater accuracy. (*Malone v. The Mary*, 1 Peters' Adm. Decis. 140. *Phœbe v. Dignum*, 1 Wash. C. C. Rep. 48. *Douglass v. Eyre*, 1 Gilpin's Rep. 147.) Whether the entry in the log-book, in order to be evidence, must have been made (according to the letter of the act of congress) on the very day on which the alleged desertion took place, does not appear to be as yet authoritatively settled. In *Phœbe v. Dignum*, supra, the court seem strongly to favor the notion that it must. But *Hopkinson, J.*, in *Douglass v. Eyre*, supra, contends that it need not under all circumstances; for in some cases it would be impossible. At any rate, the entry purporting to have been made on the day, is *prima facie* evidence that it was so made, and it lies on the opposite party to show the contrary. (Id. 152, 3.)

Where the log-book is offered, it must be identified; and where the party offering it called a sailor belonging to the vessel, who deposed to the hand-writing of the mate in several parts of it, and that during the voyage he saw him marking the words "Log-book," &c. on the cover; held, notwithstanding this testimony, that as the book may not have been kept on the voyage, but might afterwards have been made up by the mate to suit the purposes of the cause, it was not sufficiently identified. And this, though the opposite party had given notice to produce the log-book. (*United States v. Mitchell*, 2 Wash. C. C. Rep. 478, 9.) See further as to a log-book as evidence, *Bixby v. The Franklin Ins. Co.* 8 Pick. Rep. 89. *Smallwood v. Mitchell*, 2 Hayw. Rep. 145, 6.

NOTE 789—p. 414.

In the case of *Furness v. Cope*, 2 Moore & Payne, 197, a banker's book was received to show that a customer had no funds there. It was authenticated by one clerk, though the entries in it were made by several. See 5 Bing. 114, S. C. The banker, however, was not a party; it was the bank ledger of a house which stood indifferent between the parties, and its admissibility was put on the great inconvenience of calling

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all the clerks. (Per Cowen, J., in *Merrill v. The Ithaca & Owego Rail Road Co.* 16 Wend. 594.)

See post, note 800, p. 1157; also post, note 802, p. 1159.

NOTE 790—p. 414.

Old entries in the vestry books of a parish were held not evidence to show the right of election to a parish office to be in the parishioners and rector, as it did not appear whether the incumbent was present at the meeting they related to; but extracts from the register of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings at which the rector was present. (*Hatley v. Cook*, 5 Carr. & Payne, 441.)

NOTE 791—p. 414.

See *Furness v. Cope*, 2 Moore & Payne, 200, 1, per Park, J. See post, note 797.

NOTE 792—p. 415.

See *Elton v. Larkins*, 5 Carr. & Payne, 225. Id. 372, S. C.

In an action for a false representation on the sale of a vessel that she was copper-fastened, the defendant offered a book called *Lloyd's Register of shipping*, in which she was described as copper-fastened. The witness who produced it said, it was made up from information furnished by surveyors. On the trial there was a conflict of testimony as to the proportion of iron fastenings in the vessel, to those of copper, and the book was proposed, in order to show that, among ship-owners and underwriters, the vessel was *considered* as copper-fastened. Denman, C. J., held it inadmissible, saying, "I think we do not know enough of the mode in which the book is kept to justify its admission in evidence." (*Freeman v. Baker*, 5 Carr. & Payne, 475. For a description of this book, see *Kerr v. Shedden*, 4 Carr. & Payne, 531, note (a).) Whether underwriters at *Lloyd's* must be taken, with reference to insurances, to be cognizant under all circumstances of the lists filed at *Lloyd's* reading room, so as to render them evidence of their knowledge of facts withheld by the insurers, quere. (*Elton v. Larkins*, 5 Carr. & Payne, 225. Id. 372, S. C. See *Bain v. Case*, 3 id. 496.) These lists have been allowed as evidence against the insured, to prove his knowledge of facts not communicated to the underwriters, it being shown that the broker of the former, who effected the policy, had read the lists before the insurance was effected. (*Bain v. Case*, supra.)

NOTE 793—p. 415.

In New-York, the poll books or lists are to be destroyed on the completing of the canvass in each town. So also the ballots, save such as have been rejected as imper-

fect, which, together with a true copy, are to be filed with the town clerk. (1 R. S. 138, §§ 51, 52.)

Parol evidence is admissible as to the number of persons entitled to vote at the election of trustees of religious societies, although a register of the names of the stated hearers in such church is required by statute to be kept. The register is to be used for no other purpose than that contemplated by the statute, which is to test the right of voting, when elections are held. (*The People v. Peck*, 11 Wend. 604, 611.)

NOTE 794—p. 415.

The return of a freeholder, in Massachusetts, upon a warrant directing him to warn a meeting of the inhabitants of a school district, or town, is conclusive as in favor of assessors, that the inhabitants were warned according to the return. (*Saxton v. Nimms*, 14 Mass. Rep. 315. *Thayer v. Stearns*, 1 Pick. Rep. 109. *Briggs v. Murdock*, 13 id. 305. *Wells v. Battelle*, 11 Mass. Rep. 491.)

As to returns generally, when evidence, &c., see ante, note 741, p. 1083, et seq.

NOTE 795—p. 416.

See *Coombs v. Coether*, 1 Mood. & Malk. 398.

NOTE 796—p. 416.

See *Rushworth v. Craven*, 1 M'Clel. & Younge, 417.

The minute book of the court of sessions in granting licences, kept by the clerk, is, in Massachusetts, evidence of the fact of a licence granted. (*Commonwealth v. Bolkom*, 3 Pick. 281.)

NOTE 797—p. 416.

In South Carolina, a sheriff sued to recover for maintaining one B. in prison, who was committed on a ca. sa. in the defendant's favor. To prove the length of B.'s confinement, the sheriff offered in evidence an old sheet of paper, on which the jailer, who was dead, had entered a memorandum of the commitment and imprisonment of B. And held, that it was not evidence; even a book of original entries with every appearance of regularity, could not be made evidence of such a charge. (*Walker v. M'Mahan*, 1 Const. Rep. So. Car. 129.)

As to a sheriff's book, in that state, to prove an official return made by him on a writ, see *Reid v. Colcock*, 1 Nott & M'Cord, 592. The original entry on the writ is the best evidence. (Id.)

NOTE 799—p. 417.

As to the manner, the time when, and the person by whom, the entries in registers should be made, in order to be receivable as evidence in England, see *Doe, dem. Warren, v. Bray*, 8 Barn. & Cress. 813, stated ante, note 464, p. 616. See *S. C. 3 Mann. & Ryl.* 428. Also *Walker v. Wingfield*, 18 Ves. Jr. 443. *Duins v. Donovan*, 3 Hagg. Ecc. Rep. 301.) A parish register is admissible, notwithstanding the loss of a leaf, not destroying the series of entries. (*Walker v. Wingfield, supra.*)

As to the authenticity of registers of births, &c., in the United States, see ante, note 786, p. 1149, 1150.

NOTE 799—p. 418.

For the later English cases on the subject of rolls of manor-courts as evidence, see 2 Harr. Dig. 1089.

NOTE 900—p. 422.

The general rule is, that corporation books are evidence in disputes between members, but not against strangers. (*Commonwealth v. Woelper*, 3 Serg. & Rawle, 29. *Fleming v. Wallace*, 2 Yeates' Rep. 154. *Highland Turnp. Co. v. M'Kean*, 10 John. Rep. 154.) And when evidence, if there is nothing on their face to raise a suspicion that the corporate proceedings have been irregular, they will be treated and referred to as evidence of the legality of the proceedings. In a contest among the members of a church as to the validity of a by-law, which required two thirds of the members to pass it, where it was stated in the minutes of the corporation that *on due invitation the corporators met*, held that this amounted to evidence of two thirds being present. (*Commonwealth v. Woelper*, 3 Serg. & Rawle, 29.) See *Grays v. Turnpike Company*, 4 Rand. Rep. 578. *Wood v. The Jefferson Co. Bank*, 9 Cowen's Rep. 194, 205.

The books of a corporation are not evidence to prove a usage, by entries of acts of submission by particular persons to the exercise of rights insisted on, without proof aliunde of the situation of those persons, and their relative position in reference to the corporation. (*Davies v. Morgan*, 1 Price's P. C. 77, cited 2 Harr. Dig. 1081. See *S. C. 1 Tyr.* 457. 1 Crom. & Jer. 587.) Where the plaintiff claimed land under a lease from a corporation, and the defendant set up that the corporation had re-entered for rent and then demised to him; held, that the books of the trustees of the corporation could not be used to prove such re-entry. (*Jackson ex dem. Donally, v. Walsh*, 3 John. Rep. 226.)

But in an action by a turnpike company to recover the amount of stock subscribed by a person, the books of the company are admissible evidence to show that they have pursued the course pointed out by their charter. (*Grays v. Turnpike Company*, 4 Rand. Rep. 578. *The Highland Bank v. M'Kean*, 10 John. Rep. 154.)

The books of a banking corporation have been held evidence in a suit on a note brought by the bank against the endorser, a stranger, to prove the election of its officers; and this was adjudged sufficient, *prima facie*, to show that the bank had complied with the previous requisitions of their charter, and that it had a legal existence. (*Wood v. The Jefferson Co. Bank*, 9 Cowen's Rep. 194, 205.) See *The State v. Buchanan*, 1 Wright's Rep. 233.

The books of a corporation, a bank for instance, have been allowed as evidence for them, in suits against strangers, in aid of the testimony of a witness who had made an entry therein the truth of which was in question. (*Farmers & Mechanics' Bank v. Boraef*, 1 Rawle, 152.) This seems, however, to have been upon the principle which allows memorandums, made of a transaction at the time, to go to the jury, under certain circumstances, along with the testimony of the person who made it. (See ante, note 528, p. 750, 1, 2, &c.) The court slightly advert also, in support of their decision, to the doctrine allowing previous consistent declarations of a witness to be given in evidence in corroboration of his oath. (See ante, note 533, p. 776, et seq.) In this respect the entries in the books of a corporation would obviously stand upon the same footing as a similar entry in a tradesman's book. And there are many cases where the entries in the books of banks, have been both admitted, and rejected, upon grounds which are as well applicable to books of individuals. See several cases ante, note 490, p. 680, et seq. Also, ante, note 489, p. 674, et seq.; note 528, p. 750, 1, 2, 3.

And it may be well to observe here, that these books of incorporated banks, &c. stand upon a different footing, generally, in this country, from the books of the Bank of England. The former are not public books, in the sense in which that term is understood by the courts, except as among the members of the corporation. In other cases, the rules of admissibility in regard to them, as well as the mode of authenticating entries in them, are not essentially variant from those which relate to books of a mere private nature. (See *Ridgway v. Farmers' Bank of Bucks County*, 12 Serg. & Rawle, 256, 263; *The Philadelphia Bank v. Officer*, 12 Serg. & Rawle, 49; see also ante, note 490, p. 679, 680, 1; *Courtney v. The Commonwealth*, 5 Rand. 666; *Angell & Ames on Corp.* 406, 7, 8, 9.)

The corporation of a city, and municipal corporations generally, differ from a private corporation, in respect to the matters we are considering. An agent of the corporation of the city of New-York, for instance, sued for acts done by order of the corporation, in removing obstructions in a street, may, in his *individual capacity*, avail himself of the minutes and books of the corporation in his defence. "It" (the corporation of the city) "more nearly resembles," say the court, adverting to the distinction noticed, "the legislature of an independent state, acting under a constitution prescribing its powers. The acts of this corporation concern the rights of the inhabitants of the city; it exercises a delegated power, not for its own emolument, but for the interests of its constituents; and while it keeps within the limits of its authority, the constituents are bound by the acts of the corporation. When the citizen wishes to shew those acts, he must resort to the authentic record of them, which is the original minutes of the corporation." This, it seems, is the best evidence. (*Denning v. Roome*, 6 Wend. 651.)

The official tax books of the corporation of the city of Washington, made up by the register, from the original returns of the assessors laid before the board of appeals, are

evidence to show the tax assessed upon an individual; the assessors' original returns need not be produced. (*Roukendorf v. Taylor's lessee*, 4 Peters' Rep. 349.) "The book was made out by an officer in pursuance of a duty expressly enjoined by law. This not only makes the tax book evidence, but the best evidence which can be given of the facts it contains." (*Id.*) In Kentucky, the minutes of the trustees of Louisville, and other towns in the commonwealth, are competent evidence on trials as to town property. But there is no provision authorizing their verification by the clerk's certificate. It would seem to follow then, say the court, that they ought to be verified by oath, and proved to be true copies from the real book of the trustees kept by the proper officer and recognized by the board as such. (*Dudley v. Grayson*, 6 Monroe, 259.) But on writ of error, unless the objection to the admissibility in the court below was distinctly on the ground that the paper was not sufficiently authenticated, the court will not notice it, but will only regard the objection as one of relevancy or competence. (*Id.*)

The Virginia legislature, by statute, vested certain trustees with 100 acres of land, to be appropriated partly as a present to settlers and partly for the benefit of the proprietors; held, that the books and other records of the trustees, (called in the case a corporation,) being first shown to be in the hand-writing of the proper officers of the board, were admissible in evidence. The court said the trustees were established for public purposes; and their books were the best evidence of their acts and proceedings. (*Owings v. Speed*, 5 Wheat. 420.) And in Massachusetts, a proprietary book of ancient date has been held admissible, without proving the entries by the clerk of the proprietors who made them. (*The Proprietors of Monumoi v. Rogers*, 1 Mass. Rep. 159. See *Pitts v. Temple*, 2 id. 538.) The sales book of the proprietors of Cincinnati, has been admitted as to early sales. (*Williams' lessee v. Burnet*, 1 Wright's Rep. 53.) An ancient book of records of the town of Boston, entitled the book of possessions, which, although not regularly authenticated, had been preserved among the records of the town, was held competent and sufficient evidence to establish ancient titles under allotments from the town. (*Rust v. The Boston Mill Corporation*, 6 Pick. 158.) A book of the proprietors of common lands, was allowed in evidence in tracing title, on a witness stating that it had been formerly in the possession of his grand father, whose executor had it 30 years, and then delivered it to the witness; the presumption from lapse of time being, say the court, that the witness had the lawful custody of it, and there being no evidence of the present existence of the proprietary with a clerk to keep the books and records; and there being no place appointed by law for the deposit of such books when a proprietary becomes extinct. (*Tolman v. Emerson*, 4 Pick. 160, 163.)

The town record books in New-Hampshire, may be used by selectmen in justifying their doings as such, to show their appointment by a meeting of the inhabitants; and also to show a tax voted at such meeting. (*Bishop v. Cone*, 3 N. Hamp. Rep. 513.) See *M'Fadden v. Kingsbury*, 11 Wend. 669. The record of the appointment, and proof that the selectmen had acted under it, was held in this case proper evidence to be submitted to the jury, as in favor of the selectmen, from which to infer that the meeting, at which the selectmen were appointed, was a legal one in all respects. (*Bishop v. Cone*, *supra*.) It seems that a record like the above, when erroneous, may be amended by the clerk so as to conform to the truth, by motion to the court on behalf

of the selectmen. (Id. See *Wells v. Battelle*, 11 Mass. Rep. 477; *Taylor v. Henry*, 2 Pick. 397.)

NOTE 801—p. 422.

The chest of an incorporated company, kept by their clerk for the time being, is the proper custody for old documents relative to the admission of freemen and other acts of the company; but the private house of a former deceased clerk, is not the proper custody for a convention dated in the reign of Ed. 4, between the then Prince of Wales and the corporation. (*Shrewsbury v. Hart*, 1 Carr. & Payne, 114.)

NOTE 802—p. 423.

Several cases relating to the mode of authenticating these books were introduced ante, note 800, p. 1156, 7, 8. The book of a corporation must in general be identified; and it must be shown that the book was kept and the entries were made by the proper officer, or some other person in his necessary absence. (*Highland Turnpike Co. v. M'Kean*, 10 John. Rep. 154. *Gaines v. The Tombeckbee Bank*, 1 Alab. Rep. 50.) It is not enough that the book is in the hand writing of a person stated therein to be secretary, and that the witness producing it received it from such person. (*Highland Turnpike Co. v. M'Kean*, supra.) Nor is it sufficient merely that the book is proved by a former secretary or clerk to have been handed down to him as the corporation book. (*Martin v. Gunby*, 2 Harr. & John. 248.)

As to the admissibility of bank-books, see ante, note 800, p. 1157. In England, mere sworn copies of the books of the bank of England are evidence. (See post, p. 424, of the text.) It is otherwise as a general rule in respect to the books of banks in the United States. In assumpsit against a bank on a bill drawn by its president, his authority to draw was denied. To prove one item in his case, the plaintiff offered examined copies from the discount book of the bank of Pennsylvania, a third person. Held, inadmissible; as the original should be produced. The court denied that this came within the rule, that where an original is of a public nature and admissible in evidence, an examined copy is evidence, per se. To make it admissible, if so at all, there must be proof that the original was made by an officer of the bank; the officer himself to prove this, if to be found, and if not, his hand writing to be proved. The court admitted the contrary rule as to the bank of England; but said that their books are truly of a public nature. But to give that name to the books of the banks of Pennsylvania, and on the same principle to those of incorporated insurance companies, &c., with which the country has been inundated, might produce serious consequences. "We know," say the court, "that these books are often badly kept; and it would be dangerous to admit copies in evidence when the originals may be easily had; nor should the originals be admitted without proof by whom the entries were made." (*Ridgway v. Farmers Bank of Bucks County*, 12 Serg. & Rawle, 256, 263.) In *Philadelphia Bank v. Officer*, (12 Serg. & Rawle, 49,) it was held, that the entries in a book of an incorporated bank, were not admissible, as between third persons, to

show a deposite of money, unless it be first proved that the clerk who made the entries was dead, or beyond the reach of process; and this, though it was admitted that the entries in question were made by J. M. who was clerk at the time. The rule has subsequently been laid down thus: "I take it to be a general and established principle, that neither copies of the books of an incorporate bank, nor the books themselves, are admissible against any other than the bank, or without proof being first made by whom the entries in the book were made; and that the proper witnesses to make such proof are the clerks by whom the entries were made, if to be found within the jurisdiction of the court, but if dead or out of the jurisdiction of the court, proof may be made of their hand writing." (*Gochenauer v. Good*, 3 Pennayl. Rep. 274, 280, by the court, Kennedy, J., delivering the opinion.) It seems, however, that where a bank is located at a great distance from the place of trial, or where the books are required to be in different places at the same time, an examined copy from the books, with proof that the original entries were made by an officer of the bank, (proved by himself, if to be found, and if not, with proof of his hand writing,) would be competent evidence. (*Id.* 280, 1.)

Mere certified copies would not be admissible unless rendered so by statute. (*Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178.)

In Massachusetts it has been said, that clerks of religious and other corporations, and other recording officers, may certify copies of their records; and in doing so, act under the obligation of an oath of office, and their certificates are evidence. (*Oakes v. Hill*, 14 Pick. Rep. 442. See *Sawyer v. Baldwin*, 11 Pick. Rep. 494; *Stebbins v. Jennings*, 10 *id.* 188.) The general rule, however, is otherwise, and, unless through the intervention of a statute, mere certified copies of corporation records and minutes are inadmissible. (See *Dudley v. Grayson*, 6 Monroe, 259, stated ante, note 800. p. 1158. Also *The Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178, supra.) And note; the proceedings of churches and ecclesiastical bodies, generally, may be proved by parol, though minutes be kept of them by their clerks. (*Charleston v. Allen*, 6 Verm. Rep. 633, 639. *Dow v. Hinesman*, 2 Aik. Rep. 18, ante, note 793.) See *Riddle v. Stevens*, 2 Serg. & Rawle, 537, where the minutes of a presbytery were held evidence to prove certain facts; e. g. the suspension of a minister, on due complaint made; but not to show the facts upon which it was founded.

The record of a certificate of incorporation of a religious society, is not evidence of the fact of incorporation. The certificate itself must be produced. (*Jackson, ex dem Walton, v. Leggett*, 7 Wend. 377.)

Where it was referred to the court to determine whether a book produced was the record of a church: it appearing that during the whole time it was kept, the ministers of the parish and pastor of the church kept it wholly or principally, he being the proper officer to keep such a record; and being kept in form of a record, and containing a regular statement of the admission of members, the choice of officers, and the transaction of the regular business of the church; held, that such book was to be considered the record book of the church. (*Sawyer v. Baldwin*, 11 Pick. Rep. 492.)

As to the effect of lapse of time in dispensing with proof of the hand writing of the entries in corporation books, see *Davies v. Morgan*, 1 Prices' P. C. 77, cited 2 Harr Dig. 1081. S. C. 1 Tyr. 457; 1 Crom. & Jer. 587. See also ante, note 800, p. 1158, where some cases were introduced bearing on this subject. In an action for

tolls claimed by the lessee of a corporation, an ancient schedule, produced from among the muniments of the corporation, copies of which had been delivered to the lessee and acted upon by him, were held admissible evidence for the lessee. (*Brett v. Beales*, 1 Mood. & Malk. 419.)

As to the necessity and mode of proving the seals of private corporations, see ante, note 716, p. 1062. See also that note in respect to the distinction between public and private corporations in this particular, and likewise between foreign and domestic ones.

NOTE 803—p. 429:

We have seen that in determining what mode of authentication should be required in reference to judicial proceedings of a foreign country, the political situation of such country will be taken into consideration, (see ante, note 771, p. 1123, 4,) and for the purpose of ascertaining that, resort has been had to matters of general history. Accordingly, in *Hadfield v. Jameson*, (2 Munf. Rep. 71,) Tucker, J., in a case of this kind, regarded Edward's History of the West Indies, produced by Mr. Wirt, as evidence of the condition of St. Domingo.

The reason why public history is admitted as evidence, seems to be, that the facts necessary to be established are properly subjects of history, and because of the extreme difficulty, or utter impossibility of establishing the facts by other testimony. But facts which have recently transpired, and must be in the knowledge of persons living at the time, cannot be thus proved. (Per Hitchcock, J., in *Morris v. Edwards*, 1 Hamm. Rep. 209.) A particular custom cannot be thus proved. (*Id.*) And semble, that public history, not of the country at large, but of a particular town or city, is not evidence. (*Id.*) The book should be a general history; and Nichol's History of Brecknockshire, in England, was held inadmissible on a question of boundary, upon this ground. (*Evans v. Getting*, 6 Carr. & Payne, 586.)

In *Commonwealth v. Alburger*, (1 Whart. Rep. 469,) on a question of title to land in the city of Philadelphia, general histories, long treated as authentic, were held admissible as furnishing evidence of the concessions and agreements made by Wm. Penn, with the first purchasers of lands in the city. (*Id.* 475.)

In *Jack v. Martin*, (12 Wend. 323,) Nelson, J. inclined to think, that the supreme court of New-York were warranted in taking judicial notice of the fact of the existence of slavery in Louisiana, as a part of the public history of the country.

A jury, however, it has been said, are not to be left entirely to their own information as to matters of history. Some proof must be adduced to them; for they should all have the same proof to act upon, and not be left, each to his own stock of information, whether scanty or abundant, correct or erroneous. (*Gregory v. Baugh*, 4 Rand. 611.) In *Mima Queen v. Hepburn*, (7 Cranch, 296,) Marshall, C. J., advertent incidentally to this subject, remarked, that matters of general and public history may be received without that full proof which is necessary for the establishment of a private fact.

The case of *Morris v. Lessee of Harmer's heirs*, (7 Peters' Rep. 554,) is an instructive one on several points relating to this subject. There the plaintiffs offered to read

from Dr. Drake's work, called a "Picture of Cincinnati," the date of surveying and laying out lots in that part of Cincinnati which lies east of a particular reservation. The author was living, and had already been used by the defendants as a witness in respect to the location and boundary of the lots, they having taken his deposition. The circuit court received the evidence, and the defendants excepted; and the supreme court, on error, held the following language: "If this exception were to be considered solely upon the general principles of the law of evidence, we should think it was well taken. All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. Historical facts, of general and public notoriety, may indeed be proved by reputation; and reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed within the knowledge of many living persons from whom he has derived his materials; there would seem to be cogent reasons to say that his book was not, under such circumstances, the best evidence within the reach of the parties." (Id. p. 558, 9.) Dr. Drake's testimony, however, in the depositions on the part of the defendants, having already been used by them, and he having stated therein, among other things, that he was present when the city surveyor made the survey of a part of the city called the foundation of Fort W.; that afterwards, in preparing a plat of the town, for the "Picture of Cincinnati," he took great pains to lay down the site of the fort correctly; and having also testified to various things, on inquiries made by the defendants respecting the surveying and laying out of the lots; held, that his book was proper evidence for the plaintiffs. His remarks in it as to the date of the surveying, &c., (comprehended in the scope of his testimony,) might be serviceable in explaining, qualifying, and controlling his testimony. At all events, the plaintiffs might properly refer to the book to show statements which might affect the results of his testimony. (Id. p. 559, 560.)

NOTE 804—p. 424.

Besides the documents adverted to in our preceding notes under this head, many others, partaking more or less of a public character, are evidence, in virtue of various statutes and local usages in the United States. We shall not attempt any thing like a general enumeration of them, but merely set down here some few of such as have occurred in the course of our previous researches, noting the cases relating to them in a very general way.

Surveys, maps, plats, and other papers, filed or on record in the land office, are frequently resorted to in tracing title. The following authorities will exhibit much of the doctrine on this subject, particularly as it prevails in Pennsylvania, where questions

respecting the admissibility and competency of surveys, &c. seem often to have arisen. *Fathergill's lessee v. Stover*, 1 Dall. 7. *Shield's lessee v. Stover*, 2 Yeates' Rep. 219. *Hewes' lessee v. M'Dowall*, 1 Dall. Rep. 5. *Master's lessee v. Shute*, 2 id. 81. *Biddle's lessee v. Shippen*, 1 id. 19. *Hurst v. Dipppo*, 1 Dall. Rep. 20. *Penn's lessee v. Inham*, 3 Wash. C. C. Rep. 90. *Salmon v. Rance*, 3 Serg. & Rawle, 315. *Griffeth's lessee v. Evans*, 1 Peters' C. C. Rep. 166. *M'Clemens v. Graham*, 2 Serg. & Rawle, 460. *Griffith's lessee v. Tunckhouser*, 1 Peters' C. C. Rep. 418. *Todd's lessee v. Ockerman*, 1 Yeates' Rep. 295. *Jones v. Bache*, 3 Wash. C. C. Rep. 199. *Morris' lessee v. Vanderen*, 1 Dall. 64. *Penn's lessee v. Hartman*, 2 id. 230. *Burd v. Seabold*, 6 Serg. & Rawle, 137. *Motz v. Bolard*, id. 210. *Eddy's lessee v. Faulkner*, 3 Yeates' Rep. 580. 1 Binn. 188, S. C. *Torry's lessee v. Beardsly*, 4 Wash. C. C. Rep. 242. *M'Kelry v. Gilleland*, 1 Watts' Rep. 312. *Burchfield v. M'Cauley*, id. 9. *Snyder v. Bowman*, 4 id. 132. *Zerbe v. Schall*, id. 138. *M'Cormick v. M'Murtrie*, id. 193. *Martz v. Hartley*, id. 261. *Bellas v. Levan*, id. 264. *M'Call v. Sybert*, id. 431. *Beeson v. Hutchinson*, id. 442. *Keene v. Lownsbury*, 5 id. 348. *Freytag v. Powell*, 1 Whart. 536. *Goddard v. Glominger*, id. 209. *Gardeneir v. Marcy*, 5 Watts' Rep. 337. *Ross v. Barker*, id. 391. *Steinmetz v. Logan*, id. 518. *Smith v. Collins*, id. 505. *Lindsay v. Scroggs*, 2 Rawle, 141. *Wilson v. Stoner*, 9 Serg. & Rawle, 39. *Galt v. Galloway*, 4 Peters' Rep. 332. See *Coxe's Dig.* p. 682, et seq.; *Chirac v. Reincker*, 2 Pet. 613.

Articles of agreement between Lord Baltimore, proprietary of Maryland, and Thomas and Richard Penn, proprietaries of Pennsylvania, settling the boundaries between the two provinces, were admitted in evidence in Pennsylvania, being regarded in the light of a state paper well known by the courts of justice. (*Ross's lessee v. Cuthshall*, 1 Binn. Rep. 399.)

A certified copy of the list of first purchasers under Wm. Penn, is good evidence in that state, the original being on file in the surveyor general's office. (*Commonwealth v. Alburger*, 1 Whart. Rep. 469. *Hurst v. Dipppo*, 1 Dall. 20. *Kingston v. Lesley*, 10 Serg. & Rawle, 387.) Indeed, by statute, (9th April, 1781,) copies of all records and papers of the land office, are as good evidence as the originals. (*Commonwealth v. Alburger*, 1 Whart. 473, 4.)

The plat of the lots in the city of Cincinnati, which had been recorded, and on which the streets and alleys were designated, and which had been generally recognized and used in the surveys of lots laid down in the same, has been received in evidence. (*Morris v. Lessee of Harmer's heirs*, 7 Peters, 554. See *Chirac v. Reinecker*, 2 id. 613.)

Exemplifications of public grants of lands by the state, are evidence. And in New-York it is no objection to such exemplification of a patent granted in 1787, that the name of the governor of the state *pro tem.* does not appear subscribed to it, nor that the letters L. S. designating the place of the great seal do not appear upon it; it being judicially known, that at that period, and long after, the seal was *appended* to patents, instead of being *impressed* upon them; and the legal presumption being that no patent would be issued or recorded unless executed in due form of law. (*Williams v. Sheldon*, 10 Wend. 654.) See *Hedden v. Overton*, 4 Bibb's Rep. 406. The great seal authenticates the patent, and, it seems, is, *per se*, to be regarded as *prima facie* evidence that the patent has been approved by the commissioners of the land office, and was issued by their direction. (*Williams v. Sheldon*, *supra*. See *Jackson, ex dem. Norton*,

v. Sheldon, 5 Cowen's Rep. 460.) Public grants under the great seal are evidence upon common law principles, and independent of any statute. (*Patterson v. Winn*, 5 Peters' Rep. 241.)

As to the mode of authenticating grants or patents from the United States, see act of congress of Jan. 23, 1823, Ing. Abr. 376.

A book purporting to contain the proceedings of the commissioners of forfeitures in New-York, but not proved ever to have been in their possession, though found, in the clerk's office in 1806, and having been there 17 years, is not admissible in evidence to shew a sale by the commissioners; nor will a conveyance be presumed, even where such a book is shown to be genuine, unless the requisites of the statute creating the commissioners and defining their duty, appear to have been complied with by the purchaser, and the certificate state that a conveyance was given. (*Jackson, ex dem. Williams, v. Miller*, 6 Cowen's Rep. 751.)

In New-Jersey, Sharp's book of surveys, containing maps, surveys, &c. has always been deemed admissible in deducing titles under the West Jersey proprietors. (*Denn v. Pond*, 1 Cox's Rep. 379.) And sworn copies of surveys from public offices are evidence in that state. (Id.)

Blunt's Coast Pilot and Bowditch's Navigator have been allowed as evidence to show the situation of the tide at a given time and place, without proving their correctness. (*Green v. Aspinwall*, 1 City Hall Rec. 11, 14.)

And the Directory of the city of New-York has been used, no objection being made, in identifying the grantor in a deed. (*Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140, 144.)

An orderly-book of a company of militia, is evidence, in Massachusetts, of the time and place at which the company were ordered to assemble, and of the non-appearance of members. (*Cobb v. Lucas*, 15 Pick. 7.) The neglect of the clerk to record the order will not be an excuse for non-appearance. (Id.)

A paper purporting to be a pardon of a person granted by the governor of a state, under his signature and the great seal, has been held admissible without other proof authenticating it. (*United States v. Wilson*, 1 Baldw. Rep. 91.)

As to transcripts of accounts, &c. from the treasury department of the general government, in certain cases, and of bonds, &c. on file and connected with such accounts, see act of congress, 3d March, 1797, § 2, Ing. Abr. 559. in connection with *State v. Jones*, 8 Peters' Rep. 375, *United States v. Buford*, 3 id. 12, *Cox v. The United States*, 6 id. 172, *Bleecker v. Bond*, 3 Wash. C. C. Rep. 529, *United States v. Patterson*, 1 Gilpin's Rep. 44. In Kentucky, a paper purporting to be a copy from the treasury department of the United States, of an adjudication of a claim for a horse lost in the late war, by the commissioner of claims, certified by the auditor of the department, but not under seal, was held inadmissible. The court concede that no evidence should be required in a state court, as to documents from a public office of the U. States, save such as would be required in the U. States courts; "but we are aware," say they, "of no decision which admitted vouchers when not authenticated by the seal." (*Wickliffe v. Hill*, 1 Litt. Rep. 330.)

The act of congress of February 21, 1799, provides, that the description or specification of a patent of an invention shall be filed in the office of the secretary of state, and that certified copies thereof shall be evidence. (Ing. Abr. 480, § 4.) The law being

silent as to the letters patent themselves, they stand upon the common law ground, and an exemplification of them by the secretary, under the seal of his department, is competent evidence. (*Peck v. Farrington*, 9 Wend. 44.) So the letters patent may be proved by a sworn copy. (*Id.*)

NOTE 805—p. 424.

Such is the general rule as to all entries in public books. (*Jackson, ex dem. Bgart, v. King*, 5 Cowen's Rep. 238. *Stoever v. Whitman's lessee*, 6 Binn. Rep. 416. *United States v. Johns*, 4 Dall. Rep. 412, 415. *Dudley v. Grayson*, 6 Monroe's Rep. 259. *Welsh v. Crawford*, 14 Serg. & Rawle, 440. *McCarty v. Sherman*, 3 John. Rep. 429. *Peney v. Gilliland*, 1 Wright's Rep. 38. *Tubb v. Madding*, 1 Alab. Rep. 129, 130. *Peck v. Farrington*, 9 Wend. 44, 45.) In New-York, it has been said that a justice's docket is a private and not a public book. (*Wickware v. Bryan*, 11 Wend. 545, 546, 7, per Savage, C. J.) But *quere*; see ante, note 764, p. 1111, 1112, and the cases there cited relating to this point.

Mere certified or office copies, however, from such books, are not evidence, unless where the officer is authorized to give out or certify copies. (*Stoever v. Whitman's lessee*, 6 Binn. 416. *Dudley v. Grayson*, 6 Monroe, 261, 2. *Schnertzell v. Young*, 3 Harr. & M'Hen. 502. *Donohoo's lessee, v. Brannon*, 1 Tenn. Rep. 323. *The Hallowell & Augusta Bank v. Hamlin*, 14 Mass. Rep. 178. *Sampson v. Overton*, 4 Bibb, 409.) Where an officer is authorized to authenticate copies, and to act generally by deputy, his deputy may authenticate them. But not a mere clerk in the office, though it be necessary that he be sworn before he can act as such clerk. (*Sampson v. Overton*, 4 Bibb, 409.) The officer ought to state the character in which he certifies or does the act. But the omission to do this will not generally render his certificate inadmissible. The law has been said to be, that the court may know officially all officers known to the laws of the state, of whose appointment there is a record. But still it seems they may require proof, when he has not stated his official character, and it nowhere appears in the certificate; but when it does so appear, the law will presume that he possesses such character until the contrary appears. (*Donohoo's lessee v. Brannon*, 1 Tenn. Rep. 327.) On this subject, see ante, note 475, p. 627, 8. *Commissioners v. Ross*, 3 Binn. 541. In general, it seems, the copy should come from the officer whose duty it is to keep the original. (*United States v. Perchman*, 7 Peters' Rep. 85; see ante, note 702, p. 1047.)

NOTE 806—p. 424.

But where the question arises as to the genuineness of a signature to a transfer made on a book of the bank of England, the book itself must be produced. (*Auriol v. Smith*, 18 Ves. 197.)

Examined copies of bank books are not generally evidence in the United States; not being regarded in the light of public books like those of the bank of England. (See ante, note 800, p. 1157; also ante, note p. 902, 1159, 1160.)

NOTE 807—p. 424.

See *Rowe v. Brenton*, 3 Mann. & Ryl. 297, S. P.

NOTE 808—p. 425.

As to books and records in public offices in other states, it is provided by act of congress, that all records and exemplifications of office books which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books and the seal of his office thereunto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify that the said presiding justice is duly commissioned and qualified; or if the said certificate is given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken. (Act of April 27th, 1804. 3 L. U. States, 621, § 1. Ing. Abr. 299.) The foregoing provisions are declared applicable to the records and office books of the respective territories of the U. S., and the countries subject to the jurisdiction thereof, no less than to those of the several states. (Id. § 2.)

In *Henthorn v. Doe*, (1 Blackf. Rep. 157,) a copy of a Virginia patent, attested by the register of the land office with his seal affixed thereto, to which was added the certificate of the governor with the great seal of the state, certifying to the official character of the register of the land office, but omitting to state that his attestation was in *due form*, was held inadmissible. It seems that the part of the authentication omitted in the above case is indispensable. (Id.) See ante, note 771, p. 1132, 3.

In Massachusetts, a sworn copy of a map made by a surveyor appointed by the legislature of New-York to make the survey, the original being on file in the office of the secretary of the state of New-York, was held competent evidence. (*Smith v. Strong*, 14 Pick. Rep. 128.) It was verified in this case by the oath of the surveyor himself.

As to proof of deeds, wills, &c., registered or recorded in books kept in public offices in the neighboring states, they will be treated of under subsequent heads.

NOTE 809—p. 426.

In a note to *Browne v. Cumming*, (10 Barn & Cress. 70, n. (b).) the reporter says: "Holt, C. J., was present at the trial of Lord *Preston*; but he there does not deny

that a party acquitted of felony has a right to a copy of an indictment for the purpose of using it in evidence, although he refused it to a prisoner about to take his trial for the offence charged in the indictment." It is further said, that the distinction between cases of indictments for felony, and those of indictments for misdemeanors, seems to rest entirely upon the order of the judges made at the Old Bailey, as reported by Ke-lyng; and a *quere* is added, as to the power of the judges thus to alter the law. (Id.)

The doctrine of the text appears to have been acted on in an early case in New-York; and a motion to the supreme court was there made for a copy of the indictment in order to ground an action for a malicious prosecution. (*The People v. Pollyon*, 2 Cain. Rep. 202.) We are aware of no subsequent case in which such a motion was either made or deemed necessary.

How far the doctrine has been recognized in Pennsylvania, will be seen by *Gray v. Pentland*, (2 Serg. & Rawle, 23,) where the court acted on a principle which was considered analogous to that on which the English rule proceeds. (See *id.* 32, per Tilgham, C. J.)

NOTE 810—p. 426.

See *Gresley's Eq. Ev.* 115.

In *Browne v. Cumming*, (10 Barn. & Cress. 70,) a rule had been obtained by the attorney general, to restrain the plaintiff from using a copy of an indictment for felony as evidence, which it was alleged had been obtained through mistake or misrepresentation; upon showing cause, however, the rule was discharged, on the ground that there had not been such mistake or misrepresentation as to call for the court's interference.

NOTE 811—p. 427.

In New-York, it is provided by statute, that "Every person indicted for any offence, who shall have been arrested upon process issued upon such indictment, or who shall have duly entered into recognizance to appear and answer to such indictment, shall, on demand, and on paying the fees allowed by law therefor, be entitled to a copy of the indictment, and of all endorsements thereon." (2 R. S. 728, § 53.)

NOTE 812—p. 428.

See *Gresley's Eq. Ev.* 115, 116.

In New-York, the law makes it the duty of a justice of the peace to give out transcripts of proceedings had in causes tried before him, that they may be used as evidence; and also of certain judgments rendered by him, for the purpose of filing in the clerk's office, and thus creating a lien upon real estate. (2 R. S. 247, § 127. *Id.* p. 269; §§ 245, 6, et seq.) It has been said that it is no part of his *official duty* to furnish copies to parties in order to enable them to appeal, &c. (*Wickware v. Bryan*, 11

Wend. 545, 6, 7.) In the same case it was remarked by Savage, C. J., delivering the opinion, that "Parties may indeed inspect and examine his [the justice's] docket, by his permission, for that docket is a private book, not a public record." (*Id.*) Quere, however; is not a justice's docket (especially where, as in New-York, the statute expressly requires him to keep one, and prescribes what it shall contain) a public book, and to be treated as such in regard to the right of inspection? (See ante, note 764, p. 1111, 1112, and the cases there cited.)

NOTE 813—p. 428.

A bishop's registry of presentation is a public book; and a mandamus lies to him to grant inspection of it to one claiming a right to present to a vacant living. (*Finch v. Ely*, (Bishop,) 2 Mann. & Ryl. 127. *Rex v. Ely*, (Bishop,) 8 Barn. & Cress. 112.)

NOTE 814—p. 430.

The books of a corporation are public with respect to its members, but private in regard to third persons. (*Gresley's Eq. Ev.* 116.)

In New-York, each director of a bank has a right to inspect the books of the bank; nor can the board of directors, by resolution or by-law, take away such right, even although they believe the director hostile to the interests of the institution: and it was accordingly held, where the cashier had refused to permit a director to inspect the discount book, that a mandamus lay, commanding the cashier to submit the book to his inspection, although the cashier's conduct had been approbated by a resolution of the board of directors, who also directed the cashier and clerks, in the same resolution, not to allow such director to inspect the discount book. (*The People v. Throop*, 12 Wend. 183.) The mandamus, in such case, need not be directed to the board; but is properly directed to the cashier. (*Id.*)

In Massachusetts, a bank depositor has a right, on proper occasions, to inspect the books of the bank; the bank officers having charge of them being so far agents of both parties. (*Commonwealth v. Knapp*, 3 Pick. Rep. 96.)

In a civil suit in England, touching the validity of a parish vote, the plaintiff, a parishioner, is entitled to inspect the parish books. (*Newell v. Simpkin*, 6 Bing. 565; 4 Moore & Payne, 395.) So held, in an action of trespass for turning the plaintiff out of the vestry room. (*Id.*)

NOTE 815—p. 431.

In trespass, for entering to distrain for poor rates, the defendant (who acted on the behalf of the parish officers) averred, in justification, that the plaintiff's house was within the parish, which the plaintiff denied: held, that the plaintiff could not demand an inspection of the parish books, under the circumstances, on the ground merely that the defendant alleged him to be a parishioner. (*Burrell v. Nicholson*, 3 Barn. & Adolph. 649.)

Under a bill of discovery, in aid of an action to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parochial rates, the court ordered defendants, the parish officers, to produce for his inspection the rate books, account books, minute books, orders, and other documents which related to the matter in question, and were admitted by their answer to be in their possession. (*Burrell v. Nicholson*, 1 Mylne & Keene, 680.)

NOTE 816—p. 432.

Where an indictment was preferred against a county, at the instance of the inhabitants of a parish, for not repairing a bridge, and the question intended to be raised was whether the inhabitants of the parish or those of the county were liable to repair it; the court refused to compel the parish to allow the county to inspect the parish books and documents relating to the bridge. (*The King v. Buckingham*, 8 Barn. & Cress. 375.) They viewed it like the common case of one litigant party endeavoring to compel his adversary to produce his own private books as evidence against himself. (*Id.*)

Defendants, sued by a corporation for making, while directors, false entries in the books of the corporation, were held not entitled to inspect the books of the corporation, without an affidavit that such inspection was necessary to their defence. (*Imperial Gas Co. v. Clarke*, 7 Bing. 95.)

"The general rule, no doubt, exempts a party from producing papers to his opponent, unless he can be considered to hold them in the character of a trustee; but there are exceptions to the rule; and, in the case of corporations, a party has been entitled to have access to by-laws and the like." (*Per Tindal, C. J., id.*)

In New-York, the courts have made no distinction, it seems, between corporations and private persons in this respect. They will neither compel the one nor the other to furnish evidence against himself, in this way, except in certain cases; as where the paper to be inspected or copied is the immediate foundation of the action; and in a few other cases depending on peculiar circumstances. (*The Bank of Utica v. Hillard*, 6 Cowen's Rep. 62. See S. C., 5 id. 419. *Willis v. Bailey*, 19 John. Rep. 268. *Lawrence v. The Ocean Ins. Co.* 11 id. 249, n.) The New-York doctrine on this entire subject depends now upon general rules, adopted by the supreme court, and will be treated of under the subsequent head of "proof of deeds, agreements, &c."

NOTE 817—p. 432.

See *The King v. Buckingham*, 8 Barn. & Cress. 375. S. C., 2 Mann. & Ryl. 412.

NOTE 818—p. 433.

See *Rex v. Clean*, 7 Dowl. & Ryl. 393. 4 Barn. & Cress. 899, S. C.

NOTE 819—p. 434. .

In New-York, the relator, a bank director, in the case of the *People v. Throop*, 12 Wend. 183, stated ante, note 814, obtained a rule in the first instance that the cashier submit the discount book to his inspection, or shew cause why a mandamus should not issue. The affidavit upon which this rule was obtained, stated merely that the relator was a director in the bank, and that the cashier had refused to permit him to inspect the discount book. Several points of practice were settled by the court for such cases; and among others, that on shewing cause, the relator holds the affirmative. It was also decided that where cause is shown, but not satisfactorily, a mandamus will be awarded in the first instance; but the party proceeded against will be allowed to make up a record *pro forma*, for the purpose of suing out a writ of error.

NOTE 820—p. 435.

The court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of a corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion. (*The King v. Wardens of the Merchant Tailors' Company*, 2 Barn. & Adolph. 115.)

To ground an application for a mandamus to inspect books, quere, whether it is sufficient to show, that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right. (Per Denman, C. J., in *The King v. Trustees of the Northleach and W. Roads*, 5 Barn. & Adolph. 997.)

NOTE 821—p. 436.

For the form of a *subpœna duces tecum* and the ticket, see ante, note 5, p. 11. See also the form recommended by Mr. Chitty, 3 Chitty's Gen. Prac. 829, n. (v.) For the form in the English courts of equity, see Gresley's Eq. Ev. 75 n. (p.)

It has been recommended that the subpœna, in addition to the usual clause, should in express terms require the witness to *search*, as this would prevent a not unfrequent excuse that the witness was unaware that it was his duty to search. (See 3 Chitty's Gen. Prac. 829.) We are not apprised of any decision, however, showing that such extraordinary requisition is necessary even for the purpose mentioned. A subpœna *to attend* merely, does not lay the witness under an obligation to search, or bring with him any documents, even though he be at the same time served with a notice to produce. (*Id.* 830. *Parry v. May*, 1 Mood. & Rob. 279.)

It is believed that this writ generally issues of course. But in Pennsylvania it is said not to be warranted, without a special application. (Per Tilghman, C. J., in *Gray v. Pentland*, 2 Serg. & Rawle, 31.)

NOTE 822—p. 436.

The witness may be compelled to produce the writing or paper, which he has thus been required to bring forward, without being sworn. (*Davis v. Dale*, 1 Mood. & Malk. 514. S. C., 4 Carr. & Payne, 335. *Somers v. Moseley*, 4 Tyr. 158; 2 Crom. & M. 477. *Perry v. Gibson*, 1 Adol. & Ellis, 48.) On an indictment for perjury, a sheriff's officer had been subpœnaed to produce a warrant of the sheriff; and after argument he was ordered to do so without being sworn. (*Murlis' case*, 1 Mood. & Malk. 515.) See further in respect to the same subject, *Rush v. Smith*, 1 Crom. M. & R. 94; also ante, note 510, p. 730; *Rosc. Cr. Ev.* 128. The above cases may be consulted as showing, in what instances, and how far a person subpœnaed to produce a paper, and sworn for that purpose, may be cross-examined. See likewise ante, p. 273 of the text; and *Wood v. Connell*, 2 Whart. Rep. 542, 562.

As to the attachment for not obeying the *subpœna duces tecum*, see ante, note 5, p. 11, 12; also ante, note 30, p. 24, et seq. There seems to be no distinction, in principle, between compelling a witness to produce a document in his possession, under a *subpœna duces tecum*, in a case where the party calling him has a right to use the document in evidence, and compelling him to give testimony when the facts lie in his own knowledge. A *subpœna duces tecum* is now regarded as a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey; and obedience to it will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it. (*Per Shaw, C. J.*, in *Bull v. Loveland*, 10 Pick. 9, 14.)

NOTE 823—p. 436.

See *United States v. Reyburn*, 6 Peters' Rep. 352, 366; also several cases cited post, note 832.

NOTE 824—p. 436.

The question whether the witness is bound to obey the *subpœna* by the production of the paper, is one for the court, after the witness has been sworn, or has been brought up on an attachment. (See ante, note 5, p. 12.)

Under what circumstances a witness is bound, upon process of this character, to produce a paper or document in his possession, has frequently been the subject of consideration by the courts. The analogy adverted to in the text seems in the main a safe guide on questions of this sort; for as every man is, in furtherance of justice, bound to disclose all the facts within his knowledge which do not tend to his crimination; upon the very same principle it should seem he is likewise bound, as a general rule, to produce such documents as are essential to the discovery of truth and the great ends of justice. But as he is protected from answering questions, the answers to which may subject him in penal responsibility, so he ought not to be compelled to produce any document in his possession, where the production would be attended with similar con-

sequences. (2 Stark. Ev. 87, 6th Am. ed.) In this view our previous observations and citations of authority respecting the privilege of witnesses, extending from note 514, p. 734, to note 525, p. 749, may be made available on the present subject.

The analogy, however, according to several English decisions, is not perfect. "There seems in one respect," says Mr. Starkie, "to be a distinction between compelling a witness to answer orally, and obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but it seems he is not compellable to produce title-deeds or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy, founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds or other private documents," (1 Starkie's Ev. 87, 6th Am. ed.) Accordingly, in *Rex v. Hunter*, (3 Carr. & Payne, 591,) after a bill of indictment had been presented to a grand jury for forging a deed, the grand jury came into court and stated that a lady, who was a witness on the indictment, had refused to produce certain deeds, which it was material for the grand jury to see; neither of them, however, being the deed alleged to have been forged: and the question was put to the court whether she could be compelled to produce them. Mr. Justice Park, after conference with his associate, told the grand jury, that if these deeds formed part of the evidence of this lady's title to any part of her own estate, they could not compel her to produce them; but that if it should appear they did not relate to the title of any part of her estate, then she was bound to produce them. (See also *S. P., Pickering v. Noyes*, 1 Carr. & Payne, 262; *Roberts v. Simpson*, 2 Stark. Rep. 203; also, see *Doe, dem. Courtail, v. Thomas*, 9 Barn. & Cress. 288, per Tenterden, C. J.; *Harris v. Hill*, Dowl. & Ryl. N. P. Cas. 17.) See post, note 830, p. 1177. One who has advanced money on a lease, and who holds it as his security, is not bound to produce it under a *subpoena duces tecum*. (*Mills v. Oddy*, 6 Carr. & Payne, 728.) A person having a lien merely on papers, may be compelled, notwithstanding this, to produce them; but if he fears they will be abstracted, he is allowed to stand by and watch in court while they are in use. (*Thompson v. Mosley*, 5 Carr. & Payne, 501.) Where a witness, called to produce an assignment, objected to doing so, on the ground that he held it as security and the production of it would affect his interest, *Abbott, C. J.*, refused to compel him. A question was reserved as to the propriety of the refusal, but the court waived it, and disposed of the case upon other grounds. (*Schlencker v. Moxey*, 3 Barn. & Cress. 739; *S. C.*, 5 Dowl. & Ryl. 747.) A kindred principle has been acted upon in Massachusetts. There, an action was brought upon a promissory note, which was in the hands of W., a third person. W. was served with a *subpoena duces tecum* on the part of the plaintiffs, requiring him to produce it; but this he declined doing unless ordered by the court. He testified that the defendant, a mechanic, assigned his property to him, (W.) who was a creditor, and that the plaintiffs and the other creditors put their demands, including the note in question, into his (W.'s) hands for collection, under an agreement that he (W.) might furnish stock to the defendant to work up for the benefit of the creditors, and that the proceeds of all the property should be applied first, to the re-payment of the advances made by the witness, and the surplus to the demands of the creditors; he further testified that a large sum was due him on account of such advances. The court express-

ed themselves clearly of opinion, that under these circumstances, the witness had such an equitable interest in the note, and such a right to the custody of it, that he ought not to be compelled to produce it for the purpose required, viz. that of maintaining the suit, and thereby fixing a lien, by attachment, upon the funds placed in his hands for the common benefit of all the creditors. (*Bull v. Loveland*, 10 Pick. Rep. 9, 15.) In South Carolina, a security in a sheriff's bond was compelled to produce the books of his principal (who had died insolvent) on a *subpœna duces tecum*, notwithstanding he was apprehensive of danger to himself from the production in the way of suits upon the bond. (*Hawkins' ex'r v. Sumpter*, 4 Dess. Eq. Rep. 446. See S. C. id. 102.)

This privilege, however, in the cases mentioned, is that of the witness, who may refuse the production or not; counsel cannot raise the objection. (*Mills v. Oddy*, 6 Carr. & Payne, 728.)

Attornies and solicitors, who hold the papers of their clients, cannot be compelled, under a *subpœna duces tecum*, to produce them, in a controversy between third persons, except where their clients would be compelled. (*Mills v. Oddy*, 6 Carr. & Payne, 728, per Park, B. 1 Stark. Ev. 87, 8, 6th Am. ed. See ante, p. 141, 2, 3 of the text, and the notes under that head, for various cases in which this doctrine has been applied; also ante, note 5, p. 11, 12; *Bothomley v. Osborne*, Peak. add. Cas. 101; *Bate v. Kinsey*, 1 Crom. M. & R. 38; S. C. in note (a) to *Mills v. Oddy*, supra; *Bateson v. Hartsink*, 4 Esp. Rep. 43; *Harris v. Hill*, Dowl. & Ryl. N. P. Cas. 17; *Fury v. Smith*, 1 Hud. & Brooke, 749.) In respect to this privilege, as it regards the clerks of solicitors and attornies, see ante, note 282, p. 289; *Mills v. Oddy*, 6 Carr. & Payne, 728.

But where the client would be compelled to produce papers under this *subpœna*, his attorney may in like manner be compelled, when they are in his custody. (*Doe, dem. Courtail, v. Thomas*, 9 Barn. & Cress. 283.) And in such case, it is no protection to the attorney that he received the papers confidentially. (*Id.*) Otherwise, however, where he is the attorney for the party whose cause is on trial, and received the papers confidentially in that character. (See ante, note 279, p. 276; *Durkee v. Leland*, 4 Verm. Rep. 612; but see *John v. John*, 1 Wright's Rep. 584, 585, 6.) Nor can he then be obliged to testify to the contents. (*Dale v. Livingston*, 4 Wend. 558. *Bothomley v. Osborne*, Peake's add. Cas. 99, 101, and note (a). And, *semble*, that the same rule prevails in respect to the attorney of a third person who has received papers from his client confidentially which the latter could not be compelled to produce. (See ante, note 279, 280, p. 277, 8.) But if the attorney in such case be compelled to give parol evidence of the contents, the parties to the suit have no right to object; even upon the supposition that the judge acted erroneously. (*Marston v. Downes*, 1 Adol. & Ell. 31.)

The same principle which excuses the attorney or solicitor of a person from producing documents which might affect his title, under a *subpœna duces tecum*, has been applied in the case of one holding a paper as agent or trustee of such person; and held, that the latter was not compellable to produce the title-deeds of the trust estate, where the object was to show that the *cestui que trust*, who was plaintiff, had no legal title. (*Roberts v. Simpson*, 2 Stark. Rep. 203. *Willis on Trustees*, 229. No. 30, Law Lib. Philadel. See *Cocks v. Nash*, 9 Bing. 723.) Where an action of trespass was brought for seizing the plaintiff's ship, Lord Kenyon refused to compel the person, who had officiated as the agent of the defendant, to produce the power of attorney under which he

had acted in taking the property. The counsel contended that a witness was obliged to produce every paper in his possession, so as that the paper did not criminate himself; but his lordship denied the position, remarking that if such were the case it would occasion the ruin of millions. He added, that "it is a good plea in bar in the court of chancery, that the defendant (although the legal title was in another) had an equitable title by honest means without notice, and the court would not compel the production of those papers which, if produced, would strip the defendant of his fair equitable title." (*Miles v. Dawson*, 1 Esp. Rep. 405.) In an action on a note, the defence was that there had been a composition with the defendant's creditors; and H. was called by the defendant as a witness. He had been subpoenaed to produce a deed between the defendant's mother of the first part, H. and the plaintiff of the second part, and certain creditors of the third part. The deed constituted H. and the plaintiff trustees for the payment of the defendant's debts. H. stated that he held the deed as the trustee; that titles depended on it; but he was ready to produce it. The plaintiff however objected; and, per Gurney, B.: "I do not know what the deed is. The defendant is no party to the deed. The plaintiff says, my interest is affected by the production of the deed: what right has the defendant to call upon him to produce the deed? The plaintiff says you hold the deed for me; you have no right to produce it." (*Cooks v. Nash*, 6 Carr. & Payne, 154.) But held, that the defendant might go into secondary proof of the contents; and an extract, furnished and proved to be correct by the trustee, was allowed in evidence. (*Id.*)

It has been laid down in New-York, in general terms, that the cases in which the production of papers may be coerced by subpoena are, where they are the property of a competent witness; or at least, where they do not belong exclusively to the adverse party. When the latter can say "these are my papers," the court will not compel one who happens to have the temporary possession of them, in right of the party, to produce them on subpoena. Hence, the cashier of a bank was held excused from producing their books, &c. on a *subpœna duces tecum*, in a suit to which the bank was a party. (*Utica Bank v. Hillard*, 5 Cowen's Rep. 419.) So as to a clerk in the bank. (*Utica Bank v. Hillard*, *id.* 153.) So the steward of the plaintiff, who as such has a deed belonging to the latter, cannot be compelled through a *subpœna duces tecum* on the part of the defendant, to produce it; but after notice to produce, given to the plaintiff, the steward may be compelled to swear to the contents; for his knowledge of these is not within the principle of privileged communications, which extends only to counsel, attorneys, &c. (*Falmouth v. Moss*, 11 Price, 455. See *Utica Bank v. Hillard*, 5 Cowen's Rep. 153, 158.)

Where none of the objections adverted to apply, it seems that the writings in a man's possession are as much liable to the calls of justice as the faculties of speech or memory are. For not only a man's estate, but even his liberty or life may depend upon written evidence, which is the exclusive property of a stranger. As for instance, where a man's title depends upon the precise time of his birth, and the executor of an accoucher is in possession of an entry made by the latter, which would be legal evidence to prove such time. In criminal cases also, proof that the prisoner at a particular time and place signed an instrument, may be decisive as to his innocence. (1 Stark. Ev. 88, 9, and note (e).)

NOTE 825—p. 437.

Where a party was agent of vendor and vendee in the sale and purchase of an estate, and afterwards became the sole agent of the vendee, to whom an abstract of the title-deeds was delivered, but who afterwards refused to complete his purchase, and retained the abstract in his hands, the court compelled the defendant and his agent to deliver it up to the plaintiff, after action brought to recover the purchase money of the estate. (*Langslow v. Cox*, 1 Chit. Rep. 98.)

The doctrine in the text, that where there is only one copy of the agreement, the party holding it is trustee for the other, was lately recognized in *Blogg v. Kent*, (6 Bing. 614,) and the production of a written memorandum was there ordered for the inspection of the opposite party. (See also per Tindal, C. J., *Jessel v. Millingen*, 1 Moore & Scott, 605; *Alexander v. Alexander*, 1 Alc. & Nap. 109; *Reid v. Coleman*, 1 Crom. & M. 456; 2 Dowl. P. C. 163, S. C.; *Anonymous*, 2 Chitty's Rep. 230.)

If a paper, e. g. an annuity deed, has been placed in the hands of a third person for the benefit of two, and one gets possession of it, he will be compelled to produce it for the inspection of the other. (*Devenoge v. Bouverie*, 8 Bing. 1. 1 Moore & Scott, 29, S. C.)

In general, one who is not a party to the suit, though he hold the paper as a trustee or agent, will not be compelled by rule to produce it; for he should be compelled (if at all) by *subpœna duces tecum*. (*Cocks v. Nash*, 9 Bing. 723. 3 Moore & Scott, 164, S. C.) See also *Davies v. Brown*, 9 Moore, 778, 784; 1 Mann. & Ryl. 571, n. (b.) S. C.) But where the object of the discovery asked for is to enable the plaintiff to declare, the rule is different. Accordingly, in an action on a deed, the plaintiff having had the same taken from him under a warrant for felony, the court, on affidavit of demand upon the magistrate and constable, directed them to give him a copy to declare on, and to produce the originals at the trial, the plaintiff undertaking to pay the expense. (*Harris v. Aldritt*, 2 Chitty's Rep. 229.)

The court will, in many cases order a paper to be deposited, where a question is raised upon the genuineness of the hand-writing. Thus, an indictment being found for sending a threatening letter, the court, on motion of the defendant, ordered it to be immediately deposited with the clerk, that the defendant's witness might inspect it. (*Rex v. Harrie*, 6 Carr. & Payne, 105.) In a suit on a bill of exchange, the court ordered the bill to be lodged with the officer, for the personal inspection of the defendant, when it appeared from his affidavit, that the cause of his refusal to pay, as acceptor, was a reasonable suspicion of the acceptance having been forged. (*Richey v. Ellis*, 1 Alc. & Nap. 109.)

NOTE 826—p. 437.

But in an action on a charter-party against the charterer, the court refused to compel the plaintiff to allow the defendant the inspection of the ship's log-book. (*Rundle v. Beaumont*, 4 Bing. 537. S. C. 1 Moore & Payne, 396.)

In an action by plaintiffs, ship-owners, against the defendant, their broker, the court refused to compel the defendant to give a copy of a letter which he had received,

touching an adventure in which the ship was to have been employed, the parties not having a common interest in the paper. (*Rowe v. Howden*, 4 Bing. 539, n. And see *Ratcliffe v. Bleasly*, 3 Bing. 148; *Gigner v. Bayley*, 5 Moore, 71; *Portmore v. Goring*, 4 Bing. 152.)

In Connecticut, the court refused to compel the assured to produce his instructions to the master of the vessel, and also the clearance and other papers, in order that they might be inspected by the opposite party, the insurer. (*Sage v. The Middleton Ins. Co.*, 5 Day's Rep. 409.)

NOTE 827—p. 437.

But the court will not compel the production, in order to be stamped, of a paper affecting the rights of a third person, not a party. (*Lawrence v. Hooker*, 2 Moore & Payne, 9.)

NOTE 828—p. 438.

Where a plaintiff had surreptitiously obtained from his adversary a paper, (viz. a bill of items of an account,) necessary as evidence for the latter, the court stayed the proceedings in the suit till the plaintiff should give a copy to the satisfaction of the prothonotary, and ordered that the copy should be evidence. (*Edginton v. Nixon*, 2 Bing. N. C., 316.)

Property and books of account having been seized under an immediate extent in chief, issued against a collector of taxes and his partner in trade for a debt due to the crown, and a claim entered by the assignees of the defendants, who had become bankrupts; held, that the assignees were entitled to an inspection and copies of the books, previous to the trial of the issue between them and the crown. (*Rex v. Winkles, M'Clel. & Y.* 33.)

And, it seems, that in a suit by a corporation against their agents, alleging the making of false entries in the corporation books, the court will make an order on the corporation to allow an inspection of their books; but not without an affidavit shewing that the inspection is necessary. (*Imperial Gas Company v. Clarke*, 7 Bing. 95.)

A new trial having been granted, the court allowed the plaintiff to have inspection of a deed, read in evidence by the defendant on the first trial, though the former was no party to it. (*Hewitt v. Pigott*, 7 Bing. 400.)

NOTE 829—p. 438.

* But see *Wallis v. Murray*, 4 Cowen's Rep. 399, stated post note, 832.

The court refused to compel the defendant to give the plaintiff a copy of a lease in his possession on which covenant had been brought, upon affidavit that no counterpart

of the lease was in the possession or power of the plaintiff, and that the attorney who drew the lease and counterpart had absconded. Best, C. J., said: "The short ground on which we decide is, that the plaintiff has not shewn that the counterpart is not in existence." Park, J., referred to the case of *Street v. Brown*, cited in the text, as showing that, in such cases, the party holding the paper does not hold it as trustee for the other. Per Gaselee, J.: "The application should have been for a copy only." (*Portmore v. Goring*, 12 Moore, 368. 4 Bing. 152, S. C.)

NOTE 830—p. 438.

We have seen, ante, note 824, p. 1172, that, in England, a witness cannot in general be compelled, under a *subpoena duces tecum*, to produce his title-deeds. A similar doctrine seems to prevail in regard to the rule to produce. Accordingly, in an action against the sheriff for a false return of *nulla bona*, to a writ of *fi. fa.* against the goods of Lord Egmont, the defence set up was, that the goods were the property of trustees, under two deeds, one of which was read in evidence on the trial, and the execution of the other admitted, but was not used. A new trial having been granted, the plaintiff moved for a rule allowing him to inspect both deeds; and the court granted inspection of the one read in evidence, but refused it as to the deed which was withdrawn, saying, as to the latter, that it came within the general principle excusing a party from producing his muniments for the inspection of his adversary. (*Hewett v. Pigott*, 7 Bing. Rep. 400.)

In the court of exchequer, a bill was filed by the vicar, against occupiers, for tithes; and the plaintiff moved that G., one of the defendants, produce certain deeds and papers mentioned in his answer, for inspection. The motion was resisted by G., on the ground that several of the documents related and showed his title as lay impropriator, to some of the tithes in question. And the court held, that the plaintiff was not entitled to the production of such of them as related to the defendant's title to the tithes. (*Shepherd v. Lloyd*, 2 Young. & Jerv. 490.) The lord chief baron, in this case, laid down the doctrine as follows—that according to the general practice of the court, a defendant is bound to produce all writings in his custody relating to the matters in dispute, though they may in fact make against him; but there has always been a limitation to that, with respect to title-deeds relating to the inheritance; in regard to these, he said: "I have always understood that one party is not bound to give the other an opportunity of examining his title-deeds; though, as to this, there is again a distinction where the party has an interest in the deed. I am, therefore, disposed to draw a distinction between those which expressly relate to the title of G., and those which are collateral to his title. (Id.) An heir at law, seeking a remedy against a will or recovery, and showing a *prima facie* title, has a right to the production of the anterior title, but not to the subsequent title. (Id.)

NOTE 831—p. 439.

The following cases will serve still further to illustrate the principles and practice of the English courts, in respect to documental discovery.

The plaintiff and defendant had signed an agreement on unstamped paper, which was given to a third person to hold for all parties. The defendant requested the loan of it to take a copy, which was granted; and in twenty-one days from the execution, the plaintiff desired the defendant to give it him to get it stamped, which he refused to do, nor did he return it to the trustee: on being afterwards required to produce it, he swore it was either lost or destroyed; but his attorney admitted he had a copy. The court ordered the latter to produce the copy, and directed that if it were given in evidence, duly stamped, the defendant should be precluded from producing the original to defeat it. (*Bousfield v. Godfrey*, 2 Moore and Payne 771.)

The judge granting an order to deliver to the defendant a copy of a paper sued upon, will generally make it a part of the order that the defendant shall make no objection to the stamp. (*Price v. Boulby*, 1 Car. and Payne 466.) And if the equity of the case require it, the court will confine their order for inspection to particular parts of a deed. (*Ramsbottom v. Cooper*, 2 Chitty's Rep. 231.)

The grounds of the application for a discovery must be fully stated and explained in the affidavits upon which the motion is founded. (*Rundle v. Beaumont*, 1 Moore and Payne 396. 4 Bing. 537, S. C.) It is not enough for the party to swear, in general terms, that the production is necessary to his defence; he must show his interest in the paper, and the specific purpose for which he requires it. The nature of the document also must be shown. (*Id.* Per Tindal C. J., in *Jessel v. Millingen*, 1 Moore and Scott, 605.)

Where the application was founded on an affidavit of the plaintiff, stating that the defendant's attorney had told the plaintiff he had a document in his possession bearing the plaintiff's signature, which, when produced, would put an end to the cause, and alleging further, that he (the plaintiff) had never signed any such paper, and that if any existed, it was a forgery; held, that a sufficient ground for ordering the production was not shown. (*Id.*)

NOTE 852—p. 439.

The courts in New-York, previous to the late revision of the statutes, have been very cautious in relation to this practice of compelling a party to furnish evidence against himself; and have allowed it only where the instrument to be inspected or copied was the immediate foundation of the suit, and in a very few other cases depending on peculiar circumstances. They granted the order, where the action was on a policy of insurance, to compel the assured to produce to the insurers all papers, or true copies thereof, relating to the matter in issue. (*Lawrence v. The Ocean Ins. Co.*, 11 Johns-Rep. 245, n (a).) So, an order was granted against the defendant in ejectment, requiring him to deposit in the clerk's office certain deeds, upon affidavits showing that the defendant relied on those deeds for his defence, and that the plaintiff expected to prove, with proper opportunity for inspection by his witnesses, that such deeds were forgeries—

(*Jackson, ex. dem. Titus, v. Jones*, 3 Cowen's Rep. 17.) And where the action was on a note, a like rule was made requiring the plaintiff to deposit it in an office where the defendant and his witnesses could have access to it, upon affidavit of the defendant that he had never signed the note, and expected to prove it a forgery. (*Brush v. Gibbon*, 3 Cowen's Rep. 18, n (a).) And where the action was on a special contract, the counterpart of which, belonging to the plaintiff, was lost, the court ordered the defendant to allow the plaintiff to take a copy of the one in his possession. (*Wallis v. Murray*, 4 Cowen's Rep. 399.) But where the declaration was on the general counts, upon implied promises, the defendant was held not entitled to an order on the plaintiff to produce letters or writings in his possession, or to furnish the defendant with copies. (*Willis v. Bailey*, 19 Johns. Rep. 268.) And where the plaintiff's declaration was on a note, the court refused to order the plaintiff to furnish the defendant with copies of entries made in their books, relating to the note, or to allow an inspection. (*The Bank of Utica v. Hillard*, 6 Cowen's Rep. 62. See *Clarke v. Spencer*, id. 59.) So also it was held, that a third person, no way interested in the suit, could not be compelled to produce a private paper of his own, for the inspection of a party. "If the plaintiff deem it material," said the court, "he must compel its production by *subpoena duces tecum*, or in some other way than by motion." (*Davenbagh v. M'Kinnie*, 5 Cowen's Rep. 27.) See ante, note 825, p. 1175. And in trover for a bond, the court refused to compel the defendant to furnish a copy of the instrument, to enable the plaintiff to declare. (*Denslow et ux. v. Fowler*, 2 Cowen's Rep. 592.) *Semble*, that such an application can only be granted in actions arising *ex contractu*. (*Id. Davenbagh v. M'Kinney*, 5 Cowen's Rep. 27.)

The foregoing decisions will suffice to show how this subject of documental discovery was viewed by the New-York courts, independent of any legislation respecting it. They were unwilling to adopt the broad position, said, in the text (p. 438,) to have been laid down by Lord Mansfield; preferring rather that the party should be turned over to his remedy by bill in equity, than be obliged, in this way, to furnish evidence against himself, except in certain cases; as where the instrument to be inspected or copied was the immediate foundation of the action, and in a few other cases depending on peculiar circumstances. (Per Curiam, in *Utica Bank v. Hillard*, 6 Cowen's Rep. 62.)

But, it is now provided by the revised statutes, that the supreme court shall have power in such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers and documents, in his possession, or power, relating to the merits of any such suit, or of any defence therein. (2 R. S. 199, § 21.) The court is also required by general rules to prescribe the cases in which such discovery may be compelled, and the proceedings for that purpose, where the same are not provided for by statute; and in so doing, they are to be governed by the principles and practice of the court of chancery in compelling discovery, except that costs of the proceeding shall always be awarded in the discretion of the court. (*Id.* § 22.)

In pursuance of this statute, the supreme court has provided, that application may be made, to compel the production and discovery of books, papers and documents, relating to the merits of any suit pending in that court, or to any defence in such suit, in the following cases. 1. By the plaintiff, to compel the discovery of papers or documents in the possession or under the control of the defendant, which may be necessa-

ry to enable the plaintiff to declare, or to answer any pleading of the defendant: 2. The plaintiff may be compelled to make the like discovery of papers or documents, where the same shall be necessary to enable the defendant to answer any pleading of the plaintiff: 3. The plaintiff may be compelled, after declaring, and the defendant after pleading, to produce and discover all papers, or documents, on which the action, or defence is founded: 4. After issue joined in any action, either party may be compelled to produce and discover all such books, papers, and documents, as may be necessary to enable the party applying for such discovery, to prepare for the trial of the cause. (Rule 28, of 1830, and of 1837.)

The object of the statute was to substitute a rule of court in the place of a bill of discovery, where the discovery sought is of a documentary character; and it may be safely assumed, that if a court of chancery would grant the discovery, in aid of the suit at law, the case is within the rules of the supreme court. (See *Townsend v. Lawrence*, 9 Wend. 458.) In *Fitzhugh v. Everingham*, 2 Edw. Ch. Rep. 605, M'Coun, Vice-Chancellor, refused to entertain jurisdiction of a bill filed, praying a discovery of books, papers, and documents, in aid of a suit at law, on the ground that the court of law had full power to compel the discovery. If the action in which the discovery is sought, is of a penal nature, it seems, that following the practice and adopting the principles of courts of equity, the discovery will be denied. (See *M'Keon v. Lane*, 2 Hall's Rep. N. Y. C. P. 520; *United States v. The Saline Bank of Virginia*, 1 Peters' Rep. 100, 104; *United States v. Twenty-Eight Packages*, 1 Gilp. Rep. 306; *Sharp v. Sharp*, 3 John. Ch. Rep. 407.)

The power of compelling discovery in chancery extends to deeds, papers, and writings, in the possession, or power of the party. (Wigram on Discovery, 2, and the cases there cited.) These are limited to the point or points in the cause, or the exigencies of the particular trial. (Id. 31, 64.) And there are various cases in which production or discovery cannot be had; as, if the suit, in aid of which they are sought, be criminal in its character, or the discovery would tend to subject the party to a criminal prosecution, or show him guilty of great moral turpitude, or work a forfeiture of interest, or the discovery be privileged, &c. (Id. 60 to 64, and see also, id. 265, et seq.) Some other heads discussed by this writer, will be found useful in fixing a construction on the New-York statute limiting discovery according to equitable principles. See also *Gresley's Eq. Ev.* 25, et seq.

The effect of papers called out in this way is the same, when used by the party requiring them, as if they had been produced upon notice. (2 R. S. 200, § 27.) Previous to the statute above considered, it was said, that where a party had been compelled by rule to discover papers, the papers produced were to be regarded like an answer in chancery in some respects; and therefore the party producing them was entitled to have the whole read, if the other party read any portion of them; (*Lawrence v. Ocean Ins. Co.*, 11 Johns. Rep. 241, 260, per Thompson, C. J.); under such circumstances, like an answer, they would, it seems, be *prima facie* evidence of the facts stated in them as in favor of the party required to produce them, liable to be disproved by the opposite party. See as to answers in chancery, ante, note 647, p. 929.

The practice under the above New-York statute and rules, and several decisions in relation to both, will be seen by reference to *Grah. N. Y. Prac.* 524, et seq.

By the 15th section of the judicial act, (2 L. of U. States 63,) the United States courts are empowered, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant, as in cases of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.

Where an application was made, pursuant to the foregoing provision, in behalf of a defendant, at the suit of the United States, for an order requiring the plaintiffs to produce certain papers, alleged to be on file in the public offices at the seat of government of the United States, and of which, as was further alleged, the officers charged with their custody had refused to permit copies to be taken; the judge for the northern district of New-York, to whom the application was addressed, expressed strong doubts whether this was such a case as was contemplated by the act of congress; inasmuch as the officers of the government were not parties to the suit, and might be examined as witnesses. (Conklin's Treat. p. 293.) None are within the act of congress except parties; (United States v. Twenty-eight Packages, 1 Gilpin, 307;) and it embraces, it seems, only such suits wherein a judgment by default may be given against the defendant, which can be enforced by execution; and hence, if the proceeding is *in rem*, e. g. against goods as forfeited, the act does not apply. (Id.) Nor will the court in any case compel a party to produce evidence which would subject him to a forfeiture. (Id.) But they compelled the plaintiff, in ejectment, to produce a title paper to land in dispute, where the instrument went merely to defeat his own title, though the defendant showed no title in himself. (Hylton's lessee v. Brown, 1 Wash. C. C. Rep. 342.) This was on the ground that, in equity, a discovery in a similar case would be compelled. (Id. p. 344. See Metcalf v. Harvey, 1 Ves. 248.) Though the contrary was expressly decided on a former trial of the same cause. (1 Wash. C. C. Rep. 298.)

If deeds are on record, the court will not grant a rule on the party in whose possession the originals are, to produce them, unless a special reason for it be assigned. (Geyger's lessee v. Geyger, 2 Dall. Rep. 332.)

If the party seeking a discovery under this act, intend nonsuiting the plaintiff, or defaulting the defendant, as the case may be, he must notify the opposite side that he will move the court for an order to that effect, viz. that he produce the papers, or, on failure, that a nonsuit be awarded, or judgment by default rendered. (Bas et al. v. Steele, 3 Wash. C. C. Rep. 381.) This order need not be absolute in the first instance, but may be, *nisi* cause shall be shown on the trial. (Dunham v. Riley, 4 Wash. C. C. Rep. 126.) Whether the notice of the rule to produce, &c. required by the act, must be served on the party or his attorney, has not, we believe, been distinctly decided. In Geyger's lessee v. Geyger, cited supra, the notice was served on the attorney; and the court, without settling the point, said, "we will always keep the cause under our control for the purpose of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial

till a full opportunity has been afforded for the attorney's communicating the rule to his client." Further as to the practice and decisions under the act of congress, see *Conk. Treat.* 286, et seq.

It seems that, in Pennsylvania, they have a statute somewhat similar to that of New-York, above referred to. (*Alexander v. Coulter*, 2 Serg. & Rawle, 494.) They have a statute also in Ohio. (See *John v. John*, 1 Wright's Rep. 585.) And in Vermont. (*Durkee v. Leland*, 4 Verm. Rep. 615.)

In South Carolina, a party cannot be compelled to produce his books to be used by his adversary in a court of law; the defendant, after giving notice to produce, may give parol evidence of their contents; or if he have not such evidence, he must go into chancery for a discovery. (*Boyce v. Foster*, 1 Bail. Rep. 540.)

In Kentucky, on an information by the attorney-general against a clerk of a county court, alleging misbehavior in office, the court compelled the latter to produce papers and books belonging to his office to be used as evidence against him. (*Commonwealth v. Rodes*, 1 Dana, 595.) See further as to the doctrine in this state, *Smith v. Morrow*, 7 Monroe, 234.

NOTE 833—p. 439.

The rule on this subject, generally, is the same in criminal as in civil cases. (See *Rex v. Watson*, 2 T. R. 201, per Buller J.; *M'Nally's Ev.* 236, 7, 8, 9; *Roscoe's Cr. Ev.* 9, et seq; *The People v. Holbrook*, 13 John. Rep. 90; *United States v. Britton*, 2 Mason 464, et seq; *State v. Kimbrough*, 2 Dev. Rep. 431, 436; *State v. Gustin*, 2 South. Rep. 744, 746; *State v. Potts*, 4 Halst, 26, 28, 9, et seq.

NOTE 834—p. 439.

The general rule, that where one party wishes to avail himself of a written instrument, in possession of his adversary, he must give notice to produce it, is recognized in the following cases, as well as in many others cited in our succeeding notes under this head. *Waring v. Warren*, 1 John. Rep. 340. *Rogers v. Van Hoesen*, 12 id. 221. *Nicholson v. Hilliard*, 1 N. Car. Law Repos. 253. *Dobbin v. Watkins*, Col. Cas. 33. *Pickering v. Meyers*, 2 Bail. Rep. 113. *Blood v. Harrington*, 9 Pick. 552. *Smith v. Morrow*, 7 Monroe's Rep. 234. *Thayer v. Middlesex Mutual Fire Ins. Co.*, 10 Pick. 326. *M'Clean v. Hertog*, 6 Serg. & Rawle, 154. *Alexander v. Coulter*, 2 id. 494, 496. *Kennedy v. Fowke*, 5 Harr. & John. 63. *Campbell v. Wallace*, 3 Yates' Rep. 271. *Jackson, ex. dem. Livingston, v. Frier*, 16 John. Rep. 193. *Boyce v. Foster*, 1 Bail. Rep. 540. *Fraux v. Fraux*, 1 Penning. Rep. 166, 7. *State v. Kimbrough*, 2 Dev. Rep. 431. *Thornton v. Moody*, 2 Fairf. Rep. 255, 6. *M'Kellip v. M'Ilhenny*, 4 Watts' Rep. 317.

NOTE 835—p. 439.

English writers on the subject of evidence are agreed, that the service of the notice may be either on the party or his attorney. We have before observed, however, that the case of the Attorney General v. Le Merchant, cited in the text, strongly intimates that it should be on the attorney. (See ante, note 7, p. 13.) And in a case decided as late as 1852, in the exchequer, Gurney, B., appears to have so held. (*Houseman v. Roberts*, 5 Carr. & Payne, 394.)

In New-York, the notice to produce, according to the rules of the supreme court, must be in writing, and be served on the attorney, when one is employed. (*Semble*, see rule 10, Supreme Court, 1837; also ante, notes 6, 7, pp. 12, 13.) And notice to the attorney of the party on record is sufficient, though he be only a nominal party; notice to the party in interest, is, in such case, unnecessary. (*Brown v. Littlefield*, 7 Wend. 454.) When the attorney has been changed, a notice served on the first attorney, before the change, is good and operative as to the second. (1 Mood. & Rob. 242. *Grah. N. Y. Prac.* 528, 2d ed.)

In Indiana, it seems, the notice may be served on either the party or his attorney. (*Lagow v. Patterson*, 1 Blackf. Rep. 327, 328.)

As to the form of the notice, it should be sufficiently specific in its terms fairly to apprise the party of the paper which he is required to bring forward. On this subject the rule applicable to notices generally, would seem to apply. (See *Graham's N. Y. Prac.* 529.) A notice not describing the paper sought, but in broad terms requiring the party to produce all papers relating to the bill or debt in question, has been held too vague. (*France v. Lucy, Ry. & Mood.* 341. *Jones v. Edwards*, 1 McLell. & Younge, 139.) See 3 Chitty's Gen. Prac. 835, 6. Conceding, however, that a notice in general terms, to produce all papers in the party's possession or under his control, relating to the matter in suit, would be held of no force or effect, yet, although the notice does not give a minute description of the paper sought, if it apprise the party that this paper is the one wanted, the object of the notice is answered, and it will be held sufficient. (See per Sutherland, J., delivering the opinion of the court in *Walden v. Davison*, 11 Wend. 65, 67.) Accordingly, notice to the attorney to produce a certain letter, written by the plaintiff to the defendant, concerning an execution produced on a former trial of the same cause, "and all other papers in your custody or power, relating to the matter in controversy in this cause," was adjudged sufficiently explicit to notify the attorney that the execution was one of the papers required; especially where it was shown that, on such former trial, the letter and execution were produced by the attorney himself, and he did not attempt to excuse himself from its production on the second trial, except on the ground of its not being in his possession. (*Walden v. Davison*, supra.) In an action for services as a singer, notice was given to the defendant to produce all letters, papers, books, receipts, vouchers, memorandums, and all other documents written by the plaintiff to the defendant, or by the defendant to the plaintiff, or otherwise; and it was held sufficient to warrant parol evidence of a memorandum, signed by the defendant and delivered to a witness, and afterwards re-delivered to the defendant, stating the terms of the engagement. (*Jones v. Hilton*, Lancaster Sp. Ass. cor. Holroyd, J., 1825. 1 Stark. Ev. 348, n. (s), 6th Am. ed.) A paper may be described in a notice by its subject matter, without reference to its date, &c. Hence, in

an action to recover monies received by the defendant under an award of commissioners, a notice to him to produce all letters, papers and books, in his possession, relating to such moneys, was held sufficient to authorize parol evidence of letters coming within the range of the notice. (*Vasse v. Mifflin*, 4 Wash. C. C. Rep. 519.) It will not do to say, that the accuracy and precision of special pleading is necessary in notices of this kind; and there is a manifest distinction even between a notice to quit, and notice to produce. (Per Morton, J., delivering the opinion of the court in *Bogart v. Brown*, 5 Pick. Rep. 18, 19.) Where a copy of the paper required was annexed to the notice, though it appeared by the testimony of witnesses, that the supposed copy materially differed from the original in one particular, it was held, that the notice was sufficient to entitle the party to give parol evidence of the original, it being manifest, from all the circumstances, that the adverse party must have understood what paper was intended to be referred to. (*Bogart v. Brown*, *supra*. See S. C. wrongly cited from 5 Mass. Rep. ante, note 6, p. 13.) A *subpoena duces tecum*, served on the attorney, to produce the paper required, will not be treated as a sufficient notice. (*McPherson v. Rathbone*, 7 Wend. 216, 219.)

The notice will be insufficient if entitled in a wrong cause. (1 Starkie's C. 61, cited in Stark. Ev. 976, n. (f), 3d Am. ed. See ante, note 6, p. 12.) In an action by A. and B., assignees of C., (a bankrupt,) against E., a notice to produce a document was entitled, A. and B., assignees of C. and D., v. E.; and this was held insufficient, although A. and B. were in fact assignees of C. and D. under a joint commission. (*Harvey et al. v. Morgan*, 2 Stark. Rep. 17, 19, 20.)

A notice to produce a paper *on the trial*, generally, without referring to any particular circuit, is not spent by the cause not being tried at the next circuit; but is good and operative whenever the trial comes on. (*Jackson, ex dem. Burr, et al. v. Shearman*, 6 John. Rep. 19.) And, where a party to a suit in a justice's court had given notice to produce a paper *on the trial*, it was held, that such notice was sufficient and operative in the common pleas, the cause having been removed there by appeal. (*Wilson v. Gale*, 4 Wend. Rep. 623.) In North Carolina, a notice which in terms required the party to produce a paper, *on his trial this day*, was deemed operative whenever the trial should come on, whether on the day mentioned, or any other day of the same or a subsequent term. (*State v. Kimbrough*, 2 Dev. Rep. 431, 438.)

NOTE 836—p. 459.

The notice must be reasonable in point of time; and whether it is so, or not, is a question exclusively for the court, upon which they are to exercise a sound legal discretion in reference to the circumstances of each particular case. (Per Savage, C. J., in *Utica Ins. Co. v. Caldwell*, 9 Wend. 296. Per Woodworth J., in *Gorham v. Gale*, 7 Cowen's Rep. 739. See also *M'Pherson v. Rathbone*, 7 Wend. 216; *Hammond v. Hopping*, 13 Wend. 505, 508, 9, per Sutherland, J.)

The rule in *Bryan v. Wagstaff*, cited in the text, proceeds upon the ground, that a party resident abroad is presumed to have left with his attorney all papers necessary to the conduct of his cause. (See *S. P. Drabble v. Donner, Ry. & Mood*, N. P. R. 47; 1 Carr. & Payne, 188, S. C. And see *Bryan v. Wagstaff*, on error, reported 8

Dowl. & Ryl. 208. 5 Barn. & Cress. 314. 2 Carr. & Payne 125, S. C.) Whether the rule applies in any case except where the defendant is resident abroad, *quere*. (See *Vice v. Anson*, 1 Mood. & Malk. 96, per Tenterden C. J. 3 Carr. & Payne, 19, S. C. But at all events, the papers must be so necessarily connected with the cause as to render it probable that they would have been left with the attorney: and where this was not so, and the notice was served on the attorney too late for the party to receive it in time before the trial, it was held insufficient. (*Id.* See *Affalo v. Foudrinier*, 1 Mood. & Malk. 334, n. (a). *Rex v. Atwood*, K. B. sittings after Hilary Term, 1828, 2 Harr. Dig. 1098. S. P.) In *Drabble v. Donner*, (Ry. & Mood. N. P. Rep. 47,) a notice to produce letters written by the plaintiff to the defendant, who was a foreigner, was held sufficient when served four days before the trial, though the defendant had come into the country only seven months before, not designing to change his residence, and though the letters were written eighteen years back, and were addressed to the defendant at his foreign domicil. The court did not pretend that the notice was sufficient to enable the party to obtain the papers from his residence, but went upon considerations of the inconvenience and delay which would be occasioned, unless inferior evidence were received under such circumstances. (S. C. 1 Carr & Payne, 188.) The English cases, however, generally require that notices to produce should be served in such season as will afford the other side a reasonable opportunity of obtaining the paper. (See *Atkinson v. Carter*, 2 Chitty's Rep. 403. *Brown v. Waters*, 1 Mood. & Malk. 235. *Sims v. Kitchen*, 5 Esp. Rep. 46. *Houseman v. Roberts*, 5 Carr. & Payne, 394.) A cause was tried on Wednesday morning at the assizes; on the previous Monday evening the defendant's attorney, being at the assizes town, and nineteen miles from his office, was served with notice to produce a paper, which would probably be at his office; held, that the service was too late. (*Hargest v. Fathergill*, 5 Carr. & Payne, 303.) Notice was given to the attorney, at Billericay, in Essex county, to produce certain deeds, who went to London and obtained them; afterwards, and on Monday preceding the day of trial, which was appointed for Wednesday, a fresh notice was given to the attorney to produce another deed; the attorney stated to the person who served the notice that he had not the deed, but that if the adverse party would pay the expense of sending a messenger for them to London, it should be had: this offer not being complied with, the court held the notice insufficient, and that secondary evidence could not be given. Otherwise, however, it seems, if the party had offered to pay the expense of sending. (*Doe, ex dem. Curtis v. Spitty*, 3 Barn. & Adol. 182.) A prisoner tried at the assizes on Wednesday for setting fire to his house with intent to defraud an insurance company, was, on the Monday preceding, served at the prison with a notice to produce the policy of insurance given him by the company; the prisoner's home was ten miles from the prison; and held, that the prisoner could not be presumed to have the policy in his possession at the prison, and as the trial might have come on at an earlier period, the notice was not sufficient to let in secondary proof. (*Rex v. Ellicombe*, 5 Carr. & Payne, 522.) And it has been laid down generally, that a notice to produce, served upon a prisoner, after the commencement of the assizes at which he is to be tried for felony, is too late. (*Rex v. Howarth*, 4 Carr. & Payne, 254.) It should be given a reasonable time before the assizes. (*Id.*) When the party does not live at the assize town, it should be served before the commission day. (1 Mood. & Rob. 259. *Rosc. Cr. Ev.* 11.)

The sufficiency of the notice, as to time, has been considered in several New-York cases. The notice should, in general, be served previous to the circuit at which the cause is tried. How long previous, however, will depend on circumstances. Where a party resides a distance from the circuit, (e. g. twenty miles,) and there is no presumption that the paper was brought with him to the circuit, a notice served on his attorney, at the circuit, will not be deemed reasonable. (*Gorham v. Gale*, 7 Cowen's Rep. 739.) The party or his attorney ought not thus to be compelled to leave the court in quest of papers, when, perhaps, during the interval, the cause may be reached on the calendar. (*Id. Utica Ins. Co. v. Caldwell*, 3 Wend. 296, per Savage C. J.; *McPherson v. Rathbone*, 7 id. 219.) Besides, it is unreasonable to impose on a party the trouble and expense of sending for a paper, which, had the other party exercised ordinary diligence, might have been avoided. (Per Woodworth J., in *Gorham v. Gale*, supra, p. 743, 4.) See *Doe ex dem. Curtis, v. Spitty*, 3 Barn. & Adol. 182, stated supra. In the case of the *Utica Ins. Co. v. Caldwell*, supra, it turned out that the paper might have been obtained in the interval between the notice and the trial; yet the notice being served on the 5th, at 4 P. M., to produce papers which were at New-York, the circuit commencing on the 7th, at 10 A. M., at Utica, it was held insufficient; for the attorney could not know that the cause would not be reached, or that the circuit would last till he could obtain the papers.

When the paper wanted, however, is in the possession of the party or his attorney in court, or is so very near by that it can be obtained without delaying the trial, a notice at the circuit, and even on the trial, will be sufficient. (Per Savage C. J., *Utica Ins. Co. v. Caldwell*, 3 Wend. 296; Per Woodworth J., *Gorham v. Gale*, 7 Cowen's Rep. 739. *McPherson v. Rathbone*, 7 Wend. 216. *Hammond v. Hopping*, 13 id. 505. *Anonymous*, Anth. N. P. 199.) As to the rule on this subject in Maine and South Carolina, see *Emerson v. Fish*, 6 Greenl. Rep. 206; *Pickering v. Myers*, 2 Bail. Rep. 113, 114. In Vermont, notice on the trial is not sufficient, even though the paper be in court; (*Semble, Durkee v. Leland*, 4 Verm. Rep. 612, 615;) and such, indeed, appears to be the rule in England. (See post p. 443, 4, 5, of the text.) In the circuit court of the United States, sitting in Pennsylvania, the principle of the above New-York cases was acted upon. (*Rhodes' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 718.

The question, whether the paper is in court, is sometimes settled by direct evidence of the fact; and even the attorney of the party required to produce, may be compelled to testify on this point. (*Rhodes' lessee v. Selin*, supra; also ante, note 279, p. 277, and the cases there cited: but see per *Williams C. J.*, in *Durkee v. Leland*, 4 Verm. Rep. 615.) In other cases the fact may be presumed from the nature of the paper required, and its particular connection with the cause. Accordingly, where the suit was on a note, to which the defence of usury was set up, the plaintiff being fully apprized that such defence would be insisted on; held, that a note given for the extra interest, contemporaneously with the one sued upon, might, from its connection with the cause and the nature of the instrument, be fairly presumed to be in possession of the party or his counsel in court, and therefore, that notice to produce given pending the trial would be sufficient. (*Hammond v. Hopping*, supra.) Such presumption, however, may be rebutted, by the oath of the attorney or party; but unless this is done, secondary evidence will be received. (*Id.*) As to the presumption of possession, generally, see the next succeeding note.

NOTE 837—p. 440.

The writings required must, in some way or other, be shown in the party's possession or power, before it can be said that he is in fault for not producing them, and consequently before secondary evidence of their contents is received, or any inference made against him from their non-production. (See per Sutherland, J., in *Life & Fire Ins. Co. v. The Mechanic's Fire Ins. Co.*, 7 Wend. 34. Per Taylor, C. J., in *Nicholson v. Hilliard*, 1 N. Car. Law Repos. 254. Per Johnson, J., in *Reid v. Colcock*, 1 Nott & M'Cord, 592, 604. M'Kellip v. M'Ilhenny, 4 Watts' Rep. 318, 319.)

Some cases as to the mode of proving the fact of possession, will be found in our next preceding note. It cannot be made out as against one defendant by the declarations of his co-defendants, unless a joint liability in all be first shown. (*Birbeck v. Tucker*, 2 Hall's Rep. N. Y. C. P., 121; see also ante, note 170, p. 171, 2.)

But possession is frequently presumed from the nature of the paper, as well as other circumstances, indicative of its place of custody. The enquiry, in the first instance, may generally be determined by ascertaining to whom the possession rightfully belongs; for, in the absence of proof to the contrary, the law will presume that the person entitled holds the custody. Thus an appointment of an officer as overseer was presumed to be in his possession. (*Rex v. Leicester*, 1 Barn. & Ald. 173.) On the general question as to the person to whose possession title deeds belong, see Lord Buckhurst's case, 1 Coke's Rep. 1. A party claiming under a deed with general warranty, though presumed to possess the deed to himself, is not supposed to hold the title papers anterior to such deed; they are presumed to be in the hands of the warrantor. (*Cooke's lessee v. Hunter*, 2 Tenn. Rep. (Overt.) 113. *Nicholson v. Hilliard*, 1 N. Car. Law Repos. 253, 4. *Jackson, ex. dem. Gillespy, v. Woolsey*, 11 John. Rep. 453.) Where, however, land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser is presumed to have the anterior deeds. (*Nicholson v. Hilliard*, supra.) Otherwise, however, in Maine; for there, it is said, the universal practice is for every man to retain possession of deeds to himself. Hence, the grantee is presumed to possess none of the title papers anterior to his own deed. (*Knox v. Silloway*, 1 Fairf. Rep. 216, 217.) So, *semble*, in the New-England states generally. (Said, in id. See *Southerin v. Mendum*, 5 N. Hamp. Rep. 423; *Eaton v. Campbell*, 7 Pick. 10. *Poignard v. Smith*, 8 id. 272.) A purchaser at a sheriff's sale is not supposed to have the custody of the title deeds, except the one to himself. (*Nicholson v. Hilliard*, supra.) But see per Tilghman, C. J., in *Little v. Delancey*, 5 Binn. 270. Documents relating to a reversionary estate, were presumed in possession of the assignee. (*Goodtitle v. Saville*, 16 East. 91, n(a).) Trustees, in a deed of settlement, may be supposed to have the custody of that; but the title deeds are, in general, the muniments of the settlor. (*Fury v. Smith*, 1 Hud. & Brooke, 735, 749, per Bushe, C. J.) Where it appeared that muniments of the plaintiff's title were in the hands of his counsel on a former trial, held, that they must be presumed in his possession, or under his control, so far as to render operative a notice to produce, served upon the plaintiff. (*M'Kellip v. M'Ilhenny*, 4 Watts' Rep. 318, 319.) Proof that a letter was sent, purporting to enclose a bill, and that a bill answering the description in the letter was shortly after in the possession of the party, was held presumptive evidence that he received both letter and bill. (*Kieran v. Johnson*, 1 Stark. Rep. 109.) The fact of a

letter having been sent to a lady some years before her death, was held not sufficient to raise a presumption of its being in the custody of her executrix three or four years after her death. (*Drew v. Durnborough*, 2 Carr. & Payne, 198.)

In some of the states, where a *prima facie* case of possession is made out against a party notified to produce a paper, he may be sworn to prove the contrary. Such is the law in Pennsylvania. (*Wood v. Connell*, 2 Whart. Rep. 532.) But a party sworn for this purpose, cannot be allowed to testify generally as to the very gist of the cause. (*Id.*) In the circuit court of the U. States, held, that though the party might purge himself by swearing he had not the paper in his possession, or had diligently searched but could not find it, yet he could not be obliged to answer whether he had not received such a paper. (*Vassee v. Mifflin*, 4 Wash. C. C. Rep. 519.) Nor is he obliged to testify at all, but he generally does so in order to avoid the inferences which might otherwise be made against him. (*Wood v. Connell*, 2 Whart. Rep. 562, 3.) As to this doctrine in New-York, see *Hammond v. Hopping*, 13 Wend. 505. But the attorney of the party may be compelled to testify. (See *Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 718; ante, note 287, p. 281, and the cases there cited; also ante, note 836, p. 1186.)

The operation of a notice to produce cannot be defeated, by the party subsequently transferring the custody of the paper to another person; for such conduct, if sanctioned, might compel the opposite party to call a most unwilling witness. (Per Best, C. J., in *Best v. Osborne*, 1 Carr. & Payne, 632. *Knight v. Martin*, 1 Gow. 26.) Even where the party, in good faith, lets the paper go out of his hands, after notice, he ought to apprise the other party of it, so that he may know where to find it. (*Jackson, ex dem. Burr, v. Shearman*, 6 John. Rep. 18, 21.) Where notice had been given to the party, and upon a second trial, was served upon the attorney, who informed the party serving it, that the instrument had been assigned, without his privity, to some one he did not know; held, that the notice was insufficient without further inquiry from the party. (*Leeds v. Cook*, 4 Esp. Rep. 256.) See *Fury v. Smith*, 1 Hud. & Brooke, 735, 738, 9.)

NOTE 838—p. 440.

But the privity must distinctly appear. Accordingly, in an action against several, as owners of a ship, to recover for materials furnished the vessel, H., one of the defendants, severed from the rest, who all were willing a verdict should pass for the plaintiff, provided H. were made liable also. H. defended on the ground that his interest in the vessel was merely that of a mortgagee out of possession, that the materials were not furnished on his credit, and that though the other defendants, being owners, were liable, he was not. It appeared that after the materials were furnished, the vessel was put in use, and one R. appointed ship's husband, (H. however, having nothing to do with this,) and all the books and accounts relating to the vessel were after that time, kept by R. Notice had been given by the plaintiff to H.'s attorney to produce the books of the ship kept by R., and, on the trial, H. was called upon to produce them, or submit to have parol evidence received of their contents; the other

defendants admitting the books to be in H.'s hands. But held, that the notice did not lay H. under an obligation to bring them forward, and that secondary evidence could not be received. "There was no proof that they were in H.'s hands" say the court, "and the admissions of the other defendants, as to that fact, could not prejudice his rights. If the books were in R.'s hands, he should have been compelled to produce them in the ordinary way, by a *subpoena duces tecum*. At all events, parol evidence of their contents, could not be given as against H., until the fact was proved that the books were under his charge." (*Birbeck v. Tucker*, 2 Hall's Rep. N. Y. C. P. 121, 128.)

In an action of trespass, assault and battery, the defendant justified under one Y., who, as bail for the plaintiff, had undertaken to surrender him; the defendant, who was keeper of a lock-up house, under the directions of Y. took the plaintiff there; and while at that place, the plaintiff's attorney handed Y. a paper, which the defendant had received notice to produce. Best, C. J., held, that the plaintiff had not gone far enough—that tracing the paper to Y.'s hands, was merely tracing it to one acting in an independent character. (*Evans v. Sweet*, Ry. & Mood. 83. 1 Carr. & Payne, 277, S. C.) Otherwise, *semble*, had the paper, instead of being traced to Y.'s hands, and no farther, been left with a servant of the defendant at his dwelling house. (*Id.* See *Prichard v. Symmonds*, Bull. N. P. 254; *Rex v. Pearce*, Peake's N. P. Rep. 75.)

Where the plaintiff, who had been secretary to the committee of a charitable society, sued three of the committee for his salary, after a dissolution of the society, and it appeared that the resolution under which the plaintiff had been employed, was entered in a book, which, during his engagement, was under his charge; held, that the book appearing to be in the possession of another member of the committee, notice to produce it, served on the defendants, would not authorize secondary evidence of its contents. The plaintiff should have served the member, who held the book, with a *subpoena duces tecum*. (*Whitford v. Tutin*, 10 Bing. 395.)

A notice to produce, served on two joint executors, is sufficient it seems as against both, though the one to whose possession solely, the paper is traced, has let judgment go by default. (*Beckwith v. Benner*, 6 Carr. & Payne, 681, per Gurney, B.)

NOTE 839—p. 440.

See *Burton v. Payne*, 2 Carr. & Payne, 520, S. P.

Where a lease belonging to the plaintiff was in the court of chancery, but it did not appear by what means it came there, the court presumed it placed there at the instance of the plaintiff, and that it was liable to be withdrawn on his application: For the purposes of notice to produce, it was, consequently, still considered under his control and in his possession. (*Jackson, ex dem. Burr, et. al. v. Shearman*, 6 Johns. Rep. 19, 21.) See *Blood v. Harrington*, 8 Pick. Rep. 553.

If a private paper is in a public office, and as much under the control of the one party as the other, the party wishing to avail himself of it should obtain it; he cannot, it seems, give notice to his adversary to produce it, and then, on failure, resort to secondary evidence. (*Blood v. Harrington*, 8 Pick. 552, 554, 5. *Williams v. Mundie*, Ry. & Mood. N. P. Rep. 18.)

Where a paper was traced to the hands of the party's agent, notice having been served to produce it; and the party showed that the paper had been delivered to the stamp office, by the agent, to have it stamped, but when the notice was served, said nothing about it—*Per Best, C. J.*, “The case is new, but I am of opinion, on the common sense of the thing, that when one party has notice to produce a particular instrument, and does not say that he has it not, but has delivered it to the stamp office, the other party ought to be allowed to give parol evidence of its contents.” (*Sinclair v. Stevenson*, 1 Carr. & Payne, 528.)

NOTE 840—p. 441.

See S. C., 3 Bing. 164; 10 Moore, 564.

The possession by the attorney is the possession of the client, for this purpose; and therefore, where notice to the party personally is allowed, as in England, it will be operative even though the paper be in the hands of his attorney. Accordingly, on an indictment for uttering a forged deed, it appearing that the deed, alleged to have been forged, was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that, after the trial, it was returned to the prisoner's attorney; held, that if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling the attorney to prove what he had done with the deed. (*Rex v. Hunter*, 4 Carr. & Payne, 148.)

Inferior evidence of deeds was allowed on the part of the plaintiff, after a notice served upon the defendant's attorney, who formerly possessed them as attorney for another person sued by the plaintiff for a part of the same premises, though such deeds were not proved ever to have been in the present defendant's possession. (*Den, ex dem. Popino, v. McAllister*, 2 Halst. 46.)

In the case of a corporation whose books are wanted by a party suing them, the latter may give notice to the attorney of the corporation. (*Thayer v. Middlesex Mutual Fire Ins. Co.* 10 Pick. 326, 330.) It seems, however, that the attorney on record, or who appears for the corporation in the particular case, is the one meant; and not the general attorney of the body. (See *id.*)

NOTE 841—p. 441.

The English judges have very uniformly held, that if a party calls for a paper under a notice to produce, and inspects it, he cannot object to its being read and treated as his own evidence, if it is at all pertinent to the issue. (See *per Park, J.* in *Wilson v. Bowie*, 1 Carr. & Payne, 8; and note (a) to the same case.) In a very recent case the rule seems to be laid down thus—that if during the cross-examination of a witness, the counsel examining calls for a document under a notice to produce, and on its being produced, examines it, *so as to become acquainted with its contents*, he will be bound to put it in as evidence on his side. (*Calvert v. Flower*; 7 Carr. & Payne, 386.)

We find but few American cases on this subject. In *Jordan v. Wilkins*, (2 Wash. C. C. Rep. 482, 484, note,) the defendant produced certain papers under a notice from

the other side, and prayed the opinion of the court whether he was obliged to show them to the adversary, until the latter declared his intention of using them. And held, that he was not; that the plaintiff had no right to see the contents but on this condition. Whether such is the law in Pennsylvania, *quærs*. (*Farmers' and Mechanics' Bank*, 6 Ser. & Rawle, 293.) *Semble*, that merely calling for and inspecting the papers produced under a notice, will not render them evidence. (*Withers v. Gillespy*, 7 Serg. & Rawle, 14.) At all events, papers called for, not under a notice, but as an act of courtesy, are not within the rule; and the party invoking them under such circumstances, neither lays himself under an obligation to use them as evidence, nor does he make them evidence for the opposite side. (*Id.*) And the mere notice to produce papers, never makes them evidence for the adverse party; if the party giving notice choose afterward to waive reading the paper in evidence, he is at liberty to do so. (*Blight v. Ashley*, 1 Peters' C. C. Rep. 15, 22. *Willings v. Consequa*, *id.* 302, 311.) Nor can the paper be used for the adverse party, even though called for and produced under notice, unless pertinent and competent in itself. (*Hylton's lessee v. Brown*, 1 Wash. C. C. Rep. 343.)

The English rule, that a party calling for a paper under a notice to produce, and inspecting it, thereby obliges himself to consent that it shall be evidence, was at one period supposed to be the law of New-York. (*Lawrence v. Van Horne*, 1 Cain. Rep. 376.) But afterward when the point was again brought under consideration, though incidentally, Spencer, J., delivering the opinion of the court, repudiated the doctrine, and said, that *Lawrence v. Van Horne* settled nothing; that the then chief justice (Radcliffe) expressed no decided opinion on the question, and the rest of the court were equally divided. He maintained that the notice to produce, and calling for the inspection, ought to be considered analogous to a bill for discovery, "where most certainly the answer is not evidence for the adverse party." (*Kenny v. Clarkson*, 1 John. Rep. 385, 395. *Per Thompson, J.*, in *Lawrence v. Van Horne*, *supra*.) The scruples against adopting the English rule seem to have arisen mainly from the notion, that unless the party might inspect the instrument on its production, without rendering it evidence, he would in many cases be needlessly driven into chancery for a discovery. (See *per Thompson, J.*, in *Lawrence v. Van Horne*, *supra*; also *per Spencer, J.*, in *Kenny v. Clarkson*, *supra*.) Regarding the point as still an unsettled one in this state, it may be, that since the revised statutes and the rules of our supreme court, noticed *ante*, note 832, p. 1179, so materially enlarging the power of compelling discovery at law, there will be less reluctance, (as there is now less reason for it,) in following the course of the English courts. (See *Grah. N. Y. Prac.* 531, 2d ed.)

The rule in Delaware is, that a party, calling for papers from the other side under a notice to produce, and inspecting them, makes them evidence. (*Randel v. Chesapeake and Delaware Canal Co.* 1 Harringt. Rep. 233, 234.)

It will be seen from the foregoing cases, that the only appearance of conflict has been, as to whether the act of *perusing* or *inspecting* the paper, would lay the party calling for it, pursuant to notice, under the obligation of considering it evidence. That merely *calling for* the paper is not enough to produce such consequence, seems agreed. And it is equally clear on the other hand, that if the party calling for a paper under a notice, actually *uses* it as evidence, he thereby renders it evidence for his adversary; to what extent will be seen hereafter.

NOTE 842—p. 441.

See per Thompson J., in *Lawrence v. Van Horne*, 1 Cain Rep. 286, 7. Per Huston J., in *Wishart v. Downey*, 15 Ser. & Rawle, 77, 79.

The refusal of a party to produce his books and papers, is not to be regarded as *prima facie* evidence that, if produced, they would prove what the party calling for them alleges they contain. The rule is this: the latter, in such case, may give secondary proof of the contents, if the papers are shewn or admitted to be in the possession of his adversary: and if the secondary evidence is imperfect, vague and uncertain, as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. (Per Sutherland J., delivering the opinion of the court in *Life & Fire Ins. Co. v. The Mechanic Fire Ins. Co.* 7 Wend. 31, 33, 4.) See *Cooper v. Gibbons*, 3 Camp. 363, where the defendant insisted that the refusal of the plaintiffs, to produce their books, authorized the jury to infer that certain goods, the price of which was sued for, had been charged by the plaintiffs to R. alone, and not to R. and the defendant jointly. But Gibbs J., held otherwise, saying, that the non production of the books merely entitled the defendant to give inferior evidence of their contents. (See also, *Roscoe's Cr. Ev.* 11.)

But where inferior evidence is given, all inferences from it shall be taken most strongly against the party refusing to produce. (See per Shaw C. J., in *Thayer v. Middlesex Mutual Fire Ins. Co.* 10 Pick. 329.) Every fair presumption that can arise is to be made against such party, as to those parts of the contents which do not appear from the secondary evidence. (Per Ruffin C. J., in *Symington v. M'Lin*, 1 Dev. & Batt. 291, 298.) This was said, where no requisition to produce had been made, but *parol* evidence of a note was given without objection. The question was, whether the plaintiff, a factor, had taken the note of a third person in payment for the defendant's goods (entrusted to the former to sell for the purpose of paying a debt due him by the latter out of the proceeds) so as to discharge the purchaser, and render himself responsible. The court inclined to think that, if the note taken were payable to the plaintiff, it would render him chargeable, under the circumstances; and he not producing it, and the secondary evidence on this point being general, that the note was given, without showing to whom it was payable, they intended, as it seems, that it was drawn payable to the plaintiff. (Id.) In *Jackson, ex dem. Neilson, v. McVey*, (18 Johns. Rep. 330,) the defendant gave general evidence by a witness, that a deed, which was in court in possession of the opposing party, (he refusing to produce it,) had been in his, the witness', possession—that he had often perused it, and ever supposed the premises in question to be included in it. On cross examination he said, he could not recollect a single course stated in it, and he did not know, but thought the premises were embraced in it. The circuit judge disregarded his testimony; but the supreme court, on a motion for a new trial, held, that the testimony should have gone to the jury with strong intimations that they ought to believe that the premises were included in the deed; as, if they were not, the plaintiff, by producing it, could show with certainty how the fact was; and that its non-production, the deed being in court, was very strong presumptive evidence against the plaintiff.

The limitations under which this presumption is to be indulged, were very accurately specified by Sutherland J., delivering the opinion of the court in the case of *The Life*

and *Fire Ins. Co. v. The Mechanic Fire Ins. Co.* 7 Wend. 31, 34. At the latter page, he says, that before any inference is made against a party on this ground, it must be shown that the writing produced is under his control, and some general evidence of such parts of their contents as are applicable to the case, must first be given.

The principle of the rule seems almost identical with that which, in general, presumes against a party destroying the best evidence. This was seen ante, note 298, p. 298, where we adverted to the doctrine now considered. (See *Roe v. Harvey*, 4 Burr. 2484.) And the rule, moreover, as has been remarked, is a highly reasonable and beneficial one, tending to the discovery of truth, and to the promotion of honesty, frankness, and fair dealing, and ought not to be shackled or obstructed by strict constructions or technical nicities. (Per Shaw C. J. in *Thayer v. Middlesex Mutual Fire Ins. Co.* 10 Pick. 329.) Further, as to the application of the doctrine to books of account, see ante, note 491, p. 700.

NOTE 843—p. 442.

See *Colling v. Trewick*, 6 Barn. & Cress. 394.

In general, where the possession of a paper by the defendant is one of the grievances charged in the plaintiff's declaration, it is not necessary to give any other notice to produce than the action itself implies. This is the rule in actions of trover for written instruments. (*M'Clean v. Hertogg*, 6 Serg. & Rawle, 154. See also *Wilson v. Gale*, 4 Wend. 626, per Savage, C. J.; per Johnson, J. in *Pickering v. Myers*, 2 Bail Rep. 113; *Hammond v. Plank*, Peake's add. Cas. 90.) It has been applied, also, to the case of a constable, sued for neglecting to return an execution; for, the action is predicated on his wrongful detention of the paper—his neglect to return it. (*Wilson v. Gale*, 4 Wendell, 623.) See *Jolly v. Taylor*, 1 Camp. 143. But where a suit was brought against an officer, for money collected on an execution, and the declaration was general, for money had and received, held, that the defendant was entitled to notice to produce the execution. (*Gorham v. Gale*, 7 Cowen's Rep. 739; 6 id. 467, note (a) S. C.) In an action of trespass, however, for entering the plaintiff's office, and carrying away a bill of lading, the same being charged in the declaration; held, that evidence of the contents of the bill might be given without notice to produce it. (*Gilmore v. Wale*, 1 Anth. N. P. 66.) So, in other cases where, from the pleadings in the cause, a party is fairly apprised that his adversary relies on an instrument in such party's hands. Thus, where a person had given a note, against which the statute of limitations had run, and upon its being presented for payment, seized it, saying, "I am glad I have got it in my hands;" in an action on the note, the plaintiff was let into secondary evidence without notice to produce it. (*Gray's ex'rs v. Kernahan*, 2 Rep. Const. Ct. So. Car. 65.) See *Garlock v. Geortner*, 7 Wend. 198. In an action of covenant, where one of the breaches alleged was, that the defendant had not paid \$150 in obligations; and the defendant by his plea took issue on the breach; it was held, that such plea was a sufficient notice to produce notes delivered to the plaintiff pursuant to the covenant, to authorize the defendant, on their non-production, to give parol evidence of their contents. (*Hardin v. Kretsinger*, 17 John. Rep. 293.) So, where the defendant in an action on a note, gave notice along with the plea of the general issue that he would prove the

note usurious, and that the extra interest was contained in a small note which was given to the plaintiff at the same time with the one declared on; held, that the defendant might give secondary evidence of the small note, without giving the plaintiff notice to produce it. (*Hammond v. Holbrook*, 13 Wend. 505.)

But it is not enough that the writing be merely *referred to*, in the pleadings of the party requiring the instrument. Accordingly, in Pennsylvania, where the plaintiff declared for the breach of an agreement, in not keeping fair and regular books—and it appeared on the trial that the defendant kept several books, viz. a ledger, day-book, invoice-book, and a book of sales, all of which except the last were produced; it was held, that parol evidence of the contents of the absent book was not admissible, without notice; the declaration not being sufficient to apprise the party that it was wanted. (*Alexander v. Coulter*, 2 Ser. & Rawle, 494.)

On the general principle of implied notice by the pleadings, it seems that, in England, a written notice of the dishonor of a bill, may be proved by inferior evidence, without showing notice to produce, where the action is on the very bill to which the notice relates. (See *Kine v. Beaumont*, 3 Brod. & Bing. 440, in connection with 2 Stark. Ev. 530, 31, 6th Am. ed.) The same doctrine has been recognized in North Carolina, and New Hampshire. (*Leavitt v. Simms*, 3 N. Hamp. Rep. 15. *Faribault v. Ely*, 2 Dev. Rep. 66, 71, 2) So, *semble*, in Pennsylvania. (*Smith v. Hawthorn*, 3 Rawle, 355, 358, 9.) Though, the court, in *Leavitt v. Simms*, did not put their decision upon this ground independently; but appear to have gone also on the general ground recognized in several American cases, that notice to produce a notice is unnecessary. (See post, note 850.) In England, this exception to the rule requiring notice to produce, does not extend beyond notices relating to bills which are of the subject matter of the action. (*Lanauze v. Palmer*, 1 Mood. & Malk. 31, 32. See also *Affalo v. Fourdrinier*, id. 334, 5, n. (s); *Vice v. Anson*, id. 96.)

NOTE 844—p. 442.

The general principle of the cases cited in our next preceding note, apply no less to criminal than to civil cases. Accordingly, on an indictment for stealing a written instrument, the prosecutor need give no notice to produce it, but is let in, at once, to give secondary evidence. (*The People v. Holbrook*, 13 John. Rep. 90. *Commonwealth v. Messinger*, 1 Binn. Rep. 273. See also, *Alexander v. Coulter*, 2 Serg. & Rawle 494; *Pickering v. Myers*, 2 Bail. Rep. 113, 114; *Moore v. The Commonwealth*, 2 Leigh 701.)

It has been held that, in a prosecution for forgery, no notice is necessary to produce a paper in the hands of the defendant, though such paper is not the subject of the indictment. (*United States v. Doebler*, 1 Bald. Rep. 519, 522.) Quere, however, unless the paper be so connected with the matter of the prosecution, as that the defendant may be fairly said to have been apprized that the prosecutor would resort to inferior evidence, in case the paper was not produced; for, the object of giving notice is to enable the prisoner to protect himself against the falsity of such evidence. (See per *Henderson*, C. J. in *State v. Kimbrough*, 2 Dev. Rep. 436; *Commonwealth v. Messinger*, 1 Binn. Rep. 273; 2 Russ. on Crimes 628, Philadel. ed. of 1836. Per Southard, J. in *The State*

v. Gustin, 2 South. Rep. 746; *The State v. Potts*, 4 Halst. 26, 28, 29, et seq. 1 Chitty's Cr. Law 578, 9, Springf. ed. of 1836.)

In England, upon the trial of an indictment under 2 Geo. 2. c. 25, for forging a deed of release, held, that the prosecutor could not go into secondary evidence of its contents, unless reasonable notice to produce it had been given; and a notice given during the assizes was held too late. (*Rex v. Haworth*, 4 Carr. & Payne, 254; see *Rex v. Hunter*, id. 128; S. C. 3 id. 591.)

Where notice would be entirely nugatory; as where a prisoner indicted for forgery has swallowed the instrument; clearly no notice to produce need be given. (See *Spragg's case*, cited by Lord Ellenborough in *Hall v. Howd*, 14 East, 276, note; also *Commonwealth v. Pendleton*, 4 Leigh 694; *The State v. Potts*, 4 Halst. 26.)

So, if the forged instrument be suppressed by the prisoner, parol evidence may be given; but if there be a copy which can be sworn to, that is said to be the next best evidence, and should be produced. (*United States v. Britton*, 2 Mason's Rep. 464.)

In a civil action, in Connecticut, under a statute of that state, giving a right of action to the person injured by a forged note, against the forger, it was held, that the note being in the possession of the defendant, notice to produce it was unnecessary. (*Ross v. Bruce*, 1 Day's Rep. 100.)

NOTE 945—p. 443.

See *S. P.* recognized in *Pickering v. Myers*, 2 Bail. Rep. 113, 114.

But, where a person who had the possession of a document for the plaintiff, came forward and swore as a witness for the defendant, that he had searched for, but could not find it, held, that this did not entitle the defendant to give secondary evidence; he should have notified the plaintiff to produce it. (*Smallwood v. Mitchell*, 2 Hayw. Rep. 145.)

Where a party has fraudulently possessed himself of an instrument, belonging to the opposite party, notice to produce is unnecessary. (Per Johnson, J. in *Gray v. Kernahan*, 2 Rep. Const. Ct. Su. Car. 65. See *Garlock v. Geortner*, 7 Wend. 198.) If the grantor in a deed of conveyance, which has been delivered to the grantee, surreptitiously obtain possession of it before it is registered, the grantee or those claiming under him, may give parol evidence of the contents, in an action against the grantor, or those claiming under him by conveyance subsequent with knowledge of the first conveyance, without proving loss or giving notice to produce it to the adverse party. (*Davis v. Spooner*, 3 Pick. Rep. 284.)

In a late English case, on affidavit showing that a lease had been stolen from the plaintiff by a servant, at the instigation of the defendant, he not denying the fact in his affidavit, the court made a rule that an examined copy of the enrolment should be given in evidence on the trial. (*Doe ex dem. Pearson v. Ries*, 7 Bing. 724.)

And where the plaintiff, having delivered to N. as A's attorney, a bill, in which he made C. his debtor, afterwards obtained it surreptitiously from N., and then sought to make N. liable for the same account charged in the bill against C.; the court stayed the proceedings till the plaintiff delivered a copy of the bill, and ordered that the copy

should be evidence. (*Edington v. Nixon*, 2 Bing. N. C. 324.) The contents of papers which have been secreted, in order to prevent their being used as evidence, may be proved, without notice to produce. (See ante, p. 442, of the text.) Where, upon the trial of an indictment for passing a forged instrument, it appeared that the same had been secreted to protect the offender, though without his privity, a copy taken by the person whose name was charged to be forged, was held admissible. (*Commonwealth v. Snell*, 3 Mass. R. 82. See *S. P. United States v. Doeblér*, 1 Bald. Rep. 519, 522.)

So, it is said, notice to produce is unnecessary, when the paper is in the hands of an accomplice. (Id. See *United States v. Keyburn*, 6 Peters' Rep. 352, 366, 7.)

Where, in the case of a vessel seized as prize of war, there appeared strong reasons for supposing, that the papers on board at the time of the capture, had been subtracted fraudulently by the master or some other person connected with the voyage, the libellants were allowed to give copies in evidence. (*The Julia*, 8 Cranch, 181, 192.)

NOTE 846—p. 443.

A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executed it, to prove the execution of the other part which it recites, though no notice has been given to produce the original. But as against a third person, unless he claim in privity, it is otherwise. (1 Stark. Ev. 350, 1, 6th Am. ed.) When admissible, its operation as evidence cannot be defeated by the opposite party showing that the original was not duly stamped. (*Paul v. Meek*, 2 Younge & Jer. 116.)

NOTE 847—p. 443.

On a trial for treason, a copy of a circular letter inciting to insurrection, was ruled to be evidence against the accused, on proof merely that it was one of the copies actually circulated at the time of the insurrection. (*United States v. Mitchell*, 2 Dall. Rep. 357.)

A case constituting a very striking exception to the general rule, requiring notice to produce, came before the supreme court of the U. S. The plaintiff had signed an agreement by which he undertook to rent the defendant's farm of him, and specifying the conditions. It was signed by the plaintiff only, and contained no express stipulation on the side of the defendant, except it was mentioned that, certain taxes which the plaintiff was to pay, the defendant would allow out of the rent. The action, it seems, was brought for the defendant's not leasing and delivering possession. On the trial, the plaintiff offered to read in evidence a copy of the agreement, admitted to be wholly in the hand-writing of the defendant. And it was held competent evidence, without showing any notice to the defendant to produce the original. There was no dispute as to the execution of the original; indeed, the opinion of the court shows that that fact was admitted; and they presumed that the copy offered, being in the defendant's hand-writing, had come to the plaintiff's possession by the defendant's own act.

The court (Trimble, J. delivering the opinion) concede the general rule that, in ordinary cases, notice to produce is necessary; but, having examined the numerous adjudications on the subject, they had found no case coming up to this, where the copy offered was made by the party against whom it was sought to be used. By making and delivering it, they said, the defendant consented that it should be considered as genuine and true; and it was not competent for him to allege, against his own act and admission, that the paper does not contain all the verity and certainty of the original. (*Carroll v. Peake*, 1 Peters' Rep. 18, 22.)

So far, the court viewed the paper offered as a copy merely. But, under the circumstances, and to the purpose for which it was sought to be used, they said, it might fairly be regarded as an original. As related to the plaintiff's contract, it was a copy; but it was offered along with several letters of the defendant, as a component part of the evidence to show the defendant's agreement to let the farm, and the terms of that agreement; these letters did not appear in the record, and the court said, that if there was a supposable case where the paper could be regarded as an original, and therefore not objectionable as a copy, they were bound, in favor of the decision in the court below, to presume such a case was presented. They then put the hypothesis, (which they say is allowable,) that the paper offered was enclosed in one of the letters, which, referring to it, went on to state the terms of the agreement on the defendant's part; and they held it plain that, in such a case, the enclosed paper, although it might be a mere copy as it respected the plaintiff's part of the contract, would be truly an original document by adoption and incorporation with the letter, as much as the letter itself. (*Carroll v. Peake*, supra.)

NOTE 848—p. 445.

S. P. Bate v. Kinsey, cited in *Rosc. Cr. Ev.* 10, from 1 *M. & R.* 38. *S. C.* cited 3 *Chitty's Gen. Prac.* 835, n. (k) from 1 *Crom. M. & Rosc.* 48. For the American cases on this subject see ante, note 836, p. 1186.

NOTE 849—p. 445.

In England, a notice to produce may be either parol or written; and, if both a parol and written notice has been given, proof of either is sufficient. (*Smith v. Young*, 1 *Camp.* 440. *Rosc. Ev.* 4. *Rosc. Cr. Ev.* 10. 2 *Russ. on Cr.* 629, *Phil. ed.* 1836. But see 3 *Chitty's Gen. Prac.* 835.)

In New-York, however, a notice to produce is required, by the rules of the supreme court, to be in writing. (See ante, note 835, p. 1183.)

In most of the United States, persons interested, and even parties to the record, are competent witnesses to prove the service of notice to produce. (See ante, note 122, p. 138, and the cases there cited. *Jordon v. Cooper*, 3 *Ser. & Rawle*, 575. *Smith v. Wilson*, 1 *Dev. & Batt.* 40.) The plaintiff was held a competent witness to prove the service of notice of the cause of action, required, by statute, to be given to a jus-

tice of the peace, thirty days before process issued. (*Kidd v. Riddle*, 2 Yeates' Rep. 442.)

Where a notice or demand, not required to be in writing, is served upon a party by reading it from a paper, it may be proved by the person who read it without producing the writing or excusing its absence. (*Black v. Ray*, 1 Dev. & Batt. 334.)

On the general question as to what notices should be in writing, it has been held, that where a statute requires reasonable notice, and prescribes no form, it need not be in writing. (*Rex v. Surry*, 5 Barn. & Ald. 539.) A statute directing notice *to be left* at a particular place, contemplates written notice. (*Semble*, *Gilbert v. The Columbia Turapike Co.* 3 John. Cas. 107, 109.) "A notice in legal proceedings means a written notice." (*Said*, *id.* p. 109. See the dissenting opinion of Bronson J., 15 Wend. 423, 9, 430.) But, in an action on a covenant of warranty in a deed of lands, from which the grantee had been evicted, held, that *parol* notice to the grantor, of the ejectment suit against the grantee, was sufficient. (*Miner v. Clark*, 15 Wend. 425. See ante, note 693, p. 983.)

NOTE 850—p. 446.

The doctrine of the text, that notice to produce a written notice, is unnecessary, as a preliminary to the introduction of secondary evidence of its contents, has been recognized and acted upon in various American cases. Thus, a written notice to quit may be proved by a copy made by the person who served the original, without notice to the other party to produce the latter. (*Eisenhart v. Slaymaker*, 14 Serg. & Rawle 153.) So, as to a notice of the dishonor of a bill, which may be proved by a copy made at the time of the original, the original having been served by delivering it to the party, or transmitting it to him by mail. (*Johnson v. Haight*, 13 John. Rep. 470. *Smyth v. Hawthorn*, 3 Rawle 355. *Eagle Bank v. Chapin*, 3 Pick. 180. *Taylor v. Bank of Illinois*, 7 Monroe, 576, 578. *Lindenberger v. Beall*, 6 Wheat. 104. Contra, see *Etie v. Sparks*, 4 Mill. Lou. Rep. 463.) And the party may resort at once to *parol* proof of the contents of the notice, without notice to produce it, unless it appear that higher evidence is within his power. (*Ekins v. Hanley*, 2 Fox & Smith 1, 3, 4. *Johnson v. Haight*, 13 John. Rep. 470, 1. *Taylor v. Bank of Illinois*, 7 Monroe, 576, 578. *Eagle Bank v. Chapin*, 3 Pick. 180. *Ackland v. Pearce*, 2 Camp. 601. *Lindenberger v. Beall*, 6 Wheat. 104. *Leavitt v. Simes*, 3 N. Hamp. Rep. 14. *Faribault v. Ely*, 2 Dev. Rep. 67. *Smyth v. Hawthorn*, 3 Rawle 355.) Accordingly also, a written request or notice to repair fences is provable by *parol* evidence of its contents, without notice to produce it. (*Willoughby v. Carleton*, 9 John. Rep. 136.) And a written abandonment, in an insurance case, seems to stand on the same principle. (*Peyton v. Hallett*, 1 Cain. Rep. 364; and see, in connection with this case, *Johnson v. Haight*, 13 John. Rep. 470, 471; *Mumford v. Bowne*, Anth. N. P. 40, 41.) Of course it applies to notices to produce; (*Tower v. Wilson*, 3 Cain. Rep. 174;) so, as to the contents of notices generally, served in the progress of a cause. (*Per Savage*, C. J., in *M'Fadden v. Kingsbury*, 11 Wend. 669. *Per Toomer*, J., in *Faribault v. Ely*, 2 Dev. Rep. 68.)

The principle of the exception which allows secondary evidence of written notices,

without requiring the opposite party to produce the original, has been said to extend to all written notices. "For, if it were otherwise, the notice to produce the original, could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising *ad infinitum*; so, that the party would, at every step, be receding instead of advancing." (Per Gibson, J., in *Eisenhart v. Slaymaker*, 14 Serg. & Rawle, 156.) Besides, the other party having the original in his possession, may, by producing it, correct any mistake. (*Tower v. Wilson*, 3 Cain. Rep. 174.)

Mr. Starkie thinks, that the exception should be limited in practice, as he says it is in principle, to notices to produce. He denies that it extends to notices in general, such as notices of the dishonor of a bill, notices to quit, &c. The particular contents of a notice to quit, he says, may be as essential to the cause as those of any other document, and it may therefore be as material to require the best evidence: its contents create or vary the rights of the parties; it is part of the *res gestae*; and the objection which excludes the necessity of notice to produce a notice, namely, that an infinite series of notices would thus be rendered necessary, is wholly inapplicable, the nature and object of the two documents being entirely different. (2 Stark. Ev. 530, 6th Am. ed.) Indeed, in England, it would seem, that the cases are not easily reconcilable. In *Grove v. Ware*, (2 Stark. Rep. 174) an action was brought against the surety in an indemnity bond, conditioned to pay the plaintiffs what might become due from the principal, on an account, within six months after notice. Lord Ellenborough held, that in order to let the plaintiff into proof of the notice given to the defendant, (which was in writing,) the plaintiff must show notice to produce it; that it was something more than a mere notice; it was a statement of the account between the plaintiffs and the principal. So, his lordship held in another case, that a notice of dishonor of a bill could not be proved, without showing notice to produce it, and this, where the action was on the very bill, and the proof offered, was a copy of the notice sent in a letter by mail. He said there were other circumstances, besides the general fact of notice, which were necessary to give it effect; such as the date, the time it was sent; and that, to ascertain the date, the post mark might be material. He was therefore of opinion, that the contents could not be proved without notice to produce the original. (*Langdon v. Hulls*, 5 Esp. Rep. 156, 157.) The same doctrine was held by Lord Kenyon, as to notice of dishonor sent by letter. "Call it a notice," he said, "or by any other name; it is still a letter, and must be proved as any other written paper." (*Slaw v. Markham*, Peake's Rep. 165.) But, a few years after, where a demand in trover was made in writing, Lord Kenyon held it could be proved by a copy, without notice to produce; and he compared it to a notice to quit, &c. which he said was provable by a duplicate in the same way. (*Hammond v. Plank*, Peake's add. cas. 90.) So, where a written notice of dishonor had been served, by leaving it at the defendant's house, Le Blanc, J., ruled, that secondary evidence might be given, without notice to produce, and he also likened it to a notice to quit. (*Ackland v. Pearce*, 2 Camp. 599, 601.) And Lord Ellenborough, in 1815, was of opinion that, a letter acquainting the party with the dishonor of a bill, was in the nature of a notice, and that it was unnecessary to prove notice to produce such a letter. (*Roberts v. Bradshaw*, 1 Stark. Rep. 28, 29.) In a case before the common pleas, as late as 1822, the foregoing decisions seem to have been all reviewed. There, a copy of a letter acquainting the defendant with the dishonor of a bill, taken at the time the

original was written, was offered. The judges, after argument, adjourned to enquire what the practice in the King's Bench had been, and subsequently declared the result as follows: "That the copy of an original letter, giving notice of the dishonor of a bill, is admissible, without notice to produce the original." (*Kine v. Beaumont*, 3 Brod. & Bing., 440. S. C., cited in the text p. 445, n. (2).) See also, *Ekins v. Hanly*, 2 Fox & Smith, 1.) This case, it is said, was probably decided on the ground that the action was on the very bill to which the notice related. (2 Starkie's Ev. 530, 531, 6th Am. ed.) And, in a still later case, it was held, that an examined copy of a letter, giving notice of the dishonor of a bill, (not the subject of the action,) was in admissible, without notice to produce the original. (By Abbott, C. J., in *Lanauze v. Palmer*, 1 Mood. & Malk., 31. See ante, note 843, p. 1194.) It seems, that the court in *Kine v. Beaumont*, supra, were influenced very much also, by the consideration, that the copy was made at the time of the original, and was therefore like a duplicate original. Dallas, C. J., and Borrough and Richardson, J's., intimated this quite explicitly on the argument, and on the adjourned day the chief justice, in declaring the result of their conference with the other judges, said they saw no reason for changing the opinion in part expressed when the case was last before the court. (See *Colling v. Treweek*, 6 Barn. & Cress., 209; Also, *Ekins v. Hanly*, 2 Fox & Smith, 1; *Hammond v. Plank*, Peake's add. cas. 90, n (a).)

The American cases in respect to written notices of dishonor, present, as we have seen, supra, a more symmetrical appearance. But, in admitting secondary evidence without notice to produce, they go upon various grounds; thus, that notice to produce a mere notice, is never necessary; (see *Johnson v. Haight*, 13 John. Rep. 470; *Leavitt v. Simes*, 3 N. Hamp. Rep. 14, 15;) that notice of dishonor relates only to a few simple facts, which it has been usual to prove by parol, without requiring notice to produce; (*Eagle Bank v. Chapin*, 3 Pick. Rep. 180;) that a copy of a notice, made at the time, is like a duplicate original; (*Johnson v. Haight*, supra; *Faribault v. Ely*, 2 Dev. Rep. 66;) that the nature of the action is a sufficient notice to produce, as the defendant must be aware, that without proof of the notice, the action could not be sustained; and that, if there was any defect in the notice, it would be material for him to produce it; (*Leavitt v. Simes*, 3 N. Hamp. Rep. 15; *Faribault v. Ely*, 2 Dev. Rep. 66, 71, 72; *Smyth v. Hawthorn*, 3 Rawle 355;) this latter ground agrees with some of the more recent English cases, noticed above, and ante, note 843, p. 1194, and would confine the principle to instances where the action was founded upon the bill or note to which the notice pertains.

It is somewhat difficult, therefore, to extract from either the American or English cases, any general proposition which shall answer as a test, by which to determine what class of notices fall within the exception under consideration, and what are reserved for the operation of the general rule. The subject seems, indeed, not to have been much discussed upon principle, but one case has been followed as a precedent for others, in which new applications of the doctrine have been allowed, until a course of decision has arisen, especially in this country, which certainly looks very much like putting *all* notices upon the same general ground with mere notices to produce. In New-York, however, a distinction has been attempted. A suit was brought for the penalty incurred by commissioners of highways, in refusing to prosecute an overseer, who had neglected to remove obstructions. On the trial in the common pleas, the

plaintiff deemed it material to show, that the defendants had given notice in writing to the overseer, requiring him to perform his duty by removing the obstructions; and the court held, that parol evidence of the notice was inadmissible, unless its absence was accounted for. On the cause coming before the supreme court, upon error brought, the latter decided that no notice to the overseer was necessary to be shown, and consequently the ruling of the common pleas as to the mode of proving it, was entirely unimportant. But Savage, C. J., who delivered the opinion, said, that if the statute had required notice to the overseer, as a condition to his liability, then the decision of the common pleas would have been correct. The doctrine he advanced, was this: That written notices, which form part of the foundation of the cause, cannot be proved by parol without accounting for their absence; but otherwise, as to notices which relate only to some collateral fact. For instance, in an action against an overseer, for neglecting to procure scrapers, &c., (in which case the statute does not require him to act, except after notice from the commissioners,) secondary evidence of the contents of the notice would be inadmissible, unless notice to produce the original had been given. (*M'Fadden v. Kingsbury*, 11 Wend. Rep. 667, 668, 669.) A similar doctrine was recognized by Toomer, J., in *Faribault v. Ely*, 2 Dev. Rep. 67, 68. In that case, after noticing the remarks of Mr. Starkie, the substance of which are stated, *supra*, he says: A notice given during the progress of the cause, to produce a paper for the purpose of evidence, is formal in its character, and comes within the reason of the exception. But, a notice which has been given before the commencement of the suit, which makes an essential part of the cause of action, which is a link in the chain of the plaintiff's right to recover, is of a different character, and would seem to require the best evidence the nature of the case would admit, and all the cautions which the rules of evidence prescribe. (*Id.* 68.)

These *dicta* (for they are nothing more) seem to quadrate exactly, with the views of Mr. Starkie; but, it is difficult to reconcile them with other adjudications. The observations of Toomer, J., may be consistent with the current of authority in his own state; but, in the very case, he was constrained to concede, and so the court held, that a letter acquainting a party with the dishonor of a bill, was within the exception dispensing with notice to produce. He places the exception, however, upon the principle of the cases *ante*, note 843, p. 1194.

But with regard to *M'Fadden v. Kingsbury*, the observations of the learned chief justice, seem to us directly at variance with other cases in the same court. How is it possible to reconcile them with what was directly and deliberately adjudged in *Willoughby v. Carlton*? (9 John. Rep. 136.) There, the action was brought to recover for work and labor, performed by the plaintiff in putting up the defendant's proportion of a division fence between the parties, the defendant having neglected, for one month after notice, to put up his part. According to the statute under which the plaintiff proceeded, the defendant could not be made liable unless he had had notice, and neglected for one month thereafter. (1 L. N. Y. (K. & R.) 332, 333, § 14.) Notice had been given in writing; and the proof of it was as essential as the fact that the fence to which it related was a partition fence, or that the plaintiff had neglected to repair it. And yet parol evidence of the notice was held admissible, though no notice to produce it had been given. So with respect to notices of abandonment and notices of dishonor, which, we have seen, according to the New-York cases, come

within the exception to the general doctrine which requires notice to produce. But, *M'Fadden v. Kingsbury* would interdict them entirely; nay more, it would practically interdict, as it seems to us, all notices, save notices to produce, and such others as are given in the progress of the cause. This may be more in harmony with the principle upon which the exception was originally allowed, as Mr. Starkie contends, but in New-York, until prior decisions are either explained away or overturned, it cannot be adopted without involving most palpable incongruity.

NOTE 851—p. 446.

Lord Ellenborough, in *Phillipson v. Chase*, cited in the text, admitted, that a copy of an attorney's bill made at the time of the original delivered to the party, was good evidence, because the bill delivered and the one retained were duplicate originals. This doctrine obtains as to notices generally. (See the cases in the next preceding note, at p. 1198.) Where, however, inferior evidence is offered, his lordship held, that it could not be received except after notice to produce. But it seems that *Anderson v. May*, the other case cited in the text, did not proceed upon the ground that the writings were contemporaneous. (See per Bayley, J., in *Colling v. Treweek*, 5 Barn. & Cress. 394.) And, in this case, a copy of an attorney's bill, not signed by the attorney, was received without notice to produce the one delivered; it being proved by a witness that the one delivered was signed. The court refused to put their decision upon the ground that the copy produced was a duplicate original, but went on a principle broad enough to let in secondary evidence without notice to produce, in all cases of this character. They say, in general terms, that the bill delivered is in effect a notice that unless it is paid an action will be brought; and when the action is brought, it is brought in pursuance of such notice. Bayley, J., who delivered the opinion, further said, that the case might fairly come within that class, where notice to produce has been held unnecessary because from the nature of the action the party must know that he is charged with the possession of the instrument.

NOTE 852—p. 446.

In the two next preceding notes we have incidentally adverted to several cases showing, that copies of notices, and of other writings in the nature of notices, if contemporaneous with the one delivered, have been regarded in the light of duplicate originals. This was distinctly conceded as applicable to an attorney's bill, delivered, under the English statute, to a party before suit brought; and yet the bill is not required, it seems, to be in the *form* of a notice, but is a mere statement of the items of the plaintiff's account. The copy retained, in such case, is of equal authenticity with the original. (See *Phillipson v. Chase*, 2 Camp. 110, per Lord Ellenborough.)

But, is the same doctrine applicable to letters, merely as such, without reference to the circumstance of their being a notice, either in form or substance? In *Patton's adm'r v. Ash*, 7 Ser. & Rawle, 116, an exception was taken to the admission of a copy of a letter, proved by the person who wrote it to be a true copy in his hand-writing of

one which he directed to the defendant's intestate, and put into the post office. It does not directly appear that the letter sent and the copy produced were contemporaneous writings, though such, perhaps, is the fair inference from what is stated in the report. The court held, that the copy was clearly not evidence until notice had been given to produce the original; for, it is against principle, to admit a copy of any private paper, without accounting for the non-production of the original; a copy being, from its very nature, less satisfactory than the original. See a very striking illustration of the general principle excluding copies as inferior in point of authenticity, in *Curtis v. Patton*, 6 Ser. & Rawle, 135, stated ante, note 420, p. 550.

NOTE 853—p. 447.

Service of notice of the dishonor of bills, by depositing the same in the post office in the form of a letter directed to the party, is a very usual mode, and has frequently been recognized, under certain limitations, as legitimate in the courts of this country. The cases in which it is allowable, the form of the notice, together with various other particulars relating to it, will more properly be considered in the annotations to the second volume of the text. We shall therefore merely set down here, in a general way, some few among the many decisions in which the subject has been considered. See *Agnew v. The Bank of Gettysburgh*, 2 Harr. & Gill, 478, 495; *Gallaher's ex'rs v. Roberts*, 2 Wash. C. C. Rep. 191; *Davis v. Williams*, 1 Peck's Rep. 191; *Louisiana State Bank v. Rowel*, 6 Mart. Lou. Rep. N. S. 506, 508, 9; *Clay v. Oakley*, 5 id. 137; *Prichard v. Scott*, 7 id. 491; *The Bank of Columbia v. Magruder's adm'r*, 6 Harr. & John. 172; *Patterson Bank v. Butler*, 7 Halst. Rep. 268; *Barker v. Hall*, 1 Mart. & Yerg. Rep. 183; *Nashville Bank v. Bennett*, 1 Yerg. Rep. 166; *Dunlap v. Thompson*, 5 id. 67; *Townsley v. Springer*, 1 Mill. Lou. Rep. 122; *Yeatman v. Erwin*, 5 id. 268; *Preston v. Dayton*, 7 Lou. Rep. (Curry,) 7; *Sewall v. Russell*, 3 Wend. 276; *Bank of Utica v. Phillips*, id. 408; *Bank of Geneva v. Howlett*, 4 id. 328; *Cuyler v. Nellis*, id. 398; *Bank of Utica v. Davidson*, 5 id. 587; *Bank of Rochester v. Gould*, 9 id. 279; *Bank of Alexandria v. Swann*, 9 Peters' Rep. 33; *Solarte v. Palmer*, 1 Bing. 194; *Faribault v. Ely*, 2 Dev. Rep. 67; *Nichols v. Goldsmith*, 7 Wend. 160; *Haggard v. Van Amringe*, 4 Binn. Rep. 295, n.; *Brook v. Thompson*, 1 Bail. Rep. 322; *Smyth v. Hawthorn*, 3 Rawle, 355.

NOTE 854—p. 448.

We incidentally adverted to a case or two connected with the subject in the text, in speaking of presumptions arising from artificial habits, and the custom of particular individuals, ante, note 298, p. 294. In *Toosey v. Williams*, there cited from 1 Mood & Malk. 129, a clerk in the defendant's employ was called, who testified, that the practice in the defendant's office was, for him to copy into a book (which was produced and offered) all letters directed as the one in question was; that, when copied, they were given to the defendant to seal, and afterwards carried, either by the witness, or another clerk, to the post office; but there was no particular place of deposit in the de-

fendant's office for the letters that were to be carried. Two clerks were sworn, and they both stated that they always carried the letters given them for that purpose; but neither of them had any recollection of this particular letter. Lord Tenterden, C. J., who tried the cause, rejected the evidence, expressing great reluctance however in so doing; he said, if the duty of the clerk had been to see the letters he copied carried to the post-office, it might have answered; but, it appeared, something else was to be done in this case, afterwards, and that by the defendant.

In *Flack v. Green*, (3 Gill & John. 474,) notice to two endorsers, both residing at the same place, was put in the post-office, under cover directed to one of them; and, for the purpose of proving that it reached the other, the plaintiff offered to prove, by a person who was a member of the mercantile house with which the endorser, to whom the notice was directed, was connected, that it was the invariable practice of the house to forward such notices upon the receipt of them, and, that he had no doubt and believed, from their course of business, that they had forwarded the one in question, but had no recollection of the fact; the same facts were offered to be proved by the clerks of the house. But the court held the testimony inadmissible.

Where, however, a clerk testified that it was his invariable practice to carry the original letters (a copy being offered) to the post-office, as soon as he copied them; that he seldom handed them back; and that he copied the one in question; the case was deemed to come fully up to Lord Ellenborough's requisition, in *Hetherington v. Kemp*, cited in the text, and the proof of the letter having been sent, was, accordingly, held sufficient. (*Thalhimer v. Brinkerhoof*, 6 Cowen's Rep. 90, 100, 1.)

In *Miller v. Hackley*, (5 John. Rep. 375,) a notary called to prove notice of dishonor of a bill, stated, that it was usual for him, where endorsers or drawers lived at a distance, to send a written notice by post on the evening of the same day of protestation, and, having protested the bill in question, he believed he had sent such notice in that way in the present case; held, that this was sufficient evidence, in the first instance, to sustain the allegation of due notice.

To charge the defendant, a deputy Post-Master at Washington, with the receipt of a letter containing bank notes, the plaintiff offered in evidence a post-bill (received at the defendant's office) of letters mailed at the Philadelphia post-office, containing a charge of postage corresponding with the amount of postage on the letter in question, the bill being dated on the day the letter was left to be mailed. The circuit court instructed the jury, that they might presume the letter came to the defendant's hands; but refused to charge, that if the post-bill reached the defendant's office, the jury ought to presume that the letter came there with it:—Held, by the supreme court, on error, that if the court below erred at all, it was in conceding too much to the plaintiff. "An entry on the post-bill," they said, "is, by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage." (*Dunlop v. Munroe*, 7 Cranch, 242, 270.)

NOTE 855—p. 450.

See S. C. 6 Moore, 347.

NOTE 856—p. 450.

The cases cited in the text seem to have been followed with great uniformity. The general rule is, that the party who calls out a written instrument from his adversary's possession, must prove its execution if he would use it as evidence, in the regular mode. (1 Stark. Ev. 351, 6th Am. ed.) The difficulty is, in determining how far the exception mentioned by our author extends, and the particular cases which are fairly embraced within it. It is clear, that the mere fact of the instrument coming from the possession of the adverse party, under a notice to produce, will not dispense with the ordinary proof of execution. (Id.) In *Vacher v. Cocks*, 1 Barn. & Adol. 145, the plaintiffs, assignees of a bankrupt, sued the defendants for money had and received; and on the trial, the former offered a deed, by which they proposed to show that the bankrupt, on the opening of a certain account with the defendants, assigned over to them his book-debts and some policies of insurance. The defendants had collected monies under the deed; but after the commission, and some months before the trial, they had given up both the deed and the money to the assignees. Under these circumstances, the court were clear that the plaintiffs were bound to prove the deed according to the general rule; that the exception established in *Pearce v. Hooper*, stated in the text at p. 449, could not be extended to a case like the present, where the party wishing to make the deed evidence, had had it a long time in his custody, and might therefore have been prepared to prove the execution. It is indispensable, in order to bring a case within the exception mentioned in the text, that the party producing the instrument, should claim an interest under it. (*Doe, d. Wilkins v. Cleveland*, (Marquis,) 9 Barn. & Cress. 864.) There is no distinction, so far as this subject is concerned, between a deed and any other written instrument; the latter may come within the general rule, or the exception, according to circumstances, as well as the former. (*Wetherston v. Edington*, 2 Camp. Rep. 94.) In assumpsit by the vendee, to recover back against the vendor a deposit on the purchase of real estate, the defendant, at the trial, produced (under a notice requiring it) the agreement which had been signed at the foot of the conditions of sale; held, that the plaintiff need not call the subscribing witness, as it was an instrument under which the defendant claimed an interest. (*Bradshaw v. Bennett*, 5 Carr. & Payne, 48.)

The doctrine has been recognized and acted on in the American courts. In *Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 715, 719, the defendant, on the trial, pursuant to notice, produced a diagram, and the plaintiff thereupon offered to read it in evidence without any proof to authenticate it. Washington J. rejected it, holding, that the mere fact of its coming out of the defendant's possession was not sufficient. He admitted, however, that if the party producing an instrument on notice "be a party to it, or claims a beneficial interest under it," these facts might dispense with the necessity of giving further proof, because of such privity or interest, and not because of the possession of the instrument by the party against whom it is offered. But, in the present case, he said, the instrument was a mere draft, to which there were no parties, and it was not shown to have any connection with the title of the defendant. The plaintiff, therefore, must authenticate it as though he had produced it in the first instance as his own. The case of *Betts v. Badger*, 12 Johns. Rep. 223, lays down

the rule substantially thus—that if the party, producing a deed of lands under notice, is the party to whom it was given, the custody of the paper affords high presumptive evidence that he holds it as a muniment, and the opposite party need not adduce proof of its execution, but it is to be taken, *prima facie*, as duly executed. In a still later case, the defendant in ejectment, under a notice to produce, brought forward a lease, given by one R. to the lessor of the plaintiff; it appeared that the lease came to the defendant's possession, under the following circumstances: Some years after it was made, one B. agreed to purchase of the plaintiff's lessor for \$750, B. to pay the rent in arrear and to become due to R.; B. paid the \$750, and the lessor of the plaintiff thereupon endorsed his name on the lease, and delivered it to B., who immediately took possession and held till his death, leaving a wife and children. The defendant married the widow, and lived with her on the premises. The court held, that as the defendant was not a party to the lease, and did not personally claim any beneficial interest under it, the plaintiff was bound to prove the lease in the regular mode. (Jackson, ex dem. Stewart, v. Kingsley, 17 Johns. Rep. 158.)

What is particularly important in the last case is, that Spencer, C. J., delivering the opinion of the court, extends the exception to instances not embraced within it as stated in the text. Our author has confined it to cases where the party producing the instrument, not only claims a beneficial interest under it, but is a party to it. But Spencer, C. J., says the latter circumstance is immaterial provided the party claims a beneficial interest under the instrument. See further, note to Jones v. Coopridge, 1 Blackf. Rep. 49. M'Pherson v. Rathbone, 7 Wend. 216, 219, per Savage, C. J. Stevenson v. Dunlap, 7 Monroe, 134, 137, per Mills, J.

NOTE 857—p. 451.

See S. C. 8 Dowl. & Ryl. 368.

NOTE 858—p. 451.

See S. C. 9 Dowl. & Ryl. 15. 2 Carr. & Payne, 139.

NOTE 859—p. 451.

The practice of giving notice to produce papers, is, in several points, analagous to a bill of discovery in chancery, for which it is a substitute. (See ante, note 841, p. 1190, 1.) And, in no particular is the analogy more strikingly obvious, than in respect to the doctrine noticed in the text. The complainant, in chancery, may use the defendant's answer, or not, as he pleases; (see ante, note 642, p. 926;) so the party who has given notice to produce, may at his option waive the production, and make out his case independently; (see the cases cited ante, note 841, p. 1190, 1.) But if the answer in the one case, or the writing in the other, having been thus called out, be used by the party at whose instance it was invoked, the other party has a right to the whole. Such is the general

rule. As to its application in respect to answers in chancery, see ante, notes 643, 4, p. 926, 7, 8 : also, note 647, p. 929.

This analogy has been frequently resorted to in determining how far papers brought forward under a notice to produce, and used against the party producing them, may be said to be evidence for him. (See per Gibson J., in *Withers v. Gillespy*, 7 Ser. & Rawle, 14. Also, per id., in *Farmers & Mechanics Bank v. Israel*, 6 Ser. & Rawle, 293, 296. Per Thompson, C. J., in *Lawrence v. Ocean Ins. Co.* 11 John. Rep. 260.) And it seems to be a rule to which there are few exceptions, that in every case where a document is read by one party, the whole is to be read if the adverse party requires it ; for, unless the whole be read, there can be no certainty as to the real sense and meaning. (1 Starkie's Ev. 359, 6th Am. ed. ; also, 5 Mod. 9. 3 Salk. 153. 1 Ford's M. S. 146. Andr. 258. Doug. 757. See also, ante, note 713, p. 1059.) Upon the same principle, where one document refers to another, the latter is, for the purpose of such reference, incorporated with the former, and may be read to explain it ; as, where the deposition of a captain of a ship refers to a log-book, (*Falconer v. Hanson*, 1 Camp. Rep. 171,) or a letter refers to other letters ; (*Johnson v. Gilson*, cited in the text, n. (5) ;) otherwise, however, where the reference is not so particular as to render the papers referred to necessary to ascertain the sense of the one used. (See the cases cited in note (5) of the text.) The rule we are considering will be found illustrated in many cases of written admissions, such as books of account, &c., ante, note 201, p. 227. We saw there, that in instances of that nature, the admission of a party being used against him, he has, in general, a right to the whole. The qualifications with which the doctrine is to be applied, were also noticed. Indeed, the rule is universal, and embraces not only written, but oral admissions ; and much of the doctrine ante, notes 200, 201, 202, will be found useful in guiding us to proper conclusions on similar questions, as to written admissions, declarations, &c.

The general doctrine was fully recognized in South Carolina, in *M'Grath ads. Isaacs*, 1 Nott & McCord, 563. There the defendants, under notice, produced certain letters which were read on the part of the plaintiff, and one of them referred to another letter from a Mr. Barker, (who, it seems, was interested,) in a way to connect the latter with what was read ; the defendant, thereupon, proposed to put in the letter of Mr. B., but it was rejected on the trial because he was interested. The learned judge who delivered the opinion, decided, that B.'s letter should have been allowed to be read : and citing what is said by our author, and the case of *Francis v. The Ocean Ins. Co.* 11 John. 260, he said, "that in all cases where papers are called for by one party, which are in possession of the other, they ought not to be garbled, but the whole produced, subject however to all legal exceptions when produced ; and that, whenever a document or paper is referred to by any other, which is admissible evidence, such document or paper so referred to ought to be produced." (Id. 572, 3.)

NOTE 860—p. 452.

This of course follows from the rule, that the best evidence must be given of which the nature of the thing is capable. (See ante, p. 217, et seq. of the text.) The principle of the rule, and some observations upon its application, will be found ante, note

414, p. 540, 1, 2. The succeeding notes under that head may be looked into for further illustration. See also, *Andrews v. Hooper*, 13 Mass. Rep. 475; *Cunningham v. Tracy*, 1 Conn. Rep. 252; *Pargoud v. Morgan*, 2 Mill. Lou. Rep. 99; *Kent v. Weld*, 2 Fairf. Rep. 461.

A writing, where one exists, is generally constituted the exclusive medium of proving the transaction to which it relates; but sometimes the transaction, though evinced by writing, may be proved entirely independent of it. Several cases illustrative of this distinction, will be found ante, note 420, p. 547, 8, et seq. See also ante, note 422, p. 551, et seq. 2 Stark. Ev. 569, 570, 6th Am. ed. Where the writing is the exclusive medium of proof; in other words, where it is the best evidence, it must of course be produced, or its absence duly accounted for. (*United States v. Porter*, 3 Day's Rep. 283. *St. Clair v. Jones*, Addis. Rep. 243. *Vanhorn v. Frick*, 3 Scr. & Rawle, 278. *M'Kinney v. Leacock*, 1 id. 27. *Condict v. Stevens*, 1 Monroe, 74. *Campbell v. Wallace*, 3 Yeates' Rep. 271. See the cases cited ante, note 834, p. 1182. *Davis v. Prevost*, 7 Lou. Rep. (Curry,) 274; *Patterson v. Bloss*, 4 Miller's Lou. Rep. 374; *Grubbs' lessee v. M'Clatchy*, 2 Yerg. 432; *Rex v. St. Sepulchre*, 4 Doug. 336; *Avery v. Butters*, 2 Fairf. Rep. 404; *Boynton v. Rees*, 8 Pick. 329.) Directions to an officer respecting the service of a writ, if given in writing, cannot be proved by parol, unless the non-production of the writing is first accounted for. (*Thornton v. Moody*, 2 Fairf. Rep. 254.) In general, the fact of agency cannot be proved by parol where written evidence of it exists. (*M'Kinney v. Leacock*, 1 Ser. & Rawle, 27. *James' lessee v. Gordon*, 1 Wash. C. C. Rep. 333. See ante, note 184, p. 189; *Muggah v. Greig*, 2 Mill. Lou. Rep. 593.) On an indictment against a bankrupt for concealing his effects, the evidence being, that the bankrupt, on his last examination, stated that a book given in by him to the commissioners contained a full account of his effects; held, that the prosecutor must produce the book, or account for it. (*Rex v. Evain, Ry. & Mood*, Cr. Cas. 70.) In an action against the collector of a port, for carelessly making out a coasting licence, and therein mis-describing the plaintiff's vessel, whereby he was injured; held, that the plaintiff must produce the licence, or excuse its absence. (*Felton v. M'Donald*, 4 Dev. Rep. 406.) Where a law required a written declaration to be signed and filed by a party in the office of the secretary of state, as evidence of the party's consent to avail himself of certain statutory provisions; held, that to prove such consent, as against the party, the written evidence must be resorted to; and that his declarations could not be used. (*Rinaldi v. Rives*, 1 Stewart's Rep. 174.) Where it is necessary to prove a submission to arbitrators, and the submission is in writing, it must be produced, as the best evidence; e. g., in slander, for charging the plaintiff with perjury committed before arbitrators, in which case the submission must be shown in order to make out that the arbitrators had jurisdiction. (*Bullock v. Koon*, 9 Cowen's Rep. 30, 31, 2.) See ante, note 774, p. 1135. The case of a purchaser of real estate at a sheriff's sale, seeking to show title by deed in the defendant in execution prior to the sale, constitutes no exception to the general rule; such deed must be produced, or its absence accounted for, before inferior evidence can be admitted. (*Little v. Delancey's lessees*, 5 Binn. Rep. 266, apparently overruling *Edgar's lessee v. Robinson*, 4 Dall. 132.) In an action on the covenant of seizin in a deed, parol evidence is inadmissible to prove prior claims upon the land. (*Pollard v. Dwight*, 4

Cranch, 421.) In general, to show existing incumbrances upon land, the written evidence should be produced. (*Oldham v. Woods*, 3 Monroe, 47, 50.) So, to show that land has been sold, the written evidence should be resorted to. (*Cloud v. Patterson*, 1 Stewart's Rep. 394.) Whenever it turns out, either on the direct or cross-examination, that a writing exists with regard to a transaction, which the law esteems as the best evidence, it must be produced, or its absence accounted for. If this is not done, all inferior evidence that may have been given, will be stricken out and disregarded. (*Boone v. Dykes*, 3 Monroe's Rep. 529, 531. See *Rex v. Padstow*, 4 Barn. & Adol. 208; *Rex v. Rawden*, 8 Barn. & Cress. 708.)

In Kentucky, they have a statute which dispenses with the proof of the execution of notes sued upon, and, we believe, some other instruments, unless the opposite party will, on oath, deny the signature, &c., with his plea. This is held, in that state, to dispense not only with proof of the instrument, when the suit is brought directly upon it, but the plaintiff need not even produce it. Otherwise, however, where the instrument is not the foundation of the suit, but comes in collaterally; for then the statute does not reach the case, and it stands upon common law principles. (See *Scott v. Cleveland*, 3 Monroe, 62; *Roberts v. Tennell*, id 247; *Cope v. Arberry*, 2 J. J. Marsh. 296; *Gaines v. Patterson*, 3 Dana, 408, 9; *Dodge v. The Bank of Kentucky*, 2 Marsh. Ken. Rep. 610; *M'Gee v. Deniphan*, 2 Litt. Rep. 139.) The contrary, however, has been deemed the true construction of the statute, by the supreme court of the United States; and held, that the instrument, though the direct foundation of the action, must be produced. (*Sebree v. Dorr*, 9 Wheat. 558.)

But even where the law calls for the writing as the best evidence of the transaction to which it pertains, certain things relating to the writing or the matters evinced by it, may be proved, without producing it, though they involve the fact of its existence. Thus, in an action for the purchase money of a note sold by the plaintiff to the defendant, the former may give parol evidence of the sale, without producing the note or accounting for its absence. (*Lambe v. Moberly*, 3 Monroe, 179.) See also, *Hughes v. Harrison*, 2 Mill. Lou. Rep. 89, 91, 2. And we have seen, that the fact of a suit having been commenced by writ before a certain day, may be shown without producing the writ. (Ante, note 735, p. 1137.) So, questions relating to the mere custody of the paper, may be put and answered; indeed, this is often necessary in establishing or invalidating a foundation for secondary evidence of its contents. (See ante, note 279, p. 277; note 287, p. 281.) And you may show the fact of the existence of written evidence, with a view to excluding inferior testimony on the part of your adversary. (*Boone v. Dykes*, 3 Monroe, 531. *United States v. Porter*, 3 Day's Rep. 234. *Ingraham v. White*, 2 Mill. Lou. Rep. 294.) On an indictment against B. and C. for conspiring to extort money from A., by means of a charge of forgery contained in a letter written by B., in which it was alleged that A. had forged a cheque on C.'s bankers; held, that as the indictment was founded upon the letter, the cheque need not be produced; and this, though conversations relating to a cheque alleged by the defendants to have been forged by A., were given in evidence by the prosecutor, and it appeared affirmatively that the cheque referred to in those conversations, was in existence. (*Rex v. Ford*, 1 Nev. & Mann. 776.) In *Spiers v. Wilson*, 4 Cranch, 398, the court seem to have held, that the existence of a deed of slaves, given in Virginia, might be proved by parol testimony for the purpose of characterizing the possession which accompanied it, but was

not receivable as evincing in itself any title to the slaves. See *Hughes v. Easten*, 4 J. J. Marsh. Rep. 572. In *Lowry v. Pinson*, 2 Bail. Rep. 324, a party seeking to impeach a deed of lands, on the ground of its being fraudulent as to creditors, was allowed to show by parol, that about the time of giving the deed in question, the vendor executed a prior conveyance to the vendee, (the defendant,) and another person, for which no consideration was paid; and this, without any notice to produce the original. The court said, that the general rule did not apply to a case like this where the writing relates to a collateral circumstance, and an inference favorable to the party offering the evidence, arises out of the fact of the execution and existence of the writing, and not out of its particular contents. The object of the evidence was to deduce a fraudulent intent, not from any thing contained in the instrument, but from the fact of its execution without consideration. In *Tucker v. Welch*, 17 Mass. Rep. 160, the question arose, whether a certain assignment from P. to S., was or was not fraudulent. To prove it bona fide, the defendant gave evidence of several large sums of money paid by S. for P. The plaintiff, to counteract this, offered among other things, the copy of a mortgage of a farm, executed by P. to S., to secure him for \$4500. No exception appears to have been taken at the trial to the testimony; and the court said, if there had, it would have been of no avail. "The execution of such a deed was not denied, and the question of title to the estate it conveyed, was not in issue. It was produced to prove a collateral fact, viz., that property had been conveyed to S., as a security or indemnity for debts or liabilities on account of P. The fact of such a conveyance was not denied; and it might have been proved *prima facie*, by parol, for the purpose for which the copy was used." (Id. 165.) The payment of taxes on land, as a mere act of ownership, may be proved by parol, without producing the assessments or the collector's tax-books. But, if it is proposed to prove that the taxes so paid were rightfully assessed or claimed of the person who paid them, the assessments, &c., must be shown. (*Dennett v. Crocker*, 8 Greenl. 239, 244. See *Davis v. Prevost*, 7 Lou. Rep. (Curry,) 274.)

Some of these cases, doubtless, go, to say the least of them, to the extreme verge of what is allowable, if they have not ventured beyond it; especially the dictum in *Tucker v. Welch*, and what was held in *Lowry v. Pinson*. But they will generally be found to recognize the rule, that, where the *contents* of the instrument are sought after, it must be produced, or its absence excused. Such is the well settled doctrine. (See *De Haven v. Henderson*, 1 Dall. Rep. 424; *United States v. Porter*, 3 Day's Rep. 285, per *Livingston J.*; *Sebree v. Dorr*, 9 Wheat. 558; *Cary v. Campbell*, 10 John. Rep. 363; *Townsend v. Atwater*, 5 Day's Rep. 306; *Lewis v. Beatty*, 8 Mart. Lou. Rep. 287; *Cotton v. Beasley*, 1 N. Car. Law Repos. 239; *Brush v. Taggart*, 7 John. Rep. 19; *Wilmer v. Harris*, 5 Harr. & John. 3; *Fox v. Wood*, 1 Rawle, 143, 6; *Moore v. Houston*, 3 Ser. & Rawle, 191; *Bloxam v. Elsee*, 1 Carr. & Payne, 558; *M'Kinney v. Leacock*, 1 Ser. & Rawle, 27; *Ingraham v. White*, 2 Mill. Lou. Rep. 294; *Bunch's adm'r. v. Hurst's adm'r.* 3 Dess. Eq. Rep. 290, 1; *Rank v. Shewey*, 4 Watts' Rep. 218, 219.) A deposition was overruled, because it went to prove, among other things, the contents of a paper not shown to be unattainable by the party. (*M'Kee v. Reiff*, 4 Yeates' Rep. 340, S. P. *Mather, v. Goddard*, 7 Conn. Rep. 304. *Clark v. Longworth*, 1 Wright's Rep. 189.) You cannot ask a witness what the opposite party has said, as to the contents of deeds executed by him, without accounting

for their absence. (*Bloxam v. Elsee*, 1 Carr. & Payne, 558; but see *Sewell v. Stubbs*, id. 73.) Nor can a party under the pretence of cross-examination, be allowed to avail himself of the contents of a written instrument, without accounting for its non-production. (See ante, note 532, p. 771; also, ante, note 499, p. 710; *Bloxam v. Elsee*, 1 Carr. & Payne, 558.) To identify a document, it must, in general, be produced. (Per Taunton, J., in *Atkins v. Owen*, 2 Adol. & Ellis, 35.) In this case, A. sued O. for money had and received; A. proved that O., having received a bill which was the property of the former, paid it to his own banker; he also proposed to show that O. had received credit with his (O.'s) banker, for a bill similar in amount, and that there was no corresponding debit against O. in the banker's book, nor any credit given to O. for any bill to the same amount; Held, that the proposed proof was not admissible, unless A.'s bill was produced. (Id.)

So, where the transaction or matter to which the writing relates, may be proved entirely independent of it, yet, if the *contents* are inquired after, it must be produced; for, as to these, it is the best evidence. Such is the case with respect to receipts; (see *Van Dusen v. Frink*, 15 Pick. 449; *Ex parte Simpson*, Charl. Rep. 111; *Hart v. Yunt*, 1 Watts' Rep. 252; *Wiggins' adm'rs. v. Pryor's adm'r.* 3 Porter's Rep. 450; ante, note 420, p. 547, 8;) memoranda; (ante, note 489, p. 679; *Furman v. Peay*, 2 Bail, 394; see post, note 870;) letters; (ante, note 167, p. 159; *Northrop v. Jackson*, 13 Wend. 86;) and other similar papers; (*Ramsey v. Johnson*, 3 Pennsylv. Rep. 293;) though, from their nature, the facts which they evince may be proved by parol, without accounting for the writing. In *Raymond v. Sellick*, 10 Conn. Rep. 480, the defendants offered to show by parol, that the parties had settled the identical account sued upon, and that they had paid the plaintiff therefor in full. The plaintiff objected that she had, before the settlement, given the defendant a copy of the account thus settled, and that the copy should be produced as the best evidence. But the court held that, though the defendants might use the copy, they were not bound to do so. "The copy," they said, "was, probably, delivered for the purpose of giving the defendants notice of the claim; and there is no pretence that it was ever constituted by the parties a document to be kept as evidence of the items of the demand." (Id. 483.) Besides, the object of the testimony offered was not to prove the contents of the copy, but facts which arose subsequent to its delivery. (Id.) But, in such cases, if the *contents* of the account are proposed to be proved, it must be produced, or a foundation laid as in ordinary cases for secondary evidence. (*Vinal v. Burrill*, 16 Pick. 401, 407, 8.) So, doubtless, as to the contents of a public officer's commission, though the fact of his being an officer may be proved independent of the commission. (See ante, note 427, p. 554, 5; ante, note 475, p. 627; ante, note 694, p. 1003, 4; *Dunlap v. Waldo*, 6 N. Hamp. Rep. 452.)

Certain *dicta* to be found in the American books, would lead us to suppose, that the question, in respect to the competency of oral testimony to prove the contents of a written instrument, might depend upon the relation which the instrument has to the merits. Thus, *Savage C. J.*, in *Mc Fadden v. Kingsbury*, (11 Wend. 667, 8, 9,) said—"I have always understood the rule on this subject to be, that parol evidence of the contents of papers may be given, where they do not form the foundation of the cause, but merely relate to some collateral fact." The cases, which he cited, in support of this somewhat startling proposition, are *Southwick v. Stevens*, 10 John. Rep. 443, and *Mumford v. Bowne*, Anth. N. P. 40. To these may be added, also, the dic-

tum of Parker, C. J. in *Tucker v. Welch*, 17 Mass. Rep. 165, stated *supra*, at p. 1210 of this note. *Southwick v. Stevens*, was noticed *ante*, note 396, p. 502, 3; and in addition to the remarks there made concerning it, we have only to add, that even in that case, the court went no farther than to allow matter evinced by written evidence, to be proved orally. It is still more latitudinarian, we apprehend, to adjudge that the contents of a written instrument, as such, may be thus established. *Mumford v. Bowne*, however, seems to have gone even to this extent; and though we have sought diligently, we have sought in vain, for an *adjudication* sustaining it. On the contrary, several decisions, both in the English and American courts, proceed upon doctrines directly the reverse. We shall notice only a few of them.

In *Roberts v. Tennell*, (3 Monroe, 247,) and *Cope v. Arberry*, (2 J. J. Marsh, 296,) papers were spoken of as coming in collaterally, when they did not constitute the direct foundation of the suit; but held, that they must be produced and proved by the best evidence of which the nature of the case was susceptible. (See also, *Gaines v. Patterson*, 3 Dana, 408, 9.) *Lanauze v. Palmer*, (1 Mood. & Malk. 31, 2,) furnishes an instance where a notice of dishonor, quite remotely connected with the issue, was held not provable by parol, for the very reason of its being collaterally used; whereas, if it had pertained directly to the bill on which the suit was brought the suit itself would have supplied notice to produce, and so would have let in inferior proof. (See this case, and others *ante*, note 843, p. 1194.) No admissible evidence can well be conceived of more collateral to the issue or merits, than that which relates merely to the competency of a witness sworn in chief upon the trial. Yet, if the witness' interest appear, and the evidence obviating the objection rests in writing, the writing must be produced, or his testimony disregarded. (See *ante*, note 256, p. 260.) Though it is otherwise, where a witness is examined on the *voir dire*. (See *ante*, p. 132, of the text, and the cases cited *ante*, note 252, p. 260.) A party objecting to the competency of a witness, on the ground of infamy, must be prepared to establish the fact of conviction, &c., by producing a copy of the record. (See *ante*, note 59, p. 65. See also, *S. P. Gass, v. Stinson*, 2 Sumn. Rep. 605, 907.) Again, the rule requiring the subscribing witness to an instrument to be produced, in order to prove its execution, rests upon the same principle which demands the best evidence in other cases. Yet, it is no reason for dispensing with the subscribing witness, that the writing comes in question collaterally only. (See *post*, p. 465, of the text, and *post*, note 878.)

On the whole, we know of no ground, either of principle or authority, upon which the doctrine we have been considering can be maintained. If the contents of a written instrument are so far collateral to the issue as to be immaterial, that is good ground for rejecting, not only parol evidence, but all evidence concerning them—even the instrument itself. (*M'Connell v. Brown*, Litt. Sel. Cas. 462, 3. See per Lord Ellenborough, in *Wardell v. Fermor*, 2 Campb. Rep. 282.) But if the contents are material, both the law and the reason of the thing dictate, that the instrument should be produced to speak for itself, and thus preclude any abuse which might arise from the substitution of inferior evidence. In addition to the cases before cited in this note to the general doctrine, see *ante*, note 514, p. 540, 1, 2; note 420, p. 547, 8, 9, 550; note 422, p. 551, 2, 3.

Sometimes the rule requiring the best evidence of the contents of writings, has apparently been in some degree relaxed on grounds of convenience; particularly where

certain general results from documents, were the sole object of the enquiry, and the documents themselves were too numerous or voluminous to be read and examined in court. Thus, where the question was as to the solvency of a person on a given day, he having been subsequently declared a bankrupt; held, that a witness who had examined the papers and accounts of the bankrupt, might be allowed to state the result, though he could not be allowed to speak of the contents of the accounts in detail. (*Roberts v. Doxon*, Peake's Rep. 83, S. P. *Meyer v. Sefton*, 2 Stark. Rep. 274, 276, 7. See *Rowe v. Brenton*, 3 Mann & Ryl. 312.) But in *Den v. Pond*, 1 Cox's Rep. 379, the secretary of state was called to prove that there was a book in his office of deeds and surveys made in a particular county, so as to found an inference that deeds and surveys were formerly recorded in that county; but the court held that the book itself must be produced, for that would show what it really was. (Id. 380, 1.)

The general rule is not rigidly insisted on, where a mere negative, resulting from the inspection of voluminous documents, is sought to be proved. (1 Stark. Ev. 438, 6th Am. ed.) In *Rowe v. Brenton*, 3 Mann. & Ryl. 303, a witness produced a document for the purpose of showing a particular clause; and he was allowed by Lord Tenterden to answer, whether he had not inspected about 300 other documents of the same kind, (court rolls,) in which the clause was not found.

An invariable practice as between two persons for one to accept bills drawn in a particular form by the other, may be proved without producing the bills. If the mode of dealing has varied, however, the bills must be produced or accounted for; otherwise it would be receiving parol evidence of an individual written instrument, which is not permitted. (*Spencer v. Billing*, 3 Camp. 310.)

We have seen that where secondary evidence is offered, it must be objected to in season, or its competency cannot be questioned. (Ante, note 431, p. 558. Ante, note 723, p. 1068. See also, *Gaines v. Paterson*, 3 Dana, 408, 9; *Williamson's heirs v. Johnston*, 4 Monroe, 254; *Blight's lessee v. Atwell*, 7 Monroe, 265, 6; *Pettigru v. Sanders*, 2 Bail. Rep. 549; *Kimball v. Morrell*, 4 Greenl. 370, 1.) It has been held too late to object after the testimony on the side of the party offering the secondary evidence, is closed. The objection should be made when the evidence is offered, so as to afford the party an opportunity of obviating it. (*Concord v. McIntyre*, 6 N. Hamp. Rep. 527, 528, 9. See ante, note 431, p. 558. *Callender v. Marsh*, 1 Pick. 418, 425, 6.)

The production of a written instrument may be superseded by an admission in the pleadings. (See ante, note 431, p. 558; ante, note 331, p. 444, et seq.) In Kentucky, in a suit for breach of covenant, where the declaration set forth the covenant at large, a plea of covenants performed was adjudged an admission of the covenant alleged by the plaintiff; and held, that the plaintiff might read to the jury, either the recital of the covenant in the declaration, or the covenant itself, so far as it corresponded with the recital, without proof of its existence or genuineness. (*Helm's ex'rs. v. Jones*, adm'r. 3 Dana, 86, 7.) An admission in an answer in chancery, of an instrument stated in the bill, will sometimes supersede the necessity of producing it; especially where nothing depends upon its construction. (*Owen v. Jones*, 2 Anstr. 505.) But the admission must be very explicit; if qualified by a reference to the instrument when produced, its production is necessary. (*Cox v. Allingham*, 1 Jacob's Rep. 337.)

NOTE 861—p. 452.

Notice to produce having been given and not complied with, or the loss or destruction of an instrument, are by no means the only circumstances, which will authorize the admission of secondary evidence. In general, where the best evidence is unattainable, a party may resort to secondary evidence. If a paper be on file in a public office under such circumstances that the party can neither obtain it, or compel its production, and it is not made the duty of any person to give out certified copies to be used as evidence, parol testimony will be received. (*Semble*, *Denton v. Hill*, 4 Hayw. Rep. 73. See *Butler v. The State*, 5 Gill. & John. Rep. 511, 519.) But, if the paper is one that might be withdrawn from the files, on application for that purpose, such application should appear to have been made. (See *ante*, note 839, p. 1189, 1190.) Even if the application is refused, it will not always be a matter of course to admit secondary proof. Where the liability of the defendants, in an action on a note, had been tried on the merits, in a former action on the same note, brought against them in the name of the plaintiff's agent, and the note had been put upon the clerk's files, the court refused to allow the note to be taken from the files, or to admit secondary evidence of its contents. They said, that it was always matter of discretion with the court to allow a paper to be withdrawn from the files; that the liability of the defendant's had been thoroughly tried in the former suit, upon the merits, and under circumstances favorable for the plaintiff; and, that it would be improper to grant him an opportunity to try the question over again. They also held it to be no answer to say, that the defendant's could avail themselves of the judgment in that suit as a defence to the present action. (*Rogerson v. Neal*, 16 Pick. Rep. 370.) In a suit in chancery, where it appeared that an instrument, by which the defendant transferred to the complainants the benefit of a certain judgment, had been filed in a suit at law between the parties, and the defendant produced a transcript of the record in such suit containing a copy of the instrument, which the plaintiff was willing should be read if the transcript was introduced along with it; held, that the defendant refusing to accept these terms, the copy could not be received. The appellate court, in their opinion in this case, after advertg to the general rule excluding copies till the originals shall have been accounted for, observe: "The manner of accounting for the absence of the original in the present instance, was, by showing that it had been filed in the suit at law, and this was attempted to be manifested by the record produced. But why have they thus disposed of the original? It must have been there lodged for some purpose; and its custody have been retained through the operation of law. If it had been the subject of litigation, and its claim settled between the parties in a suit for that purpose, it ought not to have been again introduced as a set-off against the demand of the complainant, or as imposing another defence to its claim. To understand, therefore, fully the cause of its absence, and the effect which had thereby been produced, the court, (*a quo*,) we think, properly required that the record should be read, or the copy not admitted. (*Handley's ex'r v. Fitzhugh*, 1 Marsh. Ken. Rep. 24.) So, the court may refuse to receive inferior proof upon principles of public policy. Accordingly, in Pennsylvania, where an action was brought for a libel upon the plaintiff, an officer, consisting of certain charges preferred against him to the governor; though the governor had declined delivering the libellous paper to the plaintiff, and the court had refused a *subpœna duces*

tecum, (which can only issue there on special application) yet, parol evidence of the contents was held inadmissible. (Gray v. Pentland, 2 Serg. & Rawle 23. See Yoter v. Sanno, 6 Watts' Rep. 166.)

The question has occasionally arisen, whether proof that a paper is out of the state will, of itself, be sufficient to lay the foundation for introducing secondary evidence of its contents, without further evidence showing an effort to obtain it. In Connecticut, it has been held that it will not. (Townsend v. Atwater, 5 Day's Rep. 298, 306.) So, also, in Louisiana. (Lewis v. Beatty, 8 Mart. Lou. Rep. N. S., 287, 288, 299.) Otherwise, however, in Kentucky; and the court liken it to the case of a subscribing witness, absent from the state. (Boone v. Dyke's legatees, 3 Monroe 532.) See also Eaton v. Campbell, 7 Pick. 10. A written contract deposited by the parties with a witness in a neighboring state, was allowed to be proved by a deposition on commission, it being out of the jurisdiction of the court. (Bailey v. Johnson, 9 Cowen's Rep. 115.) See further, what is said by Saffold, J., in May's adm'r's v. May, 1 Porter's Rep. 131.

Where the defendant had placed a deed in the hands of M., his agent, who had gone to another state, and carried it with him, and some unsuccessful attempts, the nature of which was not explained, had been made to obtain it; held, that no commission having been sent to examine M. about the deed, or to ascertain what had become of it, and there being some grounds for suspecting a designed suppression of it, parol evidence was inadmissible. (Bunch's adm'r v. Hurst's adm'r, 3 Deas. Eq. Rep. 290, 291.) An instrument having been executed at Caraccas, and it appearing that, according to the law of that place, the original was deposited with a notary and kept by him, the parties only being allowed to have certified copies; held, that this was sufficient to account for the non-production of the original. (Mauri v. Heffernan, 13 Johns. Rep. 58.)

If the paper is in the hands of a third person under such circumstances that the law will not compel him to produce it, this is a ground for allowing secondary evidence. For various cases showing this, as also when a paper is privileged so as to be unattainable through a *subpœna duces tecum*, see ante, note 832. See also, United States v. Reyburn, 6 Peters' Rep. 352, 6, 7.

That proof of the loss or destruction of an instrument is sufficient to lay the foundation for introducing secondary evidence of its contents, is, as a general rule, well established. Sometimes the loss or destruction is proved directly, e. g. by the person who destroyed it, swearing to the fact; and sometimes the fact is made out by circumstantial evidence, as by showing that it was deposited in a particular chest, office or house, which was subsequently destroyed by fire, or the ravages of war; (Jackson, ex dem. Livingston v. Neely, 10 Johns. Rep. 374; Franklin v. Creyon, Harp. Eq. Rep. 243; Jeffrey's ex'r's v. Parsons, 2 Verm. Rep. 456; Jackson, ex dem. Taylor v. Cullum, 2 Blackf. 228; Peay v. Picket, 3 M'Cord's Rep. 322; Lorton v. Gore, 1 Dow & Clark, 190; Rochell v. Holmes, 2 Bay's Rep. 487; Fallis v. Griffith, 1 Wright's Rep. 305;) that it was put into the mail, directed to a particular person, and never reached its place of destination; (Bank of the United States v. Sill, 5 Conn. Rep. 106; Champion v. Terry, 3 Brod. & Bing. 295;) or put into the letter bag of a vessel, which was chased by a privateer, and the letter bag thrown overboard; (Anderson v. Robson, 2 Bay's Rep. 495;) or, that it has been diligently sought for, and

cannot be found ; (*Proprietors of Braintree v. Battles*, 6 Verm. Rep. 399 ; *Renner v. Bank of Columbia*, 9 Wheat. Rep. 581 ; *Hall v. Hall*, 6 Gill. & Johns. 386 ; *Taunton Bank v. Richards*, 5 Pick. Rep. 436 ; *Benjamin v. Garee*, 1 Wright's Rep. 449, 450 ; *M'Mullen v. Brown*, 1 Harp. Rep. 76.) The like principles apply in criminal cases. (See *Rex v. Chadwick*, 6 Carr. & Payne, 181 ; *Commonwealth v. Snell*, 3 Mass. Rep. 82 ; *United States v. Doebler*, 1 Bald. Rep. 519.) See ante, note 844, p. 1194, 5.

It is not by any means a matter of course, to let a party in to give secondary evidence, even where he produces direct proof of the fact of destruction. If the destruction was accidental, and occurred without his agency or assent ; or even if it was voluntary, and his own act, but yet done under a mistake, so as to rebut all idea of contemplated fraud, inferior evidence will usually be allowed. Thus, should a party destroy a paper, under the erroneous impression that it could be of no further use, he may afterward, notwithstanding, prove its contents by secondary evidence. (*Riggs v. Tayloe*, 9 Wheat. 483.) Or should he destroy a note on its being paid in bank bills, he supposing at the time they were genuine, when in truth they were counterfeit, the same result would follow. (*Id.* 487.) So should he destroy one paper, supposing it to be another. (*Id.* See *Dumas v. Powell*, 3 Dev. 103 : also *Williams v. Crary*, 5 Cowen's Rep. 368, 370.) But a party who under no pretence of mistake or accident, voluntarily destroys primary evidence, to prevent its being used against him, or to create an excuse for its non-production, to injure the opposite party, or for other fraudulent purposes, thereby excludes himself from the benefit of inferior evidence. (*Riggs v. Tayloe*, 9 Wheat. 483, 487. *Renner v. Bank of Columbia*, *id.* 596. *Bank of U. S. v. Sill*, 5 Conn. Rep. 106, 111.) Accordingly, where a plaintiff sued to recover certain monies received by the defendant through a forged endorsement of the plaintiff's name on a note payable to his order, and on the trial it appeared that the plaintiff having shown the note and endorsement to a person, a witness in the cause, afterwards entirely erased and blotted out the endorsement ; held, that it not having been done accidentally, or under any mistake, he could not prove the same a forgery by witnesses who could only judge of its genuineness from having seen it before the obliteration. He had, by his act, deprived the other party of the benefit of witnesses acquainted with his hand-writing, and to admit the testimony offered, would be as repugnant to principle as to deny a party the right of cross-examining his adversary's witnesses. (*Broadwell v. Stiles*, 3 Halst. Rep. 59.) A fraudulent alteration of a note by the promisee, will prevent him from recovering either on the note itself or the original consideration. (*Martendale v. Follet*, 1 N. Hamp. Rep. 95.) See also, *S. P. Clute v. Small*, 17 Wend. Rep. 238, 242. Otherwise, as to an alteration or destruction, originating in an honest mistake of fact. (*Id.* And see *S. P. Atkinson v. Hawdon*, 2 Adol. & Ellis, 628.) Where a note sued upon was shown to have been voluntarily burnt up by the plaintiff a short time before it fell due, the court held he was bound to explain the act so as to make it appear honest and justifiable, or he could not recover. For it would be a violation of all the principles upon which secondary evidence is tolerated, to allow a party the benefit of it, who has wilfully destroyed the higher and better testimony. (*Blade v. Noland*, 12 Wend. 173, 4, 5.) Even a pretended negligent destruction or loss of an instrument, if the negligence is such as to awaken a suspicion of design, will be followed by the like result. (*Semle*, *id.*) See *Livingston v. Rogers*, 2 Johns. Cas. 488. In *Farrar v. Farrar*, (4 N. Hamp. Rep. 191,) it was held, that where a grantee cancelled a deed, with intent to revest the title,

though it would not have this effect directly, yet the destruction being voluntary, he could not give it in evidence; and so, indirectly, it should work the consequence intended. (See *Tomson v. Ward*, 1 N. Hamp. Rep. 9; *Commonwealth v. Dudley*, 10 Mass. Rep. 403.) And it has been held, that a fraudulent alteration, made by the grantee, will operate the like result. (*Chesby v. Frost*, 1 N. Hamp. Rep. 145; but see *Barrett v. Thorndike*, 1 Greenl. Rep. 73; *Hatch v. Hatch*, 9 Mass. Rep. 311.)

It has been held, as matter of practice, that a party may prove the existence of the instrument, first, or its loss, as suits him. Thus, when he intends to show that it was consumed in a particular office destroyed by fire, he may begin by proving the destruction of the office. (*Denn v. Pond*, 1 Coxe's Rep. 379.) In *Kimball v. Morrell*, 4 Greenl. 363, 370, it was laid down that the party must first show the existence or due execution of the instrument, second its loss, and then, and not till then, he may enquire specifically as to the contents. Such has been said in another case, to be the natural order. (Per *Burnet, J.*, in *Allen's lessee v. Parish*, 3 Hamm. Rep. 107, 8. *M'Credy v. Schuylkill Nav. Co.* 3 Whart. Rep. 424.) But these facts are so intimately blended together, and have such a mutual relation to, and dependence upon each other, that it is difficult and many times impossible to separate the proof one part from the other. (*Id.* And see per *Sherman, J.*, *id.* p. 121, 2. *M'Laurin v. Talbot*, 2 Hill's Rep. 526, per *Harper, J.*)

It is quite clear, however, that unless proof is adduced of the loss or destruction, satisfactory to the court, the evidence as to the execution and contents cannot be submitted to the jury. (*Jackson, ex dem. Livingston v. Frier*, 16 Johns. Rep. 193, 196. *Rees v. Lawless*, 4 Litt. Rep. 218, 219, 220. *De Haven v. Henderson*, 1 Dall. Rep. 424. *Dorsey v. Dorsey's heirs*, 3 Harr. & Johns. 219. *Showders v. Harper*, 1 Haring. Rep. 444.)

The proof of loss or destruction must generally be by witnesses testifying under oath. Accordingly, where a justice of the peace acted upon his own personal knowledge of the fact of the loss of a note, left with him at the time of joining issue in the cause, held erroneous, and good ground for reversing his judgment upon certiorari. (*Cary v. Campbell*, 10 John. Rep. 363.)

The loss may be proved by the declarations of the adverse party; (*Bristol v. Wait*, 6 Carr. & Payne, 591; *Taunton & South Boston Bank v. Whiting*, 10 Mass. Rep. 332; *North v. Drayton*, Harp. Eq. Rep. 34;) or of those under whom he claims title; (*Corbin v. Jackson, ex dem. Garnsey*, 14 Wend. Rep. 619;) and this, as to the latter, even though they might be called as witnesses. (*Id.* *Stanley v. Addison*, 8 Lou. Rep. (Curry,) 207.) In respect to the admission of one joint tenant or tenant in common, to prove loss, &c. as against the other, see note 175, p. 170.

In general, the declaration of a person who might be brought to testify on the subject is mere hearsay and inadmissible. (*The Governor v. Barkley*, 4 Hawks' Rep. 20. *Rex v. Denio*, 7 Barn. & Cress. 620; *S. C.*, 1 Mann. & Ryl., 294. *Taunton Bank v. Richardson*, 5 Pick. 441. *Mitchell v. Mitchell*, 3 Stew. & Porter, 81, 84. See ante, note 432, p. 563, 565.) Nor can you rely upon the naked declarations of a deceased person as to his having had the paper and destroyed it, without showing search. (*Rex v. Rawden*, 2 Adol. & Ellis, 156.) Rumors of the destruction of an instrument stand, of course, upon the same ground. (*Angel v. Felton*, 8 John. Rep. 149.)

Parties and persons interested are recognized as competent witnesses in respect to the facts and circumstances necessary to lay a foundation for secondary evidence. (See ante, note 122, p. 138; also ante, note 849, p. 1197.) This exception to the general rule rests upon the ground that the point is preliminary and incidental, addressed solely to the court, and not affecting the issue to be tried by the jury. (See per Marshall, C. J., in *Tayloe v. Riggs*, 1 Peters' Rep. 591, 596, 7; Jackson, ex dem. Livingston, v. Frier, 16 John. Rep. 193, 195, 6; 8 Amer. Jurist, 28, 9.) The doctrine has been held as to proof of search, loss, &c. in Kentucky; (*Grimes v. Talbot*, 1 Marsh. Ken. Rep. 205, 6;) in the supreme court of the United States; (*Tayloe v. Riggs*, 1 Peters' Rep. 591; see also *Riggs v. Tayloe*, 9 Wheat. 485, 6;) Pennsylvania; (see the cases ante, note 122, p. 138; also *De Haven v. Henderson*, 1 Dall. Rep. 454;) South Carolina, (*Smith v. Wilson*, 1 Dev. & Batt. 40, 41;) and Massachusetts; (see the cases ante, note 122, p. 138; *Poignard v. Smith*, 8 Pick. 278; *Donelson v. Taylor*, id. 390;) but parties and persons having an interest cannot be allowed to speak in respect to the contents of the instrument. (*Adams v. Leland*, 7 Pick. 62. *Donelson v. Taylor*, 8 id. 890. See *Seekright v. Bogan*, 1 Hayw. Rep. 178, note.) The doctrine as to the competency of parties, &c. on questions preliminary to the introduction of secondary evidence has been held in Virginia, North Carolina, and New-Hampshire. (See ante, note 122, p. 138.) So, *semble*, in Maine. (8 Amer. Jurist, 29, note 1.) In New-York also. (See ante, note 122, p. 138; also *Blade v. Noland*, 12 Wend. 173; Jackson, ex dem. Brown, v. Betts. 6 Cowen's Rep. 200.) And in the latter state, where one party is sworn to prove the loss, the opposite party may be examined to disprove it and account for the instrument. (2 R. S. 406, § 74.) In Delaware, parties are competent to prove loss, and the other party may produce witnesses to impeach the credit of his adversary thus sworn, before secondary evidence is given to the jury. This is upon the principle that the court must be satisfied as to the fact of loss by *credible* testimony. (*Shrowders v. Harper*, 1 Harringt. Rep. 444.)

In some cases it has been held, that the party *must* testify in order to rebut the suspicion that he is endeavoring to substitute inferior for primary evidence in order to defraud; as, where he is presumed, from the circumstances, to be in possession of the instrument. (*Tayloe v. Riggs*, 1 Peters' Rep. 591; *Blanton v. Miller*, 1 Hayw. 4; *Poignard v. Smith*, 8 Pick. 278; *De Haven v. Henderson*, 1 Dall. 424; *Park v. Cochran*, 1 Hayw. 410; *Givens v. Manns*, 6 Munf. Rep. 201; *Smith v. Martin*, 2 Tenn. Rep. (Overt.) 208.)

But in Connecticut, the loss of a specialty upon which the suit is founded cannot be proved by a party; for in that case the fact of loss is a material and traversable one, to be determined by the jury. (*Coleman v. Wolcott*, 4 Day's Rep. 389.) So, *semble*, in actions upon lost simple contracts, as notes, &c. (*Swift v. Stevens*, 8 Conn. Rep. 431.) Such is the doctrine in South Carolina; (*Sims v. Sims*, 2 Rep. Const. Ct. So. Car. 215; *Davis v. Benbow*, 2 Bail. Rep. 427;) and in Vermont; (*Wright v. Jacobs*, 1 Aik. Rep. 304; *Penfield v. Cook*, id. 96.) As to the rule in New-Hampshire and North Carolina, see *McNiel v. McClintock*, 5 N. Hamp. Rep. 355, 358; *Cotton v. Beasley*, 1 N. Car. Law Repos. 239. The doctrine has been held otherwise in New-York, Massachusetts, Pennsylvania and Louisiana; and there, in actions upon lost notes, parties &c. are competent witnesses to prove the fact of the loss. (*Chamberlain v. Gorham*, 20 John. Rep. 144. *Blade v. Noland*, 12 Wend. 173. *Meeker v. Jackson*, 3 Yates' Rep. 442. *Donelson v. Taylor*, 8 Pick. 890. *Page v. Page*, 15

id. 399. *Miller v. Webb*, 8 Lou. Rep. (Curry,) 516.) So in Delaware, in an action on a lost deed. (*Shrowders v. Harper*, 1 Harringt. Rep. 444.) But they cannot be allowed to testify to the jury. (*Donelson v. Taylor*, supra. See *Jones v. Fales*, 5 Mass. Rep. 101, and *Forbes v. Wale*, 1 W. Black. 532.)

In respect to the form of the oath to be administered where a party or person interested is sworn to prove loss, &c. see ante, note 494, p. 705, 6.

In several cases the party's affidavit has been recognized as competent on the question of loss. (See *Givens v. Manns*, 6 Munf. 201; *Taunton Bank v. Richardson*, 5 Pick. 436; *Poignard v. Smith*, 8 id. 278; *Tayloe v. Rigg*, 1 Peters' Rep. 591; *Smith v. Wilson*, 1 Dev. & Batt. 40, 41; *Donelson v. Taylor*, 8 Pick. Rep. 390; *Patterson v. Winn*, 5 Peters' Rep. 240; *Riggs v. Tayloe*, 9 Wheat. 436; *Smith v. Martin*, 2 Tenn. Rep. (Overt. 208; *Page v. Page*, 15 Pick. Rep. 374, 5.) But a person competent to testify generally in the cause, must testify in the ordinary way, that the advantage of a cross-examination may be preserved. (*Poignard v. Smith*, 8 Pick. 272, 278. See, however, *Smith v. Martin*, 2 Tenn. Rep. (Overt.) 208.)

Where a paper has been deposited in a public office, an official certificate of the officer is sometimes made evidence of the loss by statute. (See *Jackson, ex dem. Swartwout, v. Cole*, 4 Cowen's Rep. 589.) But unless there be a statute authorizing the certificate, it cannot be made evidence. See *Hammond v. Norris*, 2 Harr. & John. 130; and ante, note 702, p. 1044, 5; see also ante, note 723, p. 1068, where it will be seen that a general statute has been passed on this subject in New-York. A surrogate's certificate as to ineffectual search for a will deposited in his office, is not admissible independent of a statute rendering it so. (*Jackson, ex dem. Schuyler, v. Russell*, 4 Wend. 547.) And even where this certificate is made evidence, the party is not obliged to resort to it, but may still prove search to have been made in any other regular mode. (Id.) Or, he may show that the opposite party obtained it surreptitiously, and thus supersede the necessity of getting the certificate of the officer, which might otherwise be requisite. (*Davis v. Spooner*, 3 Pick. Rep. 287, 8.)

NOTE 862—p. 452.

The party who has a written instrument in his possession and has been required to produce it, may always prevent his adversary from resorting to secondary evidence, by producing it, when wanted, on the trial. (*Dean v. Carnahan*, 7 Mart. Lou. Rep. N. S. 258.) But, after he has availed himself of the chance that his adversary would be unable to produce secondary evidence, and finds that his artifice has failed him, he cannot, by bringing forward the instrument, exclude the use of such secondary evidence as may have been given, unless he proves the instrument himself. (*Semble, Jackson v. Allen*, 3 Stark. Rep. 74, cited in the text, n. (3).)

And a party refusing, on notice, to produce a paper in his possession or under his control, and thus obliging his adversary to resort to parol or secondary evidence of its contents, cannot be allowed to contradict the secondary evidence thus given, without producing the paper itself. (*Bogart v. Brown*, 5 Pick. 18.) Indeed, it has been held, that a party refusing to produce a paper in his possession, called for under a notice to produce, cannot be allowed afterwards to retract and put in the paper. Thus, in an

action of ejectment, the lessors of the plaintiff on the trial called for a receipt in possession of the defendant, due notice to produce having been given. The defendant declined to produce it, and was admonished by Alderson B. that he must produce it at once, or never. The plaintiff then went into parol evidence of the contents of the receipt, whereupon the defendant's counsel put it into the witness's hands, and proposed to ask him when an interlineation appearing on it was made. But, per Alderson, B. "I think you cannot now be allowed to produce the receipt, as you before refused to do so. You must produce a document when it is called for, or never. If a document be called for, and you produce it, it is subject to all objections, and you might have then examined as to the interlineation; but, if you refuse to produce it, you must take the consequences of such refusal. (*Doe d. Higga v. Cockell*, 6 Carr & Payne, 525.)

NOTE 863—p. 452.

S. P. Poignard v. Smith, 8 Pick. Rep. 272. Kerns v. Swope, 2 Watts' Rep. 75.

NOTE 864—p. 452.

See *Eure v. Pittman*, 3 Hawks' Rep. 364.

The act of a party destroying a written instrument, furnishes presumptive proof of its due execution; but, before this presumption can arise, the purport of the paper destroyed must be shown what it is alleged to have been. In other words, it must be identified in some way. (*M'Reynolds v. M'Cord*, 6 Watts' Rep. 288, 290. See *Cowper v. Earl Cowper*, 2 P. Wms. 720, 752.)

NOTE 865—p. 452.

Where secondary evidence of an instrument is admissible, the execution of it must in general be proved. (*Kimball v. Morrell*, 4 Greenl. Rep. 368. *Jackson, ex. dem. Livingston, v. Frier*, 16 John. Rep. 196. *Dorsey v. Dorsey's heirs*, 3 Harr. & John. Rep. 426. *Allen's lessee v. Parish*, 3 Hamm. Rep. 107, 108, 121, 122. *M'Intyre v. Funk's heirs*, Litt. Sel. Cas. 425, 427. *M'Conhay v. The Centre and Kishacoquillas Turnpike Co.*, 1 Pennsylv. Rep. 428. *M'Credy v. Schuylkill Nav. Co.*, 3 Whart. Rep. 424.) If resort is had to the hand writing in order to establish the genuineness of a lost instrument, the witness must be qualified to speak of the hand writing the same as if the instrument was produced. (*Dorsey v. Dorsey's heirs*, 3 Harr. & John. Rep. 426. *Norwood v. Green*, 5 Mart. Lou. Rep. 176, 177. See the notes, *infra*, as to proof of hand writing.) A lost power, under which a deed had been executed, was proved by the person to whom the power was given and who executed the deed. (*Jackson, ex. dem. Livingston, v. Neely*, 10 John. Rep. 374.) Admissions are a very usual species of evidence resorted to in establishing the genuineness of instruments

where secondary proof is admissible. (See *Mauri v. Heffernan*, 13 John. Rep. 74; *Thomas v. Harding*, 8 Greenl. 417; *Fury v. Smith*, 1 Hud. & Brooke, 737, 738; *Fearn v. Taylor*, 4 Bibb., 365, 366.) Admissions by the adverse party, or those under whom he claims title, have been received to prove, as against such party, the execution of a lost deed affecting the title. (See *Allen's lessee v. Parish*, 3 Hamm. Rep. 111, 113, 122, 123; *Rees v. Lawless*, 4 Litt. Rep. 219.) As against a party claiming through a deed executed under a power of attorney which is lost or destroyed, the declarations of the constituent of the power, are admissible to prove its execution, contents, and loss. The other party is not obliged to call the constituent, even though he be within the reach of process. (*Corbin v. Jackson*, ex. dem. *Garnsey*, 14 Wend. Rep. 619.) As to the limitations under which admissions of those through whom a party claims, are received, see ante, note 481, p. 644, et seq.; See also ante, note 175, p. 170, in respect to the admissions of one tenant in common, co-plaintiff, &c., as against another. An admission by an obligor of the fact of execution of a lost bond, is good evidence as against him, but, as to others, it is in general mere hearsay and inadmissible. (*M'Intyre v. Funk's heirs*, Litt. Sel. Cas. 427.) The acknowledgment of a deceased pauper, of the genuineness of a lost indenture of apprenticeship, and his accompanying declaration that he was then serving under it, were adjudged evidence of its execution by him on a question of settlement between two towns; but, not so as to execution by the master, or the father of the pauper. (*Kingwood v. Bethlehem*, 1 Green's Rep. 226, 227.)

If the lost bond or deed, however, was attested by witnesses, it seems they should be called, or an excuse rendered for their absence, before confessions or other testimony can be received. (*Rees v. Lawless*, 4 Litt. Rep. 219. *Keeling v. Ball*, Peake's add. cas. 88. *Gregory v. Baugh*, 4 Rand. Rep. 636. See *Livingston v. Rogers*, 1 Cain. Cas. in Err. 27; *Norwood v. Green*, 5 Mart. Lou. Rep. N. S. 175, 176, 177; *M'Mahan v. M'Grady*, 5 Serg. & Rawle 314; *Fearn v. Taylor*, 4 Bibb's Rep. 365, 366; *Kingwood v. Bethlehem*, 1 Green's Rep. 221, 226; see *Hewes v. Wiswell*, 8 Greenl. Rep. 94; *Whittemore v. Brooks*, 1 Greenl. Rep. 57; *Showders v. Harper*, 1 Harringt. Rep. 444; *Hill v. Hill*, 2 Hill's Rep. 542, note (a).) See the notes, infra, relating to subscribing witnesses. But, where a deed of lands was lost, and the witness who testified that there were subscribing witnesses to it, did not know their names, and it not appearing that the party had the means of ascertaining them; held, that he could prove the deed by acknowledgments of the opposite party. (*Jackson*, ex. dem. *Hoogland v. Vail*, 7 Wend. Rep. 125. See *Hathaway v. Spencer*, 9 Pick. Rep. 26.) S. P. as to a lost bond. (*Keeling v. Ball*, Peake's add. cas. 88.) Also, as to a lost indenture of apprenticeship. (*Kingwood v. Bethlehem*, 1 Green's Rep. 226, 227.) But, see on this subject, *Whittemore v. Brooks*, 1 Greenl. Rep. 57, 60, 61.

Where no direct testimony on the point of execution, or former existence of an instrument appears to be attainable, the fact may be proved by circumstances. On this subject see *Jackson*, ex. dem. *Gillespy v. Woolsey*, 11 John. Rep. 446; *Allen's lessee v. Parish*, 3 Hamm. Rep. 107, et seq.; *M'Intyre v. Funk's heirs*, Litt. Sel. Cas. 425; *Fury v. Smith*, 1 Hud. & Brooke Rep. 736, 737, 738, et seq.; *Sicard's lessee v. Davis*, 6 Peters' Rep. 124, 137, 138; *M'Laurin v. Talbot*, 2 Hill's Rep. 526.

NOTE 866—p. 454.

A very well grounded distinction has been made, in respect to the proof of loss or destruction, between such papers as have apparently or really become useless to the person to whose custody they belong, and such as are of the muniments of his estate or otherwise valuable to him. The law will not readily suppose that a man has acted contrary to his interest, and therefore will demand a comparatively strict account of papers which he is interested in preserving. But it is every day's practice to presume the destruction of notes, bonds, &c. which have been paid up and which were apparently no longer worth taking care of. (*Betts v. Jackson*, 6 Wend. 173, 181.) Where a contract was relinquished by both parties, something like 17 or 18 years before the trial, it was held, that the fact of its relinquishment, coupled with the lapse of time, afforded good ground for dispensing with proof of diligence in endeavoring to produce it. (*Jackson, ex dem. Bond, v. Root*, 18 John. Rep. 60, 73, 4.) So, where a bond was surrendered and thereby became *functus officio*, it was held, that there being no motive for preserving it, its loss should be presumed; and parol evidence of its contents was received, without any effort, as it seems, to produce the bond itself. (*May's ex'rs v. Hill*, 5 Litt. Rep. 309.) See also *S. P., M'Intyre v. Funk's heirs*, Litt. Sel. Cas. 427. The same principle was applied in the case of a lottery ticket which had been presented and paid, and the lottery subsequently suppressed; for no one had a motive for preserving it. (*Yoter v. Sanno*, 6 Watts' Rep. 164, 166.)

Where a party swore that, believing a paper was of no further use, it was his impression he tore it up, and that if he did not tear it up it had become lost or mislaid; held, that this was enough to let him in to give secondary evidence of its contents. (*Riggs v. Tayloe*, 9 Wheat. 496.) The doctrine of the text was recognized in Connecticut. (*Bank of the United States v. Sill*, 5 Conn. Rep. 111.) See also *Livingston v. Rogers*, 1 Cain. Cas. in Er. 37; 2 John. Cas. 488, S. C. But where the printer of a newspaper, called to prove the loss of an original advertisement printed by him, stated that it was not his practice to preserve original advertisements, and that he never did preserve them, that the original in question he believed to be either lost or destroyed, but he had not hunted for it, as he had no place he could look with any prospect of finding it; held insufficient to admit secondary evidence; for, said the court, a diligent search might have been successful. (*M'Conhay v. The Centre and Kishacoquillas Turnpike Co.*, 1 Pennysl. Rep. 427, 8.) See *Sweigart v. Lowmarter*, 14 Serg. & Rawle, 200.

Where a person has an interest in destroying a paper, its destruction will be presumed on very slight testimony. This principle is very ably illustrated by the opinion of Walworth, Chancellor, in *Betts v. Jackson*, 6 Wend. Rep. 173, on the question whether a will, under the particular circumstances, was to be presumed destroyed by the testator in his life time, or fraudulently suppressed afterwards. See also per Taylor, C. J., in *Eure v. Pittman*, 3 Hawks' Rep. 364, 372. The law, it has been held, presumes that an accomplice would destroy a letter serving to implicate him as such; and hence, on an indictment for forging bank notes, where an accomplice was called and testified that he believed a letter of this character, written to him by the defendant, was lost, the court allowed secondary evidence of its contents, though no search for it

had been made. (*United States v. Doebler*, 1 Bald. Rep. 519.) See also *Pendleton v. The Commonwealth*, 4 Leigh, 694; also ante, note 844, p. 1194, 5.

NOTE 867—p. 457.

We observed, ante, note 861, p. 1215, that the proof of a paper being lost or destroyed, was either positive and direct, or circumstantial. In the former case, if the party who seeks to introduce secondary evidence, assented to the destruction, very little difficulty can arise; for then, in general, the only further enquiry, in order to determine whether secondary evidence shall be received, will be as to the motive with which the thing took place. Did the party destroy the instrument with a fraudulent design, or was it done bona fide, or under a mistake? If the former, he will usually be precluded from resorting to secondary evidence, but in the latter case it is otherwise. (See *id.* p. 1216.)

Where direct and positive proof is unattainable, the case will usually be attended with more embarrassment. The law demands that the best evidence shall be offered of which the nature of the case admits, and which is in the power of the party to produce. Secondary evidence is not admissible, if by reasonable diligence the original could have been produced; but the degree of diligence will depend on the nature of the transaction to which the paper relates, the apparent value of the paper, and other circumstances. (Per Baldwin J., in *United States v. Doebler*, 1 Bald. Rep. p. 519, 521.) The rigor of the old common-law rule has been relaxed in this respect; and the non-production of instruments is now excused for reasons more general and less specific, upon grounds more broad and liberal than were formerly admitted. (Per curiam in *Livingston v. Rogers*, 1 Cain. Cas. in Er. 27. S. C. 2 John. Cas. 488.) In general, the party should give all the evidence reasonably in his power, to prove the loss. (Per Hall J., in *Dumas v. Powell*, 3 Dev. 104.) He is not bound, however, to furnish the strongest possible assurance of the fact. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. (Per Thompson, C. J., in *Minor v. Tillotson*, 7 Peters' Rep. 99, 101.) In practice, when there is no ground of suspicion that the paper is intentionally suppressed, nor any discernible motive for deception, courts are extremely liberal in regard to secondary evidence. (Per Phelps, J., in *Proprietors of Braintree v. Battles*, 6 Verm. Rep. 399.) The rule must be so applied as to promote the ends of justice, and guard against fraud and imposition. If the circumstances justify a well grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting secondary evidence. (Per Thompson, C. J., in *Renner v. Bank of Columbia*, 9 Wheat. 581, 587. Per Baldwin J., in *United States v. Doebler*, 1 Bald. Rep. 521.) Ordinary diligence in ordinary cases is enough. (*Underwood v. Lane*, 1 Dev. Rep. 173, 175.) Where the proof of loss adduced establishes the fact with reasonable certainty, nothing more is required. (*Jackson, ex dem. Livingston, v. Frier*, 16 John Rep. 196. *Ben v. Pete*, 2 Rand.

Rep. 542.) Evidence which induces a fair presumption of loss will be enough. (Said in *Jackson ex dem. Donaldson v. Lucett*, 2 Cain. Rep. 367, on the authority of *Livingston v. Rogers*, 1 Cain. Cas. in Er. 27. S. C. 2 John. Cas. 488.) No other than circumstantial evidence of loss can generally be expected: it will, therefore, usually suffice that the paper has been sought for where it might be supposed likely to be found, or was usually kept, and that the search was fruitless. (Per Colcock, J., in *Peay v. Pickett*, 3 M'Cord's Rep. 322.)

From the foregoing observations extracted from several cases, it will be seen that but very few propositions of a general character can be safely advanced on this subject. The sufficiency of the proof given, by way of allowing a resort to secondary evidence is, in general, a preliminary point addressed to and to be determined by the court exclusively, and upon which they are to pass in view of the peculiar features which may chance to characterize each case as it arises. (See *Tate v. Penne*, 7 Mart. Loui Rep. N. S. 448, 551; *Eure v. Pittman*, 3 Hawks' Rep. 364; *The Utica Ins. Co. v. Caldwell*, 3 Wend. 296; *Taylor v. Riggs*, 1 Peters' Rep. 591, 596, 7; *Jackson ex dem. Livingston v. Frier*, 16 John. Rep. 591, 596, 7. See ante, note 861, p. 1218.)

In some cases, the law taking cognisance of certain known rules of conduct, readily yields to the presumption that the paper is destroyed or lost; as where the paper has ceased to be of any apparent value, and no one had an interest in its preservation. So, too, where the person to whose custody the paper belonged, if it existed, had a direct interest in destroying it. (See the text from p. 454 to 456; also the next preceding note.)

Some presumption of loss may arise also from lapse of time, in certain cases, which will be taken into account in determining the question of diligent search. (Per Story, J., delivering the opinion, in *Patterson v. Winn*, 5 Peters' Rep. 242, 3.)

But in ordinary cases, where no such circumstances intervene, the rule is more rigid: And the persons with whom the instrument would be likely to be found, must be called to account for it; and the places where it would probably be deposited, should appear to have been diligently searched. (*Eure v. Pittman*, 3 Hawks' Rep. 364. *Jackson, ex dem. Bush v. Hasbrouck*, 12 John. Rep. 192. *Jackson, ex dem. Livingston, v. Frier*, 16 John. Rep. 193. *Dan v. Brown*, 4 Cowen's Rep. 483. *M'Conhay v. The Centre and Kishacoquillas Turnpike Co.* 1 Pensylv. Rep. 426. *Luce v. Sinvely*, 4 Watts' Rep. 396. *Patterson v. Winn*, 5 Peters' Rep. 239, 240, 242, 3.)

In respect to the *places* to be searched, we are to be guided by presumptions arising from the facts of the case. Where the law made the surrogate's office the place of deposit for an ancient will, ineffectual search there was held sufficient to authorize secondary evidence. (*Jackson, ex dem. Schuyler v. Russell*, 4 Wend. 543.) So, as a general rule, where the custody of a paper is committed by law to a particular officer as such, search at his office and among his official papers is *prima facie* sufficient. (*Proprietors of Braintree v. Battles*, 6 Verm. Rep. 399.) If a deed alleged to be lost, appear to have been acknowledged preparatory to recording it, the recorder's office should be searched. (*Semble, Little v. Delancey*, 5 Binn. Rep. 270, per Tilghman, C. J. *Id.* 195, per Yates, J.) Evidence by a person that he had delivered a deed to the county clerk to be recorded, and of ineffectual search for such deed at the

clerk's office, is not sufficient unless it be shown that it was never re-delivered. (Jackson, ex dem. Dunbar, v. Todd, 3 John. Rep. 300.) But if search had also been made among the papers of the grantee, it would probably have been sufficient. (M'-Mullen v. Brown, 1 Harp. Rep. 76.) Where an affidavit ought regularly to be in the custody of the person or officer before whom it was taken, diligent and ineffectual search among his papers by him and his clerk was held sufficient. (Harper v. Cook, 1 Carr. & Payne, 139.) So, where it appeared from a certificate of a state treasurer, endorsed on an exemplified copy of the certificate of appraisers, that the original certificate of the appraisers had been delivered to C., held, that as against the state, search among the papers of C. was sufficient to allow secondary evidence. (Jackson, ex dem. Swartwout, v. Cole, 4 Cowen's Rep. 595, 6.) Secondary evidence of the execution and contents of an indenture of apprenticeship was admitted under the following circumstances:—The mother of the pauper stated, that about twenty-four years ago, she received money from the parish of S. to put her son out apprentice, and that she accordingly put him out; that the indenture was signed by her, the pauper, and the master, and by a witness, that she gave it to the wife of a market-gardener who attended the market of S., to take to the overseers of the parish of S.; that the market-gardener and his wife were both dead, the latter having survived her husband; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Search had been made in the parish chest of S. for the indenture, but it could not be found. The court were of opinion that as the indenture, if it had been handed over to the overseers, would have been deposited in the parish chest, the presumption, from its not being found there, was, that it was lost or destroyed. (Rex v. Inhabitants of Stourbridge, 8 Barn. & Cress. 97. S. C. 2 Mann. & Ryl. 43.) An unsuccessful search for the appointment of a deceased overseer, made in the parish chest, and also among the papers of a person who had acted as executor of the overseer, and who was dead, was held sufficient to let in inferior evidence of its contents. And strict proof of executorship for this purpose, it was held, need not be adduced. (The King v. Witherly, 4 Mann. & Ryl. 724, 727.) Search for a will should be made in those places where it would most probably be found; as in the testator's desk, or wherever he kept his valuable papers. (Jackson, ex dem. Brown, v. Betts, 9 Cowen's Rep. 208. Dan v. Brown, 4 id. 483.) So his executors should be applied to. (Jackson, ex dem. Bush, v. Hasbrouck, 12 John. Rep. 194.) And others to whose possession it may be traced. (Id.) If it appear, or is presumed to have been deposited at a public office, search should be made there. (Dan v. Brown, *supra*. Jackson, ex dem. Schuyler, v. Russell, 4 Wend. 543.) See Jackson, ex dem. Bush, v. Hasbrouck, 12 John. Rep. 192, 194, S. P. If the cashier of a bank swears that a paper was received and filed among the papers of the bank, proof of diligent search among the papers of the bank will, it seems, be sufficient. (Taunton Bank v. Richardson, 5 Pick. Rep. 436, 443.) Proof that a ship's papers were seized with her and delivered into the court where she was condemned; but that a certain paper belonging to her could not be found there on search, is sufficient evidence of loss to warrant parol evidence of its contents. (Francis v. The Ocean Ins. Co. 6 Cowen's Rep. 404.) In Peay v. Pickett, 3 M'Cord, 318, the plaintiff claimed title under a sale by the executors of R., who derived his title from D., the latter having obtained his from N. Search had been made among R.'s papers for the

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deed from N. to D., but without effect, and also at the register's office. The deed was executed in 1779, and the cause was tried sometime about the year 1824. At the time the deed was executed, there was only one register's office in the state, viz. at Charleston; which city, a few months after the execution of the deed, fell into the hands of the British. The court, under these circumstances, held the presumption strong, that the deed was destroyed or lost through the agency of the enemy, while at the register's office, and therefore allowed it to be established by a certified copy from that office. See *Rochell v. Holmes*, 2 Bay's Rep. 487. Where the house of a person in whose custody marriage articles were presumed to have been kept, had been ransacked by French troops and rebels, and many papers therein destroyed; held, that unavailing search at the house, and at the house of the executor of such person, was prima facie evidence of the articles having been destroyed. (*Lorton v. Gore*, 1 Dow & Clark, 190.) In *Jackson, ex dem. Livingston, v. Neely*, 10 Johns. Rep. 374, the plaintiff sought to establish a power of attorney under which a deed had been given by secondary evidence. It appeared that the widow of R. C. L., to whom the deed was given, at the time of his death had possession of a trunk of papers belonging to him; that she occasionally delivered papers to the executors as they required; that she subsequently married, and two years after her marriage the trunk and papers in it were consumed by fire: but whether the power of attorney was among the papers did not appear. It was not among the papers delivered to the executors; nor was it to be found in the office of the clerk of the county where the deed was deposited for record. These facts were held sufficient to let in parol evidence of the existence and contents of the power.

As to the *persons* to be called on to account for the instrument, the general rule points to those who may be presumed to have it in their possession or under their control. Some observations showing who are regarded as the presumptive possessors of particular papers will be found ante, note 837, p. 1187, 8. We there saw among other things that, in the first instance, the person legally entitled to the possession will be presumed to have it. See per *Paris, J.* in *Kent v. Weld*, 2 Fairf. Rep. 461. And though it may not be usual for persons whose lands are sold on execution to deliver up the title-deeds to the purchaser, yet if one of the title-deeds is sought to be proved by secondary evidence, it must appear that the purchaser has been inquired of. (*Little v. Delaney*, 5 Binn. 266, 270.) See *Nicholson v. Hilliard*, 1 N. Car. Law Repos. 253, 4. Where A. assigned to B., and B. upon his marriage conveyed to trustees upon certain trusts, subject to the payment of rents &c. to him for life; held, that it was not necessary, in order to the admission of secondary evidence of the assignment from A. to B., to prove search among the papers of the trustees. (*Fury v. Smith*, 1 Hud. & Brooke, 735.) If the paper is traced to the hands of a particular person, he must in general be called and sworn to account for it. (See ante, p. 456 of the text. *S. P.*, *Jackson, ex dem. Bush, v. Hasbrouck*, 12 John. Rep. 192, 195.) Where a will was traced into the hands of a female, who had been summoned by both parties and did not appear; held, that before secondary evidence could be received she must be regularly called into court by a *subpoena duces tecum* to give some account of it. (*Eure v. Pittman*, 3 Hawks' Rep. 364.) A letter was received by A., who immediately handed it to his daughter to take care of, as was his practice with other letters; held, that diligent search in all places where A.'s letters were kept, would not answer without calling the daughter;

and this, though it appeared that the daughter aided in making search. (*Parkins v. Cobbet*, 1 Carr. & Payne, 282.) So, where W. having received a manuscript advertisement, left it with a printer by whom it was published, and W. testified that he had not enquired of the printer, and had made no particular search for it among his own papers, but was of opinion it was lost; the court held a copy inadmissible, and that enquiry should have been made of the printer. (*Sweigart v. Lowmarter*, 14 Serg. & Rawle, 200.) See *M'Conhay v. The Centre and Kishacoquillas Turnpike Co.* 1 Pennsylv. Rep. 427, 8, stated ante, note 866, p. 1222. Where an attorney testified that he filed a note among the papers in a cause, that he had since searched and could not find it, that the last he saw of it, it was in the possession of H. T.; held, that without some effort made for obtaining the testimony of H. T., or some excuse shown for not having done so, secondary evidence was inadmissible. (*Judson v. Esland*, 1 Alab. Rep. 71.) If the paper be traced to the hands of an agent of the party offering secondary evidence, the rule is more strict than in other cases. And if it is shown that he has gone off to another state, having carried it along with him, a commission, it seems, should be sent to examine him and account for its absence. (*Bunch's adm'r v. Hurst's adm'r*, 3 Dess. Eq. Rep. 290, 1.) Quere, whether this strictness would be enforced except where there was some suspicion of a designed suppression of the paper. (See ante, note 861, p. 1215, and the cases there cited.) Where the person to whose custody an instrument is traced, or properly belongs, is dead, enquiry should be made of the family, and some one of them must be called as a witness if practicable; otherwise the party will not be allowed to go into secondary evidence. (*Jackson, ex dem. Livingston, v. Frier*, 16 John. Rep. 193, 196.) So, semble, the executors of the deceased person should be applied to. (Per Curiam in *Jackson, ex dem. Bush, v. Hasbrouck*, 12 John. Rep. 194.) See further what is said in *Kent v. Weld*, 2 Fairf. Rep. 461. Where both the plaintiffs, in an action upon a lost note brought by them as executors, made affidavit that they had never had the note in their possession; and one of them testified to diligent and ineffectual search among the papers of the testator; stating also that his co-executor had had very little to do with the settlement of the estate; held, that this was sufficient to let in secondary evidence; especially, as the other executor had left the country, and there was some evidence in the case tending to show that the note, since the testator's death, had been in the defendant's possession. (*Page v. Page*, 15 Pick. Rep. 368.)

The cases requiring the person to whom a paper has been traced, to be called in order to account for it, proceed upon the presumption that it may be still in his possession. This presumption, however, is liable to be rebutted; (see *Fury v. Smith*, 1 Hud. & Brooke Rep. 748, 749; *Page v. Page*, supra;) and sometimes the very enquiry which traces the paper to the custody of a particular person, at the same time shows that he no longer has it, so as to supersede the necessity of calling him. (See *Rex v. Morton*, 4 Maule & Sel. Rep. 48, stated in the text, p. 456, 457.) Where subscription papers belonging to a corporation, were delivered to certain persons a long time ago for a temporary purpose, e. g. to obtain subscribers; held, that the presumption was not that they still continued in the possession of such persons, but that they had been returned; and therefore, search among the papers of the corporation and of the clerk who acted at the time, was adjudged sufficient, without calling those who circulated the subscriptions. (*Central Turnpike Company v. Valentine*, 10 Pick. Rep. 142.)

The testimony of a third person, showing thorough search by him among the papers of one to whom a paper is traced, has been held in a few cases to supersede the necessity of calling the latter. (See *per Best, C. J.*, in *Parkins v. Cobbett*, 1 Carr. & Payne, 282, stated *supra*.) This was held of search made at the surrogate's office for a will, the witness having searched by the assistance and under the direction of the surrogate in all places where it would be likely to be, if in the office. (*Jackson, ex dem. Schuyler, v. Russell*, 4 Wend Rep. 543.) In *Minor v. Tillotson*, 7 Peters' Rep. 99, a title deed to W. H., under whom the plaintiff claimed, was sought to be established; the plaintiff traced it to the possession of W. H., and his attorney swore that he applied to W. H. for it, who handed him a bundle of papers as containing all the titles to his Housmas lands, (the premises in dispute being a part;) but that on examination, it did not contain the deed in question. The court held, that as the circumstances left no room for the supposition that the plaintiff was acting otherwise than in good faith in offering secondary evidence, a copy was admissible without calling W. H. to testify that the deed was not in his possession. They speak of the search as equivalent to the witness having had free access to all W. H.'s papers, and say that it was made under all the advantages and prospect of finding the deed, that could have been afforded to W. H. himself; the witness having been for this purpose, in the full possession of W. H.'s papers. (Id. p. 101.) These remarks of the learned judge who delivered the opinion, lead us to suppose that there were other facts in the case beyond what appear in the report. For, how could the witness know that the papers handed to him were *all* the titles of W. H., except from W. H.'s unsworn representation to him? If the witness had examined the papers in the presence of W. H., and apprized him that the deed required was not among them, and W. H. had then made search in the witnesses presence, the case would have been strengthened; but this does not appear to have been done. *Thompson, J.*, who delivered the opinion, relied upon the case of *Caufman v. Congregation of Cedar Springs*, 6 Binn. Rep. 59, as directly sustaining the doctrine laid down. The latter case originated in the common pleas, and came before the supreme court of Pennsylvania on error. The writing in question there had been deposited in the hands of J. C. as trustee for the parties. J. C. removed to another county, and on doing so, placed the writing in the hands of his father. The father subsequently died; and all his papers came to the hands of J. S., his son-in-law. J. S., with one K., made diligent search among the papers, but could not find the writing. These facts were sworn to by J. C. and K., and the objection was, that J. S., the son-in-law, should be called; but the common pleas overruled the objection, and allowed secondary evidence to be given; and the supreme court affirmed the judgment. The testimony was taken previous to the trial under a rule of court, in the form of depositions; and *Tilghman, C. J.*, placed considerable stress on this fact, as showing, that if the party objecting had suspected collusion or negligence in the search made by J. S. and K., he might have examined J. S. under oath; for he had full knowledge of the particular search, and all the evidence intended to be relied on to prove it, in time to have done so. (Id. p. 63, 64.) *Yates, J.*, who, together with *Tilghman, C. J.*, delivered the only opinions in the case, alluded to the same circumstance, and connected it with the strong language of K.'s deposition, in which, he swore that *all* the papers of J. S.'s father were carefully examined, and that the agreement could not be found. (Id. p. 64, 65.) It seems also,

that J. S. and K. searched in the presence of each other, so that the testimony of K., went in some measure to prove the search made by J. S. We do not perceive, therefore, that even this case, which goes perhaps to the extent of allowable latitude, sustains the entire ground covered by *Minor v. Tillotson*. Nor does *Jackson, ex dem. Schuyler, v. Russell, supra*, support it in all its features. In the latter, the witness called had searched every one of the bundles in the office where the will would have been found, if in the office, and all which would have been searched by the surrogate. He searched, moreover, *with the assistance* of the surrogate. These facts could all be known, independent of hearsay. But, in *Minor v. Tillotson*, neither the witness nor the court could know, that the bundle searched was even the probable place of finding the paper, if in existence, save from W. H.'s unaided declaration.

Hearsay is inadmissible to prove search, loss, &c. (See ante, note 861, p. 1217, also ante, note 432, p. 563, 565.) Where a witness swore that a letter had been received by him or W.; that it had been diligently sought for by him as well as by W., and could not be found; and that he supposed it might have been lost in a certain fire that happened; held, that secondary evidence of the letter was not admissible, unless W. was called to testify to his own search; for the testimony of the witness, so far as W.'s search was concerned and its character, must be mere hearsay. (*Taunton Bank v. Richardson*, 5 Pick. Rep. 443.) See also *Baines v. Higgins*, 2 Mill. Lou. Rep. 220, 222. So, where a party delivered over a letter received by him to his daughter, and a witness swore that he, the witness, made diligent search, assisted by the daughter; held, that unless the daughter was called, secondary evidence was admissible. (*Parkins v. Cobbett*, 1 Carr. & Payne Rep. 282.) But, where a justice's judgment and execution were returned to the justice by the constable, and afterwards they both searched among the official papers of the former, but could not find them; the plaintiff and the justice having both removed out of the state; held, that proof of this search by the constable, entitled one claiming under the judgment and execution to give parol evidence of their contents. (*Underwood v. Lane*, 1 Dev. Rep. 173.) Where an apprentice swore that when his apprenticeship expired, he asked his master for the indentures, who said it was with the overseers of the parish; and the successors in office of the overseers proved that they had made diligent search among the parish papers, but could not find it, and that the parish books and papers of that period, were all missing; held, that the master was an indispensable witness before secondary evidence could be received, as without his testimony, the only evidence that search had been made in the proper place, was mere hearsay; and it would be contravening first principles to admit that. (*Rex v. Denio*, 1 Mann. & Ryl. 294. 7 Barn. & Cress. 620, S. C. See also *Rex v. Rawden*, 2 Adol. & Ellis 156.) If the vicar of a parish be applied to for a copy of the register of a particular date, and he state that there is no register of that year, this is not sufficient evidence of loss, to let in secondary proof; the vicar must be called. (*Walker v. Beauchamp*, 6 Carr. & Payne, 552.)

Even where the search is shown complete in respect to persons and places, it may still be a question whether it has been *thorough*. In general, it should be of a character to satisfy the court that a fair, honest, and reasonably diligent attempt has been made to obtain the instrument, without success. (See the observations relating to diligence in general, ante p. 1223, 4, of this note; also *State of Maryland v. Wayman*, 2

Gill & John. 293 ; M'Conhay v. The Centre and Kishacoquillas Turnpike Co. 1 Penn. Rep. 426.) For the purpose of showing the character of the search in these particulars, the testimony of the person who made it will generally be necessary. (*Baines v. Higgins*, 2 Miller's Law Rep. 220, 222. *Taunton Bank v. Richardson*, 5 Pick. Rep. 443.) See several cases stated *supra*, p. 1229, relating to this point. The search should be shown to have been made by a person who could read and identify the paper, or it will not be deemed satisfactory. (*Mitchell v. Mitchell*, 3 Stewart & Porter, 81.) Where a justice of the peace returned a paper to the clerk's office with others on appeal, and the clerk took out of a pigeon-hole where such papers were usually kept, a bundle which he supposed to contain all the papers in the cause, and this paper was not among them, but he made no further search : Held not sufficient to let in parol evidence of its contents. (*Southwick v. Hayden*, 7 Cowen's Rep. 334. See *Bleigh v. Wellesley*, 2 Carr. & Payne, 400.) Where the plaintiff relied upon the fact of his having destroyed a bond by mistake supposing it to be a note, and the testimony was that the plaintiff received the bond, and at the same time took up a note which he had given, all which took place at M.'s house—that he put the bond in his pocket, and on leaving M.'s house he took out a paper and tore it up. Held, that the proof of loss failed in two particulars, viz : 1st. The plaintiff should have gone to where he tore up the paper as soon as he discovered its loss, (which seems to have been the next day,) and endeavored to find some of the remnants ; and 2nd, he ought on the trial to have produced the note which he alleged he designed to destroy. (*Dumas v. Powell*, 3 Dev. Rep. 103.) It will not do to say, however, even in a criminal case, and as in favor of the defendant, that the evidence must be such as to exclude all idea that the paper might possibly have been found on a more diligent search. The rule is not so rigid. Accordingly, where the prisoner was indicted for forging a check, and on the trial the prosecutor called one D., who said he received a check from the prisoner, of which he retained a copy, and handed the original to one M. ; on producing the copy it corresponded precisely with the check alleged in the indictment ; M. testified that he delivered the check to W. ; W. swore he delivered it, along with sundry other checks, to T., and that T., in his presence, burned all of them save one ; but whether that was the one delivered by D. to M. and by M. to the witness, he did not know. T. testified that he burned all the checks but one, as stated by W. ; that he put that in his pocket-book, and had since seen it among his papers ; that two or three weeks before the trial he had looked for it and did not find it ; that not being apprised that he was wanted as a witness till he was called, he had made no thorough search among his papers for the single purpose of finding it ; he did not know that it was destroyed ; it was possibly still among his papers, but he believed it to be lost. On this testimony the prosecutor was allowed to go into secondary evidence. (*Pendleton v. The Commonwealth*, 4 Leigh, 694.) Probably the court were the more ready in giving credence to the supposition of loss, or destruction, as the witness, T., seemed to have acted suspiciously at least, in burning up the checks received by him from W. This case, doubtless, should rank along with those where slight grounds have been deemed sufficient to presume an instrument suppressed, it having been last seen in the custody of persons friendly to the prisoner. (See *ante*, note 866, p. 1222 ; also note 844, p. 1194, 5.) Where a paper was presumed to be in the hands of A., who by producing it would implicate himself in a criminal charge, held, that he having been indicted for

the offence, and process issued against him for his apprehension, but without effect, the issuing of a subpoena was unnecessary, and no further enquiry after him or search for the paper was required to admit secondary evidence. The court placed stress upon the circumstance that if A. had attended upon the subpoena, he could not have been compelled to criminate himself by producing the paper. (*United States v. Reyburn*, 6 Peters' Rep. 352, 366, 7. See *United States v. Doebler*, 1 Bald. Rep. 519.)

Where persons claiming under a will were required to show diligent search for it as a preliminary to secondary evidence, it was said that the search must appear to have been made by them, or at their request; and that search by other persons and not at their request would not suffice. (*Dan v. Brown*, 4 Cowen's Rep. 492, *curia*, per Woodworth, J.)

The search must be for the very paper in question, and must turn out to be ineffectual as to that. Accordingly, where it was proved by a clerk that he had searched the records and found no judgment, this was held not enough to authorize secondary evidence as to the pleadings. (*Fox v. Lambson*, 5 Halst. Rep. 275.)

Where the party relies on a third person, to prove search among the papers of such person, he should have him regularly served with a subpoena containing a *duces tecum* clause requiring the production of the instrument. This may be necessary under certain circumstances by way of showing that the party has used all the means in his power to obtain the best evidence, and to procure diligent search to be made. (See ante, note 821, p. 1170.) In *Rusk v. Sowerwine*, 3 Har. & John. 97, a witness proved that he had received a power of attorney, that having occasion to refer to it not long since he could not find it, but that he did not search very thoroughly for it, and believed it to be among his papers still: The court held, that unless the original was produced, or proved to be lost, or a subpoena with a *duces tecum* clause had been issued to the witness, parol evidence could not be admitted.

We have seen that the declarations of the adverse party, and of those under whom he claims, are competent evidence on the question of loss. (See ante, note 861.)

Where defendants claiming under a will, alleged by them to be lost, seek to show due search for it by the declarations of the adverse party, without calling the person who made the search, such declarations should be clear and explicit, and amount to a confession of the very kind of search having taken place which the defendants are bound to establish. A general declaration that the will could not be found, will not answer; for in what manner, or by whom search has been made, is not shown by it. (*Dan v. Brown*, 4 Cowen's Rep. 483, 491, 2.) So, *semble*, of a declaration of the adverse party that "he presumed there had been a will; that search had been made but it could not be found. (*Id.* 484, 491.) The declarations of one tenant in common and co-claimant, in partition, have been held inadmissible to prove due search as against another. (*Dan v. Brown*, 4 Cowen's Rep. 483. But see ante, note 175, p. 170.)

It has been seen also, that parties and persons interested, are allowed to testify on the question of search, loss, &c., and that sometimes they *must* testify or make affidavit, before secondary evidence will be received. (See ante, note 861, p. 1218, and the cases there cited. Also *Davis v. Spooner*, 3 Pick. Rep. 297. *Hammond v. Hopping*, 13 Wend. 509.) This, it seems, will be required in all those cases where,

notwithstanding the search proved, there is still a suspicion that the paper is in the possession or under the control of the party. But where an original deed on which a suit was brought, was traced into the hands of the plaintiff's attorney, who believed it to have been lost while in his possession, a copy was allowed as evidence without affidavit by the plaintiff that the original was not in his possession. (*Myer, et al. v. Barker*, 6 Binn. Rep. 228, 234.) See also *Smith v. Martin*, 2 Tenn. Rep. (Overt.) 208. And generally, when the law raises no presumption, and there is no suspicion that the paper is in the possession of the party, he need not be sworn. (*Denton v. Hill*, 4 Hayw. Rep. 73.)

Where a party sues upon a lost instrument in a court of law, which the defendant may be compelled to pay if found, to a bona fide holder, he must do something more than prove the mere loss; even in such cases, however, he is not bound to give positive and unequivocal evidence of destruction; indeed, circumstantial or presumptive evidence is said to be the ordinary proof. But the measure of it must be such as to establish beyond reasonable doubt, that the defendant cannot be made liable on the instrument a second time to a bona fide holder. As to this subject, however, at large, see post, vol. 2 p. 7, and the notes. The following cases may be consulted as illustrating the general doctrine. *Swift v. Stevens*, 8 Conn. Rep. 431. *Page v. Page*, 15 Pick. Rep. 368. *Rowley v. Ball*, 3 Cowen's Rep. 303. *Peabody v. Denton*, 2 Gall. Rep. 351. *Jones v. Fales*, 5 Pick. 18. *Renner v. Bank of Columbia*, 9 Wheat. 581. *Burdick v. Green*, 15 John. Rep. 247. *Pintard v. Tackington*, 10 id. 104. *Angel v. Felton*, 8 id. 149. *Holmes v. D'Camp*, 1 id. 34. *Sims v. Sims*, 2 Rep. Const. Ct. So. Car. 225. *Anderson v. Robson*, 2 Bay's Rep. 495. *John v. John*, 1 Wright's Rep. 584. *Fales v. Russell*, 16 Pick. 315. In an action on a lost note, evidence of loss coupled with the lapse of eighteen years, was held sufficient to show that the defendant could not be subjected to pay it again, and therefore the plaintiff was allowed to recover. (*Peabody v. Denton*, 2 Gall. Rep. 351. See *Davis v. Benbow*, 2 Bail. Rep. 427, 8.) If it is shown that the note is not negotiable, that, together with reasonable proof of mere loss, will entitle the plaintiff to recover. And, it has been held, that the onus is on the defendant to show the fact that the note was negotiable, if he would avoid a recovery. (*M'Nair v. Gilbert*, 3 Wend. 344. *Pintard v. Tackington*, 10 John. Rep. 104.) In New-York, it is provided by statute, that in any suit founded upon any negotiable note or bill of exchange, or in which such note, if produced, might be allowed as a set-off, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of its contents may be given, and the party will be entitled to recover on it, as if it had been produced. (2 R. S. 406, § 75.) But to entitle a party to recover, he must execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim. (*Id.* § 76.)

The following cases not easily reducible to any specific rule, may be consulted as throwing additional light upon the general doctrine as to the sufficiency of the proof of loss. *Sicard v. Cecil*, 6 Peters' Rep. 124. *Stoddert v. The Vestry of Port Tobacco Parish*, 2 Harr. & John. 227. *Sulger v. Dennis*, 2 Binn. 428. *Spencer v. Spencer*, 1 Gall. Rep. 622. *Poignard v. Smith*, 8 Pick. 278, 9. *Ben v. Peete*, 2

Rand. Rep. 542. Grimes v. Talbot, 1 Marsh. Ken. Rep. 205. Dorsey v. Gassaway, 2 Harr. & Johns. 405, 6, 7. Kingwood v. Bethlehem, 1 Green's Rep. 226.

NOTE 868—p. 457.

See S. P. Riggs v. Tayloe, 9 Wheat. 486, where the general doctrine was stated in almost the exact language of our author. Also per Macay J., 1 Hayw. Rep. 71.

The text seems to countenance the idea that there are different degrees of secondary evidence, and that parol evidence is not even admissible where it turns out that there is a copy which might be sworn to. Several *dicta* in the American books favor this notion still more directly. Thus, where the question was whether on an indictment for forging an instrument, its contents could be proved by parol, Story J., in summing up to the jury, after adverting to the rule requiring the best evidence, said—"the law will never suffer secondary evidence to be admitted, where there is better behind and within the power of the party. If, therefore, an instrument is to be proved, the original, if in the possession or control of the party, is to be produced; if the original be lost or destroyed, &c., an *examined copy, if any such exists and can be found, is the next best evidence, and must be produced.*" If no such copy exists, then the contents may be proved by parol evidence." (United States v. Britton, 2 Mason's Rep. 464, 468. See also, Kello v. Maget, 1 Dev. & Batt. 414.) But in order to shut out parol testimony after due proof that the original is unattainable, the existence of a higher degree of available secondary evidence must appear. Accordingly, in Renner v. The Bank of Columbia, 9 Wheat. 582, 597, where the question was as to the competency of parol evidence of a lost note, the defendant having objected in the court below that a notarial copy was the next best evidence after the original, the court said—"Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But to have required a notarial copy, would have been demanding that, of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protested." (See Den v. M'Allister, 2 Halst. Rep. 55.) Some cases recognizing different degrees of secondary evidence as to matters of record, will be found ante, note 723, p. 1067; see especially Hilts v. Colvin there cited from 14 John. Rep. 182.

An apprehension of the frauds which might be practised by allowing parol evidence to supply the place of lost writings, has undeniably operated to urge the demand for the best evidence to a very rigorous extent. Thus, in Pennsylvania, where the plaintiff's title was founded on a deed from M. which was lost, the court denied his right to resort to parol proof of the deed; inasmuch as he could have applied to M. for a deed of confirmation; or, if he refused, or could not be found, the plaintiff, under the act of Assembly, might have taken measures for a restoration of the evidence of his title. For these reasons, they said, they could not adjudge the testimony offered, the best. (Hamilton's lessee v. Van Swearingen, Addis. Rep. 48.) In another case and with more show of propriety, the court refused to receive parol evidence of the contents of a deposition of a deceased witness, because the party knew of the loss of the

deposition while the witness lived near him, and might have supplied the loss without great difficulty. (*M'Cally's lessee v. Franklin*, 2 Yeates' Rep. 340, 1.)

The supreme court of Indiana have allowed a defendant to prove a title founded on a judgment, execution, sheriff's deed, &c., (all of which were destroyed by fire,) by parol. *Hamilton's lessee v. Van Swearingen* was considered; but the court refused to act upon the rule there laid down, regarding that case as more than counterbalanced by the authority of others, whose principles conflicted less with reason and justice. (*Jackson ex dem. Taylor, v. Cullum*, 2 Blackf. Rep. 228. See also *Den v. M'Allister*, 2 Halst. 55, 6.) A power of attorney to transfer stock was allowed to be established by parol, the original being lost. (*Livingston v. Rogers*, 1 Caines Cas. in Er. 37, 2 John. Cas. 488, S. C.) So as to a lost power of attorney under which a deed of lands had been executed; (*Jackson ex dem. Livingston, v. Neely*, 10 John. Rep. 374;) a deed of lands; (*Jackson ex dem. Gillespy, v. Woolsey*, 11 John. Rep. 446; *Den ex dem. Baker v. Webb*, 1 Hayw. Rep. 43, 71;) and promissory notes; (*Jones v. Fales*, 5 Mass. Rep. 101; *Renner v. The Bank of Columbia*, 9 Wheat. 582, 597; *John v. John*, 1 Wright's Rep. 585, 6.) The contents of an affidavit may be proved by parol, after laying a foundation for secondary evidence by due evidence of search. (*Harper v. Cook*, 1 Carr. & Payne 139.) So as to papers generally, without reference to their particular character; even records, as we have seen, are within the same rule, and when lost &c., their contents may be supplied by oral testimony. (See ante, note 723, p. 1067; also *Hinman v. Breese*, 13 John. Rep. 529; *Gifford v. Gifford*, 1 Penning. Rep. 166, 7; *Rogers v. Van Housen*, 12 John. Rep. 221; *Ekins v. Hanley*, 2 Fox & Smith, 1; *Hall v. Hall*, 6 Harr. & Gill, 386, 412; *Francis v. The Ocean Ins. Co.* 6 Cowen's Rep. 404; *Thomas v. Thomas*, 2 Mill. Lou. Rep. 166.)

In England, the rule has recently been laid down in broad terms, that there are no degrees of secondary evidence. Therefore, where notice had been given to the plaintiff to produce a letter of which the defendant had kept a copy, it was held, that the defendant might give parol evidence of its contents, and was not bound to put in the copy. But if there had been a duplicate original, it might have been otherwise with respect to that. (*Brown v. Woodman*, 6 Carr. & Payne, 206.) See further *Liebman v. Pooley*, 1 Stark. Rep. 167.

As to the sufficiency of the parol proof to be adduced in establishing the contents of a writing, but little can be said. We have seen, that where the absence of the higher evidence is occasioned by the default or misconduct of the party against whom the secondary evidence is offered, the other party is less embarrassed than in ordinary cases, because of the legal presumptions which are indulged in his favor. (Ante, note 842, p. 1192. Also the cases cited ante, note 864, p. 1220.) In general, it has been said, the witnesses should be able to speak clearly and pointedly to the contents. (Per Story J., in *United States v. Britton*, 2 Mason's Rep. 468.) Where a written contract under which the plaintiff seeks to recover, is sought to be proved by parol testimony; "no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support." (*Tayloe v. Riggs*, 1 Peters' Rep. 591, 599, 600, per Marshall C. J.) And the witness should speak from a recollection of the writing, and not give his impressions drawn from conversations

and negotiations between the parties antecedent to its existence. (Id.) The proof of the contents of a lost paper ought to be such as to leave no reasonable doubt as to the substantial parts of the paper. (*Renner v. Bank of Columbia*, 9 Wheat. Rep. 597.) A witness may testify to the existence and contents of a writing from memoranda. (Post, p. 458 of the text, and note 870.) So, from his invariable course of business, he may be able to swear that a particular writing existed, though he have no recollection of the fact; e. g., where the question is whether a sheriff advertised lands before selling them; if he has forgotten the fact, but can swear that he believes they were advertised according to law, because he had never made sales without having done so, his testimony will be received as sufficient. (*Den v. Downam*, 1 Green's Rep. 135.) A witness called to prove the contents of a paper, (e. g., a letter,) by parol, will not be rejected because the person who wrote the letter is not produced; especially if, under the circumstances, it is doubtful whether the one who wrote it would have a better recollection on the subject than the witness. (*Liebman v. Pooley*, 1 Stark. Rep. 167.)

NOTE 869—p. 457.

We spoke of the effect of recitals, ante, note 168, p. 160, 161; and several cases were there introduced which need not be further noticed here. The English authorities, according to our author, treat the recital of one deed in another, as only secondary evidence against the party executing the latter, and those claiming under him. (See p. 457 of the text; also, *Rankin v. Hudson*, 1 Hud. & Brooke, 70; *Burnett v. Lynch*, 5 Barn. & Cress., 589, per Abbott, C. J.) In the United States, however, the recital, under such circumstances, has been usually received and acted upon as primary evidence. (See the note above referred to.) It is evidence against parties not only, but privies in blood, in estate, and in law. (*Jackson, ex. dem. Munroe, v. Parkhurst*, 9 Wend. Rep. 209. *Jackson, ex. dem. Bradt, v. Brooks*, 8 id. 426. *Carver v. Jackson, ex. dem. Astor*, 4 Peters' Rep. 83. *Denn v. Cornell*, 3 John. Cas. 174. *Jackson, ex. dem. Livingston, v. Neely*, 10 John. Rep. 374. See also *Hoyatt v. Phifer*, 4 Dev. Rep. 273; *Foster v. Frost*, id. 428; *Caldwell v. M'Gimpsey*, id. 89; *Blight's heirs v. Banks*, 6 Monroe Rep. 192, 195; *Wayman v. Taylor*, 1 Dana's Rep. 527; *Reigart v. Ehler*, 1 Whart. Rep. 18; *Wallace's lessee v. Miner*, 6 Hamm. Rep. 366, 370; *Scott v. Douglass*, 7 id. 228.)

The recital, when used, must be taken altogether; and therefore, if a patent be recited in one part as having existed, and another part shows it to have been surrendered, the recital will prove the fact of the surrender of the patent, as well as its former existence. (*Hoyatt v. Phifer*, 4 Dev. Rep. 274.)

Whether a man's covenant or deed, delivered and remaining as an escrow, can be used against him as a confession of the facts recited in it, *quere*. (*Lansing v. Gaine*, 2 John. Rep. 300.)

These recitals, however, are not evidence against strangers. (*Morris's lessee v. Van Deren*, 1 Dall. Rep. 64, 67. *Penrose v. Griffith*, 4 Binn. Rep. 231. *Hite's heirs v. Shrader*, 3 Litt. Rep. 444, 447. *Jackson, ex. dem. Webb, v. Roberts' ex'rs*, 11 Wend. Rep. 422, 433. *Den, ex. dem. West, v. Pinc*, 4 Wash. C. C. Rep. 691.

Hoyatt v. Pluifer, 4 Dev. Rep. 273. Lawrence v. Blow, 2 Leigh's Rep. 29. Hickman v. Skinner, 3 Monroe Rep. 210, 211. Mitchell v. Maupin, id. 187. Smith v. Webster, 2 Watts' Rep. 478. Jackson, ex. dem. Bradt, v. Brooks, 8 Wend. Rep. 426. Wallace's lessee v. Miner, 6 Hamm. Rep. 370.) Nor against one claiming under the party executing the reciting deed, by title *prior* thereto, or adversely to him; but only against those claiming *under* him, by title *subsequent*. Hence, recitals of certain mesne conveyances, contained in a patent from the Commonwealth to A., were held not evidence of those conveyances against B., who claimed under a warrant from the commonwealth prior to the patent. (Penrose v. Griffeth, 4 Binn. Rep. 231. See also Carver v. Jackson, ex. dem. Astor, 4 Peters' Rep. 1, 83; Garwood v. Dennis, 4 Binn. Rep. 314; Crane v. Morris' lessee, 6 Peters' Rep. 598; Sims v. Meacham, 2 Bail. Rep. 101; Weidman v. Kohr, 4 Serg. & Rawle, 174.) The recital in a patent of a release to the patentee by a former tenant in common, is not evidence of the existence of such release against one who has agreed to purchase from the patentee, in an action to compel payment of the purchase money. (Smith v. Webster, 2 Watts' Rep. 478.)

The mere admissibility of the recital, will depend upon the same principle as the admissibility of a declaration of the person executing the reciting deed. Hence, in general, in order to determine whether a recital is evidence in a given case against a party, we have only to ascertain whether an acknowledgment or confession of the person who executed the deed, would be competent; and in this view, our observations and the cases ante, note 481, p. 644 et seq., may be advantageously examined in connection with the doctrine here considered.

Seem, that the state is not estopped by recitals in its own grants or patents, for they are presumed to be made upon the suggestion of the grantee. (Per Story, J., in Carver v. Jackson, ex. dem. Astor, 4 Peters' Rep. 87: but see Commonwealth v. The Pejepscut Proprietors, 10 Mass. Rep. 155; Penrose v. Griffeth, 4 Binn. Rep. 231.) But the state, like every other party, is bound by recitals in deeds of others, under which it claims. (Per Story, J., Carver v. Jackson, ex. dem. Astor, supra.)

In some cases, where the recital points to higher evidence in the power of the party producing it, the withholding of which awakens a suspicion of intended fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him. Thus, where the question was as to what sum, if any, was due upon a bond, to secure which a mortgage had been given: though the mortgage recited the bond, yet held, that the latter must be produced. (Chewning v. Proctor, 2 M'Cord's Ch. Rep. 11, 14.) The case, however, concedes that the recital would be good secondary evidence. See also North v. Drayton, 1 Harp. Eq. Rep. 34, 37, 38; Anandale v. Harris, 2 P. Wms. Rep. 134; Skipwith v. Shirley, 11 Ves. Rep. 65; see also Jackson, ex. dem. Sackett, v. Sackett, 7 Wend. Rep. 94.

It seems that an outstanding mortgage cannot be proved (like an *absolute deed*) by a recital in another deed, even as against the party making such recital; for it is defeasible, and if produced, might contain the evidence of its being satisfied. (Per Platt J., in Jackson, ex. dem. Randall, v. Davis, 18 John. Rep. 7, 11, 12.) The fact of the existence of the mortgage recited, however, at the date of the recital, may doubtless be thus established. (Id.)

The foregoing cases will many of them show when these recitals shall conclude a party. The general rule we understand to be, that a recital in a deed estops the party executing it, and those claiming under him by title subsequent. And it should seem, that recitals in almost any other writing executed by a party, stating facts upon which the other party is drawn in to act, would estop the former, on the principle of the cases ante note 192, p. 200.

It has been held, however, in South Carolina, that the rule estopping a party by a recital in a deed, applies only to the case where he has alleged some fact in his own knowledge, and which forms a part of his undertaking. Where, from the nature of the fact recited, it is apparent that his knowledge of it must have been derived from the opposite party, the former will not be estopped. Accordingly, a prison bounds bond, reciting a *ca. sa.*, when the arrest was under a *fi. fa.*, shall not estop the obligor from showing the fact as against the sheriff's assignee, and thus avoiding the bond; for the recital of the *ca. sa.* is an allegation coming from the sheriff, and not from the obligor. (*Miller v. Bagwell*, 3 M'Cord's Rep. 429.) But, the recital is sufficient proof of the *ca. sa.* in the first instance. (*Ransom v. Keyes*, 9 Cowen's Rep. 128.) If a person enters into a covenant to pay for personal property, the possession of which he acknowledges to have received, he will be estopped to deny the receipt of it, because it is a fact which he must have known. But, if he recite that the vendor had title, he may notwithstanding show the contrary; because it is apparent that this allegation must have come from the vendor, and that the vendee could not otherwise have known its truth. (*Miller v. Bagwell*, supra.) On the other hand, there are various instances where a recital of a fact in a deed, the truth of which the party executing it must be presumed to have known, has been held a covenant of the existence of the recited fact. (See *Platt on Covenants* 33, 34, 35; Nos. 7 & 8 Law Lib. Phil.) A covenant expressed by way of recital, is as obligatory as if expressed in the body of the agreement. (*Bealle's adm'r v. School's Ex'r*, 1 Marsh. Ken. Rep. 475, 476. *Bank of Kentucky v. Vance's adm'r*, 4 Litt. Rep. 172. See *Colyer v. Jackson*, 3 Monroe Rep. 23.)

Thus much, in respect to the cases where recitals have been considered in the light of primary evidence. As secondary evidence, they have been frequently allowed to be used, even against strangers. If, for instance, there be the recital of a lease, in a deed of release, and in a suit by a stranger, the title under the release comes in question, there, though the recital of the lease is not *per se* evidence of its existence, yet, if the existence and loss of the lease be established by other evidence, the recital is admissible in the absence of more perfect proof, to establish the contents of the lease. (*Per Story, J.*, in *Carver v. Jackson*, ex. dem. *Astor*, 4 Peters' Rep. 83, 84.) And if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, the recital will of itself, materially fortify the presumption, from lapse of time, and length of possession, of the original existence of the lease. (*Id.*) The same doctrine was sanctioned in *Crane v. Morris' lessee*, 6 Peters' Rep. 598, 611. In *Garwood v. Dennis*, 4 Binn. Rep. 314, where some proof was given showing the loss of an ancient deed; possession not having been contrary thereto, and the subscribing witnesses being all dead; held, that it might be established by recitals in other ancient deeds, though the party against whom such recitals were adduced, was a stranger as it respected them; especially as the recitals

were made by persons likely to know of the existence of the lost deed, and whose interest it was that no such deed should have existed. Where an old deed, under which the plaintiff claimed, recited a North Carolina grant of a specified date; and there was proof that the public records of North Carolina, for that year, were lost; held, that this was insufficient, as against third persons, to raise the presumption of a grant. (*Sims v. Meacham*, 2 Bail. Rep. 101.) By a will dated 1735, two tracts of about 20,000 acres each, comprizing together what was called a manor, were devised, and in a conveyance by the representatives of the devisee of one of the tracts, was contained a recital that the original patentees had, as early as 1734, released and conveyed their interest in the two tracts to the testator; it appearing that no claim had been interposed to the lands up to 1827, other than under the title of the testator, held, that the recital was evidence sufficient to authorize the presumption of a conveyance from the original patentees to the testator. (*Jackson, ex. dem. Schuyler, et. al. v. Russell*, 4 Wend. Rep. 543.) In an action of dower by the widow of T. B., the defendant set up an agreement, before marriage, in bar; held, that a record of a suit by the widow, against the personal representatives of T. B., wherein the marriage articles were set out as alleged by the defendant, was not evidence for him to prove the articles; he should show some effort to produce the original, and if that could not be found, then, *semble*, the copy contained in the record might be resorted to as secondary evidence. (*Barnett v. Barnett*, 16 Serg. & Rawle, 51.)

Some cases illustrating the principle of the doctrine above considered, will be found in our previous notes relating to the declarations of third persons, where we treated of papers left by deceased notaries and others, reciting or certifying to acts in the course of their business, official, and unofficial. (See ante, note 489, p. 674, et seq. *Dobson v. Murphy*, 1 Dev. & Batt. 590, 591.) Nothing is more a matter of course at the circuit, than where a *fi. fa.* is lost, to receive as evidence of it, the deed of a deceased sheriff, given on a sale under it, reciting the *fi. fa.* Accordingly, the decision, in *Bonnet's lessee v. Davebaugh*, (3 Binn. Rep. 175) that a deceased surveyor's recital in a warrant of acceptance of the proprietaries' order for his survey, was inadmissible, though he was dead and the order probably burnt with all his official papers, is quite questionable. But this and other similar cases are undoubtedly right, when applied to recitals which are offered as primary evidence, that is to say, without first accounting for the absence of the original. (Per M'Kean, C. J., in *Morris' lessee v. Vauderen*, 1 Dall. Rep. 67. Per Yeates, J., in *Elliot's lessee v. Bonnet*, 3 Yeates Rep. 299. *Milne v. Cummings*, 4 Yeates Rep. 577.)

NOTE 870—p. 458.

The doctrine of the text partakes of the obscurity which runs through many of our author's observations on the subject of memoranda. Though it is true that a memorandum is not evidence *per se*, yet we saw ante, note 528, p. 750, et seq. that it may frequently become evidence in connection with the testimony of a witness; as where he has no recollection of the facts so that he can swear to them independent of the memorandum. In addition to the cases cited to this point in the note referred to, see

Merrill v. The Ithaca & Owego Rail Road Co. 16 Wend. 586; but see Kello v. Maget, 1 Dev. & Batt. 423.

Where the witness cannot testify to the facts independent of the written memorandum, it would be difficult to maintain, either upon principle or authority, that its production might be dispensed with. For the whole force of the witness' testimony must then depend upon the contents of the memorandum; and these, we have seen, can in no case be proved without accounting for the absence of the memorandum itself, as the best evidence. (Ante, note 489, p. 679. Note 468, p. 622. Note 528, p. 755, 6, 7. Merrill v. The Ithaca & Owego Rail Road Co. 16 Wend. 586. Loyd v. Freshfield, 2 Carr. & Payne, 325. See Hosford v. Foote, 3 Verm. Rep. 391. Also Clute v. Small, 17 Wend. 20. See further ante, note 860, p. 1211. But otherwise, where the witness can swear to the facts contained in the memorandum, (having refreshed his recollection by seeing it,) entirely independent of it. (See ante, note 421, p. 550, 1, and the cases there cited.)

We have seen that a copy of the memorandum cannot, in general, be relied on by the witness, instead of the original made at the time. (See ante, note 528, p. 750, et seq. particularly, p. 756, 757, and the case of Jones v. Stroud, erroneously cited at the latter page, from 1 Carr. & Payne; it should be 2 Carr. & Payne, 196.) Nor can he rely on a memorandum made by another, unless he is able to testify to its truth, as well as its identity. (See the same note at pp. 756, 7. Also Withers v. Atkinson, 1 Watts' Rep. 236.) Accordingly, where an exemplified copy of the record of a deed, improperly registered, was produced, and a subscribing witness (or one whose name appeared in the copy as such) testified, that the original deed had been drawn by him and was executed by the grantor at the date mentioned in the copy; that "not having seen the original, he could not speak with accuracy as to the copy, but presumed that being an exemplification under the seal of a public officer it was correct"; held, that the testimony did not prove the deed. Had the witness, say the court, undertaken to state the substance of the original from his own recollection, with or without the help of the registry to refresh his memory, it would have been competent for him to do so; but he cannot make out the defendant's case by testimony intermediate between proof of the registry as a copy, and his own recollection of the contents of the original; or by testimony compounded of both. (Kerns v. Swope, 2 Watts' Rep. 75, 80, 1.)

A lost memorandum cannot be made instrumental to prove the facts contained in it, by first establishing its contents by a person other than the maker of it, and then proving by the maker that its contents were undoubtedly conformable to the fact. (Clute v. Small, 17 Wend. 238.)

For various other cases, more or less remotely connected with the use of memoranda, as indicated in the text, see ante, note 528, *passim*. Also Withers v. Atkinson, 1 Watts' Rep. 236. Messinger v. Hagenbuch, 2 Whart. Rep. 410. Owen v. Adams, 1 Brock. Rep. 72, and *id.* 74, note (1).

NOTE 871—p. 458.

When the original is lost, and there is a counterpart, the latter should be accounted for before inferior evidence is admissible. But after the loss of the different parts are proved, or these are shown unattainable, then examined copies, or the parol evidence of witnesses, may be resorted to. (See ante, p. 457, of the text, and note 868, p. 1233, et seq; also *Kerns v. Swope*, 2 Watts' Rep. 75, 79. *Vickroy v. M'Knight*, 4 Binn. Rep. 211, per Yates, J. *Den v. M'Allister*, 2 Halst. Rep. 46, 56.)

Semble, that a copy made from memory, after the loss of the original, cannot be admitted as an examined copy. (*Jones v. Fales*, 5 Mass. Rep. 101, 103.) It may, however, be used doubtless, in connection with the testimony of the person who made it, as a memorandum. (See p. 458 of the text, and note 870.)

Sworn copies of the entries in private books have been admitted, where the originals were lost, &c. (See *Holmes v. Marden*, 12 Pick. 169. *Beekman's ex'r, v. Beekman's ex'r*, Anth. N. P. 123.) See ante, note 491, p. 700.

The draft from which an original instrument was engrossed, has been spoken of as "a much higher piece of secondary evidence than any copy made after engrossment;" (Per Bushe, C. J., in *Fury v. Smith*, 1 Hud. & Brooke 735;) at all events, it is admissible when authenticated by the person who engrossed it. (Id.) If the draft be used as secondary evidence to prove the contents of an instrument alleged in an indictment for forgery, and in the draft words are abbreviated, which are spelled out at length in the indictment, it will be for the jury to say whether they think the words abbreviated in the draft were inserted at length in the instrument as engrossed, on a question of variance arising. (*Rex v. Hunter*, 4 Carr. & Payne, 396.) The plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant upon notice, produced his part unstamped, and the plaintiff the draft: Held, that the defendants part unstamped might be read in evidence. (*Munn v. Godbold*, 3 Bing. 292.)

An examined or sworn copy is, in general, to be proved such by one who has compared it with the original. (*Kerns v. Swope*, 2 Watts' Rep. 75.) As to the mode of comparing copy with the original, see ante, note 719, p. 1065. Hence the rule, that a mere copy of a copy is not evidence. (*Whitacre v. M'Ilhane*, 4 Munf. Rep. 310. *Ryves v. Braddell*, 1 Irish T. Rep. 184. *United States v. Sherman*, 1 Peters' C. C. Rep. 98. *Norwood v. Green*, 5 Mart. Lou. Rep. N. S. 175. See ante, note 720, p. 1065.) Where, however, a witness testified that a certain record of a power of attorney was a copy of the original made by him, and that the copy produced was a true copy of the record, having been compared with it by himself; held, that this was not the case of a copy simply, but the case of a second copy, verified as a true copy of the original; and therefore, it was admissible as secondary evidence. (*Winn v. Patterson*, 9 Peters' Rep. 663.) The court said, that in point of evidence, this was precisely the same as if the witness had made two copies at the same time of the original, and had then compared one of them with the original, and the other with the first copy, which he found correct. The mode by which he arrived at the result, that the second copy was a true one of the original, might be more circuitous than that by which he ascertained the first to be correct; but that only furnished matter of observation as to the strength of the proof, and not as to its dignity or degree. (Id. See *Robertson v. Lynch*, 18 Johns. Rep. 451. Also *Kerns v. Swope*,

2 Watts' Rep. 75, 80.) *Winn v. Patterson*, *supra*, would seem a warrant for saying that no discrimination is to be made between copies, as to the point of competency, on the ground that one is more likely to be correct than another, provided the authentication of both reaches back to the original. So far it goes to sustain the general proposition noticed ante, note 863, p. 1234, that there are no degrees of secondary evidence. But *Brewster v. Countryman*, 12 Wend. 446, in some of its *dicta*, at least, seems slightly the other way. There, a sworn copy of an agreement was produced against the defendant, who had himself destroyed the original. The case states that the plaintiff proved he had requested H. to make a copy of the agreement, and the paper in question purported to be a copy in H.'s hand-writing; a witness swore also, that he had seen the original, and that the alleged copy was substantially the same. The court held the copy inadmissible, on the ground that the best evidence was not produced. They say the authenticating testimony was pretty strong, but that H.'s testimony, whose absence was not accounted for, would be stronger; that the evidence produced shewed there was better evidence in the power of the party not produced, the very case in which secondary evidence should not be received as sufficient. (*Id.* 448, 9.) The decision, itself, in this case, would seem in principle, to range along with those which forbid a resort to a circumstantial or suspicious evidence, where that which is direct and positive is plainly within the party's reach. (See ante, note 417, p. 544, 5; note 322, p. 385, 6; *Den v. M'Allister*, 2 Halst. Rep. 55; *Bank of Utica v. Hillard*, 5 Cowen's Rep. 153, 158.) See *Liebman v. Pooley*, 1 Stark. Rep. 167, stated ante, note 868, p. 1235.

Where the record of an instrument is admissible, either as secondary or primary evidence, a sworn copy will, in the like cases, be evidence of the same degree, and the record itself need not be produced. This is upon the ordinary principle applicable to public books, &c., some cases in relation to which were set down ante, note 805, p. 1165. (*Winn v. Patterson*, 9 Peters' Rep. 676, 7.) So, certified copies have been frequently admitted; (see *M'Mullen v. Brown*, 1 Harp. Rep. 76; *Cunningham v. Tracy*, 1 Conn. Rep. 252; *Poignard v. Smith*, 8 Pick. 278;) but these must depend for their competency upon the question, whether by the local law the officer is authorized to give out and certify copies. (See ante, note 805, p. 1165; *Garland's ex'rs, v. Goodloe's adm'rs*, 2 Hayw. 351; *Garwood v. Dennis*, 4 Binn. 314; *Baker v. Preston*, 1 Gilmer, 235.) And if the record itself would not be evidence, neither would sworn or certified copies of it, merely as such. (*Winn v. Patterson*, 9 Peters' Rep. 676, 7. *Kerns v. Swope*, 2 Watts' Rep. 75.) See further as to sworn or certified copies of the records of deeds, post, note 874.)

The exemplification of a copy of the certificate of appraisers, filed in the treasurer's office, having an endorsement of the treasurer upon it that the original had been delivered to C. C. deceased, has been held evidence after search among the papers of C. C.; though it was but the mere copy of a copy. (*Jackson ex dem. Swartwout, v. Cole*, 4 Cowen's Rep. 587.) As against the state, such copy having been furnished to the treasurer by the commissioners of forfeitures, for his information, and as his guide under the act vesting the lands in C. C., and having the endorsement of the treasurer upon it, of all he had done, was held of equal dignity with the original. (*Id.*)

In an action on a lost note, an alleged notarial copy of the note was permitted to go to the jury, as a fair ground for presuming, when taken in connexion with the testi-

mony of a witness, that the paper exhibited to the notary was the same which had been in the witness' possession and acknowledged by one of the defendants. (*Peabody v. Denton*, 2 Gall. Rep. 351.)

NOTE 872—p. 459.

Mere extracts from letters cannot be used as examined copies, though the witness by whom they are proposed to be authenticated, is ready to swear that there was nothing in the original, relating to the matter in controversy, beyond what is contained in the extract; for, to give a proper construction to the letter, the whole must be looked into; and the testimony of a person swearing that all which relates to the controversy is contained in what is produced, necessarily and at best only amounts to matter of opinion, which it is dangerous to rely upon in such cases, (*Dennison v. Barber*, 6 Ser. & Rawle 420. See ante, note 713, p. 1059.) Otherwise, however, if the plaintiff keeps a letter-book, which he refuses to produce, after notice. (*Dennison v. Barber*, Supra.) And the plaintiff being a merchant, the court presumed he kept a letter-book, which, they said, would have afforded better evidence of the contents of the letter, than mere parol proof of its contents. (*Id.* p. 425.)

Where due notice had been given by the plaintiff, to produce a letter from him to the defendant, and the plaintiff's clerk swore that he had copied the same into a letter-book, and then put it into the post-office, the court inclined to the opinion that a copy, proved by the clerk to be a true one from the letter-book, was competent secondary evidence. (*Robertson v. Lynch*, 18 John. Rep. 451, 457.) The objection to the copy seems to have been, that it was the mere copy of a copy; but the copy in the letter-book, having been made by the clerk who testified to the one in question, the latter was not merely a copy of a copy, but a second copy verified (circuitously to be sure) as a true copy of the original. (See *Winn v. Patterson*, stated in the next preceding note, p. 1240.) But see *Liebman v. Pooley*, 1 Stark. Rep. 167.

The letter-book, in a case like that of *Robertson v. Lynch* supra, verified by the clerk, would undoubtedly be good evidence. (See *Thalhimer v. Brinkerhoof*, 6 Cowen's Rep. 90; *Toosey v. Williams*, 1 Mood. & Malk. 129.)

And so parol evidence would be competent, even though it appeared that the party offering it, had a copy. (See *Brown v. Woodman*, 6 Carr. & Payne, 206, stated ante, note 868, p. 1234.)

When a copy of a letter is sought to be proved, its truth, as a copy, must in some way be established. Accordingly, where the defendant, having read a letter from the plaintiff's agent, in answer to a letter from him, offered what purported to be a copy of the letter to which the one read was an answer; held, that it was inadmissible until its authenticity was established. If the answer had authenticated the whole letter offered, say the court, then the copy would have been unnecessary, since its contents would have been proved by the answer. If its whole contents were not thus proved, then the part not proved was wholly unauthenticated, and may have formed no part of the original letter. (*Smith v. Carrington*, 4 Cranch, 62, 70.) Further as to the mode of proving letters, see ante, note 167, p. 159.) Where notice had been given to produce a deed executed by commissioners appointed to make partition, and there was

a strong probability that it was either in possession of the opposite party, or destroyed, its existence and execution were shown by the testimony of the commissioners, and that of the counsel who drew the deed. (*Jackson ex dem. Gillespy, v. Woolsey*, 11 John. Rep. 446.) Indeed, it seems, the jury, under the circumstances, would have been warranted in finding that a deed had been executed pursuant to the order of the court, without the parol proof adduced. (*Id.* 456.)

NOTE 873—p. 464.

An examined copy of the registry of a deed, in the registry of the county of Middlesex, is admissible, in England, as secondary evidence of its contents. (*Doe ex dem. Ubele, v. Kilner*, 2 Carr & Payne, 239.)

The enrolment of a lease under 1 & 2 Geo. 4, c. 52, § 8, which enacts, that a deed so enrolled "shall be as good and available in law, and of the like force and effect, in all respects, as if the same had been enrolled in any of his majesty's courts of record at Westminster, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate, is not admissible as evidence of the deed, without proof of the execution. (*Jenkins v. Biddulph, Ry. & Mood. N. P. Rep.* 339.)

NOTE 874—p. 464.

See *Wells v. Wilson*, 3 Bibb's Rep. 264. *Ben v. Pete*, 2 Rand. Rep. 539.

The American books abound with decisions relating to the authentication of deeds, and other instruments, which have been acknowledged or proved before some officer or court, authorized for that purpose, and then admitted to record. The form, validity, and effect of the record, however, as well as of the probate, and acknowledgment, must necessarily depend upon the details of the local statutes under which the proceeding took place; and hence, except in a few instances, we shall treat of the cases on this head in a very brief way.

In general, a record not made in accordance with the law relating to the recording of instruments, is incompetent evidence to prove the original; and so, *a fortiori*, as to a copy thereof; for, in such cases, the record amounts to no more than a mere unofficial entry of the officer. (*Kerns v. Swope*, 2 Watts' Rep. 75. *Pidge v. Tyler*, 4 Mass. Rep. 541. *Morgan v. Bealle*, 1 Marsh. Ken. Rep. 310. *Womach v. Wilson*, Litt. Sel. Cas. 292. *Yarborough v. Beard*, 1 Taylor's Rep. 25. *Miller's lessee v. Holt*, 1 Tenn. Rep. 111. *Owings v. Law*, 7 Harr. & John. 124. *Turner v. Stip*, 1 Wash. Rep. 319. *Hoddy's lessee v. Harryman*, 3 Harr. & McHen, 390. *Mitchell v. Mitchell*, 3 Stewart & Porter, 31, 83.)

This doctrine prevails, where the deed has been recorded upon a defective acknowledgment; as, if the acknowledgment be taken before an officer who had no authority to act in the particular case. (*Heister's lessee v. Fortner*, 2 Binn. Rep. 40. *Talbot's lessee v. Simpson*, 1 Peters' C. C. Rep. 188. *Johnston's lessee v. Haines*, 2 Hamm.

Rep. 55. *McCullock v. Myres*, 1 Dana 522. *Connelly v. Bowie*, 6 Harr. & John. 141.) So, where a time is fixed by statute within which the acknowledgment is to take place, and it is not done till after that time. (*Hog v. Perry*, 1 Litt. Rep. 171. *Morse v. Farrow*, 3 Marsh. Ken. Rep. 41, 2 S. P. *Anderson v. Turner*, 2 Litt. Rep. 237. *Winlock v. Hardy*, 4 id. 272.) And, where a certificate, of acknowledgment or probate is rendered necessary prior to recording, and the record is made without the certificate, or upon one not answering the requirements of the law, the record will be deemed unofficial. (*Womack v. Hughes*, Litt. Sel. Cas. 292. *M'Connell v. Brown*, id. 459. *Anderson v. Turner*, 2 Litt. Rep. 237. *Johnston's lessee v. Haines*, 2 Hamm. Rep. 55. *Hall v. Gittings*, 2 Harr. & John. 380, 389, 390. *Stanton v. Button*, 2 Conn. Rep. 527. *Pendleton v. Button*, 3 id. 406. *Hayden v. Wescott*, 11 id. 129. *Jackson, ex dem. Gould, v. Gould*, 7 Wend. 364.) So, where the instrument purports to have been recorded upon proof by the subscribing witnesses, but the requisite number was not produced. (*Vickory v. M'Knight*, 4 Binn. Rep. 204. *Pidge v. Tyler*, 4 Mass. Rep. 541. *Maxwell v. Light*, 1 Call's Rep. 117.) As to the validity of acknowledgments and probates, see *infra* p. 1246, et seq.

In North Carolina, where a deed was proved, and before its registration the boundaries of another tract were inserted; held, that this did not impeach the deed, but only showed that, as to the tract last inserted, the deed was unregistered. (*Den, ex dem. McLindon, v. Winfree*, 3 Dev. Rep. 262.) *Quere*: would not the record be bad in respect to the whole deed? See *Moore v. Bickham's lessee*, 4 Binn. Rep. 1, where it is laid down, that after a deed has been acknowledged preparatory to recording, the parties have no right to make the most trifling alteration in it. "An altered deed," say the court, "is not the same deed which is certified. The act of the magistrate is independent of the parties, and no consent of theirs can warrant them in falsifying it." (Id. 4.)

If a time is limited within which an instrument is to be recorded, the officer has no authority to record it, if presented afterwards; and though he do so, the record will be treated as an unofficial entry, not competent to prove the instrument. (*Womack v. Hughes*, Litt. Sel. Cas. 292. *M'Connell v. Brown*, id. 459. *Winlock v. Hardy*, 4 Litt. Rep. 272. *Taylor v. Shields*, 5 id. 295. *Cunningham's lessee v. Buckingham*, 1 Hamm. Rep. 264. *Bank of Kentucky v. Haggin*, 1 Marsh. Ken. Rep. 606. *Shields v. Buchanan*, 2 Yeates' Rep. 219. *Ross v. Clore*, 3 Dana, 195. *Williams' heirs v. Wilson*, 4 id. 508.)

So, where the instrument is one not embraced by the recording laws. (*Miller v. Holt*, 1 Tenn. Rep. 111. *Cheney v. Watkins*, 1 Harr. & John. 527. *Gittings v. Hall*, id. 14. *Conelly v. Bowie*, 6 Harr. & John. 141. *Owings v. Law*, 7 id. 194. *Dorsey v. Gassaway*, 2 id. 402, 3. *Yarborough v. Beard*, 1 Taylor's Rep. 25. *James v. Gordon*, 1 Wash. C. C. Rep. 338. *Dick v. Balch*, 8 Peters' Rep. 30.) Or, if the record is not made at the right office, or in the proper county. (*M'Keen v. Delancy's lessee*, 5 Cranch, 22. *Jackson, ex dem. Montessor, v. Rice*, 3 Wend. 180.)

But though an unauthorized record may not be admissible as a record, yet, in cases where the original cannot be procured, and the recorded copy is proved to have been compared with the original, it may be admitted on the footing of a sworn copy. The same is true of a copy of the record, provided the record itself is shown to have been compared with the original. This will be seen by the case of *Winn v. Patterson*, 9

Peters' Rep. 666, stated ante, note 871, p. 1240. The case of *Allen's lessee v. Parish*, 3 **Hamm. Rep. 107**, furnishes an instance where an unauthorized record was used, as secondary evidence, auxiliary to other circumstances, in establishing the contents of a lost deed, though no direct proof was given showing that it was a copy of the original. The person who recorded the deed was dead, and so were all the subscribing witnesses; the execution of it, and the recording, took place in another state; the person who made the record was a justice of the peace, and as such, had a right to take the acknowledgment of the deed; he was a notary also, and being so, it was natural, say the court, that he should record it among his notarial proceedings, though he had no authority for so doing. The entry or record was shown to be in the notary's hand-writing; and it was allowed, not as legal evidence in itself, nor as a mere abstract statement or fact depending for its credit on the character of the person making it; but as a circumstance, having an intrinsic relation to a variety of other facts contemporaneous, pointing to the execution of the deed. (*Id.*) In *Jackson, ex dem. Montessor, v. Rice*, 3 **Wend. 180**, an exemplification of a record (of a deed) made in a wrong county, was received as secondary evidence, along with the deposition of a witness. The witness proved the existence and loss of the original, and, as the chief justice who delivered the opinion of the court states, proved also the contents, by reference to the exemplifications; it appears, however, from the statement of the case by the reporter, that the witness, instead of referring to the exemplification, referred to the record, as having been made in E. county, whence the exemplification came; he stated the date of the deed, the premises it conveyed, and the parties; and also stated the officer before whom it was acknowledged. Indeed, the court seem to have regarded the case as one, where full secondary proof was made, independent of the exemplification; at all events, the decision cannot be regarded as allowing a certified copy or exemplification of a bad record, even as secondary evidence, except in connection with other proof. In *Garwood v. Dennis*, 4 **Binn. Rep. 314**, an exemplification of an ancient record of a deed, the record having been made without legal authority, and the original deed being lost, was allowed as evidence from the necessity of the case, and the improbability that the recorder would have placed it on record, without having compared the record with the original. (*Id.* 328, per Tilghman, C. J.) See also *M'Mullen v. Brown*, 1 **Harp. Rep. 76**; *Rowletts v. Daniel*, 4 **Munf. 473**. In Maryland, the *inspeximus* of an ancient deed, not requiring enrolment, has been received as evidence, it being corroborated by possession corresponding with it. But if possession has not gone with it, it is to be disregarded. (*Hall v. Gittings*, 2 **Harr. & Johns. 380**.) So, where a deed of personal property was lost, an *inspeximus* was received as the next best evidence of the contents, though the clerk had no authority to record a deed of personalty. It would seem, however, from the opinion of the court, that the deed was one of lands as well as personal property; and the clerk having authority to record it as to the lands, and being a true copy so far, the court said it was equally so as to the personalty. The deed was, moreover, quite ancient, and many circumstances were shown tending to prove its previous existence as a genuine instrument. (*Dorsey v. Gassaway*, 2 **Harr. & Johns. 402, 407**.) But where an exemplification purports to be an exemplification of the record of the copy of an instrument, it is not admissible, it seems, even though it be ancient. (*Barger v. Miller*, 4 **Wash. C. C. Rep. 280**. See *Blight's heirs v. Banks*, 6 **Monroe, 196**.)

A good record of an instrument, i. e. one made in conformity with the requisitions of the law, is, in some of the United States, rendered primary evidence, while in others, it is not received except upon the footing of mere secondary evidence, and in the absence of the original.

In most instances, we believe, the statute which authorizes the record, also defines its effect as evidence, and prescribes the limitations under which it shall be received. Where this is not done, the record can never be received to prove the original, except upon the footing of mere secondary evidence at most. It is not like a common law record of proceedings in court, for that is itself an original, and supposes no better evidence in existence: whereas a record or registry of a deed, or other instrument, is only a copy, and presupposes an original. (*Fox v. Lambson*, 3 Halst. Rep. 275, 280, 281, 2.) Some loose *dicta* and perhaps a few decisions are to be found favoring the notion, that where the law directs an instrument to be recorded, the record or a copy is *prima facie* evidence in all cases. (See *Craufurd v. The State*, 6 Harr. & John. 434, per Martin, J.; *Connelly v. Bowie*, id. 141; *Dick v. Balch*, 8 Peters' Rep. 30, 33.) But this is contrary to the great leading principle which demands the best evidence of which the nature of the case admits; and therefore, in *Brooks v. Marbury*, 11 Wheat. 79, where a certified copy of an instrument, required to be recorded, was offered in evidence, the original being within the power of the party, the court held it inadmissible, unless, by force of some statutory provision, a certified copy was rendered equal in degree with the original.

A diversity exists, also, as to the effect given to the acknowledgment or probate of deeds, &c. In some of the states, this proceeding, authenticated in the prescribed mode, (as, for instance, by a certificate endorsed on the instrument,) becomes *prima facie* evidence of its execution, and supersedes the necessity of calling the subscribing witnesses, or adducing other proof; while in others, as we understand the cases, it is regarded as a mere authority to the recording officer for admitting the instrument to record, and (save perhaps in the case of deeds, &c. executed by *femes covert*) has little or no effect beyond that. The lines of disagreement might be traced still further; but it would be both hazardous and unprofitable to pursue the subject much into detail, as the cases relating to it can only be accurately understood by those having the local statutes at hand. A few general observations is all we shall attempt.

An acknowledgment or probate of an instrument is not evidence of its execution, unless by force of some statutory provision rendering it so. (*Scumble*; *Dudley v. Sumner*, 5 Mass. Rep. 463. *Catlin v. Ware*, 9 id. 218. *Milligan v. Dickson*, 1 Peters' C. C. Rep. 433, 437, et seq. per Washington, J. *Catlin v. Washburn*, 3 Verm. Rep. 35, 6.) Uniform practice, however, extending beyond the memory of man, has been held to stand in the place of a statute. (*Milligan v. Dickson*, 1 Peters' C. C. Rep. 433, 437, et seq. per Washington, J. See *Davy v. Turner*, 1 Dall. Rep. 11; *Lloyd v. Taylor*, id. 17.)

But in order to render an acknowledgment or probate evidence, it must be valid and official. Where a statute prescribes a time within which an instrument is to be recorded, and the acknowledgment or probate required, as preliminary thereto, is made evidence of the execution of the original, such acknowledgment or probate cannot be so used, unless taken before the expiration of the time limited for recording.

(*Moore v. Farrow*, 3 Marsh. Ken. Rep. 41. *Anderson v. Turner*, 2 Litt. Rep. 237. *Winlock v. Hardy*, 4 id. 272.)

Acknowledgments, &c. should be evinced by writing. In Connecticut, the statute, it seems, requires, as necessary to the validity of deeds of real property, that they should be witnessed, acknowledged and recorded; (see 1 Swift's Sys. 307; Swift's Ev. 4, 5;) and though no form of acknowledgment is prescribed, it has been held, that the proceeding cannot be proved by parol, but should be certified by the officer taking the acknowledgment. (*Stanton v. Button*, 2 Conn. Rep. 537. *Hayden v. Westcott*, 11 id. 129. *Pendleton v. Button*, 3 id. 406.)

The acknowledgment or probate must be taken before an officer empowered to do the act. (See *Heister's lessee v. Fortner*, 2 Binn. Rep. 188, and other cases cited in connexion with it to this point, ante, p. 1243, 4, of this note.) And, *semble*, that where a statute authorizes any "magistrate" to take probate or acknowledgments, the same may be taken by an *alderman*; or indeed by any one "clothed with power as a public civil officer." (Per Story, J., *Gordon v. Hobart*, 2 Sumn. Rep. 401, 2, 3.) The certificate should purport on its face that the acknowledgment or probate was taken by an authorized officer. (See *Downing v. Gallagher*, 2 Serg. & Rawle, 457; *Shield's lessee v. Buchanan*, 2 Yeates' Rep. 220.) Where the officer taking the same, styles himself such an officer as is authorized, that will be *prima facie* evidence of the fact of his being so. (*Rhoades' lessee v. Selin*, 4 Wash. C. C. Rep. 718. *Willinck's lessee v. Miles*, 1 Peters' C. C. Rep. 429. *Johnston's lessee v. Haines*, 2 Hamm. Rep. 55. See also *Jeffrey's heirs v. Collis*, 4 Dana, 470; *Connelly v. Bowie*, 6 Harr. & John. 141.) It seems that the certificate will suffice, though the officer's title is not written out at length, but is abbreviated, as thus: "A. B., comm'r." (*Duval v. Covenhoven*, 4 Wend. 561, 563.) And even where his title or official character is not indicated by the certificate, the defect may be supplied by proof *abunde*. (*Rhoades' lessee v. Selin*, supra. See also *Jeffrey's heirs v. Collis*, 4 Dana, 470.) In Ohio, however, such defects can be supplied only when the original deed itself is used as evidence; and not when a copy from the record, made upon such defective certificate, is offered. (*Semble*, *Johnston's lessee v. Haines*, 2 Hamm. Rep. 55.)

All that is required, in respect to the frame of these certificates, is a substantial compliance with the law under which they are made. When substance is found, it is neither the duty nor inclination of courts to jeopardize titles in any way depending upon them, by severe criticisms upon their language. (*Jackson, ex dem. Merritt, v. Stanton*, 2 Cowen's Rep. 552, 567, per Savage, C. J. *Luffborough v. Parker*, 12 Serg. & Rawle, 48, per Tilghman, C. J. *Hall v. Gittings*, 2 Harr. & John. 390. *Talbot's lessee v. Simpson*, 1 Peters' C. C. Rep. 191. *M'Intosh v. Ward*, 5 Binn. Rep. 296. *Shaller v. Brand*, 6 id. 435. *Nantz v. Bailey*, 3 Dana, 113, 119.)

Forms of certificates which have been in use a great length of time, will not be held invalid upon slight or technical reasons; and long and general practice is entitled to great weight in construing the statute under which the certificates were made. (*Jackson, ex dem. Merritt, v. Gumaer*, 2 Cowen's Rep. 567, per Savage, C. J. *Troup v. Haight*, 1 Hopk. Ch. Rep. 239. *Nantz v. Bailey*, 3 Dana, 118, 119. *M'Keen v. Delancy's lessee*, 5 Cranch, 32, per Marshall, C. J. *M'Ferran v. Powers*, 1 Serg. & Rawle, 102, 105, 6, per Tilghman, C. J.) So far has this been carried, that where a statute mentioned "justices of the peace of the county or city," &c. as

the persons before whom acknowledgments or probate should be made, yet, it appearing to have been a constant practice for judges of the supreme court to perform this duty, held, that their acts were valid. (*M'Farran v. Powers*, 1 Serg. & Rawle, 102, 105, 6. *M'Keen v. Delancy's lessee*, 5 Cranch, 32. See also *Milligan v. Dickson*, 1 Peters' C. C. Rep. 433.)

If the statute requires that the certificate should be under the official seal of the functionary authorized, his certificate without such seal will be a nullity. (*Miller v. Henshaw*, 4 Dana, 329, 330.) As to certificates of acknowledgement without date, see *Galusha v. Sinclear*, 3 Verm. Rep. 394. *Downing v. Gallagher*, 2 Serg. & Rawle, 455.

These certificates are to be liberally construed, and to be sustained, if possible, by fair legal intendment. The court, however, in construing them can, in general, only act upon the words used; they cannot, it has been said, by intendment, fill up a blank or supply an important word. (*Hayden v. Wescott*, 11 Conn. Rep. 132. *Stanton v. Button*, 2 id. 527.) But in Pennsylvania, where the certificate was headed thus, "—— county, ss.," and then went on to say, "before me, one of the justices of the peace for the said county, personally came the above named Jacob Roop, and Susan-na his wife, and acknowledged the above indenture," &c. &c.; held, that the words "for the said county," must be taken to refer to the county mentioned in the body of the deed, as indicative of the residence of the grantors, and so the certificate was sustained. (*Fuhrman v. Loudon*, 13 Serg. & Rawle, 386.) See *Brooks v. Chaplin*, 3 Verm. Rep. 281. And where a certificate of proof stated, that A. B. appeared before the officer, and made oath, &c. but did not say that he was a subscribing witness; yet, it appearing on inspection of the deed that A. B. was one of the subscribing witnesses, held, that the certificate was substantially good. (*Luffborough v. Parker*, 12 Serg. & Rawle, 48.) The statute under which this certificate was made, required proof by one or more of the subscribing witnesses, in general terms, and did not prescribe the form of the certificate: Sometimes the statute expressly requires that the certificate itself shall identify the witness as one of the subscribing witnesses; in which case, of course, a certificate like the above, would be bad. (See *Jackson, ex dem. Kellogg, v. Vickory*, 1 Wend. 406; *Jackson, ex dem. Wood, v. Harrow*, 11 John. Rep. 434.) And in Connecticut, where the statute is very general, and prescribes no form for the certificate, it seems doubtful whether, in any instance, the certificate and the deed are to be regarded as so far parts of one thing, that in giving a construction to the former, you are at liberty to refer to the latter. (See per *Bissell, J.* in *Hayden v. Wescott*, 11 Conn. Rep. 131, 2.) Where the defect in the certificate consisted in omitting the name of the person who acknowledged the instrument, held, that it could not be supplied by reference to the deed. (*Id.*) But where a deed was acknowledged in open court, and admitted to record; though the certificate did not state the acknowledgment to have been by the grantors, yet, as the proceedings of the court were to be presumed correct, it was intended that the record was made upon the acknowledgment of the persons by whom the deed purported to have been executed. (*Philips v. Ruble*, Litt. Sel. Cas. 221. See also *Den, ex dem. Hunter, v. Bryan*, 2 Murph. 178; *Horton v. Hagler's ex'r*, 1 Hawk's Rep. 48.) In case of a deed, however, executed by a feme covert, where the certificate was, that "the deed was acknowledged in open court, and ordered to be registered;" held, that a private

examination of the feme covert could not be presumed from such certificate. (*Den, ex dem. Robinson, v. Barfield*, 2 Murph. Rep. 390.) It seems that the North Carolina statute, under which this decision was made, contemplated a private examination, previous to an acknowledgment in open court, and as an authority for taking the latter; as the court, therefore, in respect to the proceeding, was regarded as exercising a limited and special jurisdiction, the private examination, being in the nature of a jurisdictional fact, could not be presumed, but must affirmatively appear. (*Id.* p. 417, 418. See also ante, note 694, p. 1013, 1014; also note 761, p. 1104; *Pearl v. Howard*, 1 D. Chip. Rep. 173, 176; *Ross v. McClung*, 6 Peters' Rep. 235; *Miller's lessee v. Holt*, 1 Tenn. Rep. 111; *Craig's lessee v. Vance*, *id.* 122; *Elliot v. Piersoll*, 1 Peters' Rep. 328.)

In the above case of *Hayden v. Wescott*, (11 Conn. Rep. 131,) the court denied the party the right of introducing parol evidence to help out the acknowledgment. So where the certificate ran thus: "Personally appeared S. M., signer to the above and within written instrument ——— to be his free act and deed, before me—A. S., justice of the peace;" held, that the certificate imported no acknowledgment, and that parol evidence could not be admitted to show one. (*Stanton v. Button*, 2 Conn. Rep. 527. *Pendleton v. Button*, 3 *id.* 406.) As to supplying by parol a defective statement of the official character of the person taking the probate or acknowledgment, see ante, p. 1247, of this note.

Where an officer has authority to take an acknowledgment of a deed, and then to record the acknowledgment with the deed, he may amend the acknowledgment at any time before the record is made. But having made the record, his power over the whole subject expires; that which before was matter *in pais*, has then become matter of record, fixed, permanent and unalterable. This was so held, where a clerk, having taken an acknowledgment of a feme covert, had omitted to certify that she was privately examined, &c., and after he had recorded the defective acknowledgment with the deed, undertook to amend. (*Elliott v. Piersol*, 1 Peters' Rep. 328.)

In general, the certificate of acknowledgment or probate, endorsed on a deed, being an *ex parte* proceeding, if evidence at all, is only *prima facie* evidence; and the force and effect of it may be contested and entirely overcome; as, by showing that the acknowledgment was made by a party who was *non compos* at the time; (*Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 4 John. Rep. 161;) so as to the probate, that it was made by a witness incompetent for the same reason, (*id.* 1,) or from being a party to the record, (*Peters' lessee v. Condron*, 2 Serg. & Rawle, 80, 82,) or from interest, (*Jackson, ex dem. Hungerford, v. Eaton*, 20 John. Rep. 478, see *Jones v. Ruffin*, 3 Dev. Rep. 405,) or from infamy; (See *Jackson, ex dem. Gibbs, v. Osborne*, 2 Wend. 555.) So, a certificate of probate may be overcome by showing that the witnesses who appeared before the officer, were men of bad character, and unworthy of credit; (*Gardenhire v. Parks*, 2 Yerg. Rep. 23; *Vandyke v. Thompson*, 1 Harringt. Rep. 109; see also ante, note 530, p. 764;) or by showing a case of collusion between the officer and party seeking to avail himself of the probate, by which a garbled and substantially false account of the circumstances attending the execution, was obtained from the witness. (*Jackson, ex dem. Tracy, v. Hayner*, 12 John. Rep. 469.) And a certificate may be impeached by showing, that the officer making it took the acknowledgment or probate, while he was actually out

of his territorial jurisdiction. (Jackson, ex. dem. Walsh, v. Colden, 4 Cowen's Rep. 266. Jackson, ex. dem. Wyckoff, v. Humphrey, 1 John. Rep. 498.) In respect to an acknowledgment or probate taken on Sunday, see Tracy v. Jenks, 15 Pick. Rep. 467.

The following are among the many cases, exhibiting the doctrine on the subject of records, probate, and acknowledgments of deeds, &c., as held and acted upon in several of the states. *Massachusetts*: Eaton v. Campbell, 7 Pick. Rep. 10; Poignard v. Smith, 8 id. 272; Hathaway v. Spooner, 9 id. 23; Dudley v. Sumner, 5 Mass. Rep. 463; Catlin v. Ware, 9 id. 218; Pidge v. Tyler, 4 id. 541; Hastings v. Blue Hill Turnpike Co., 9 Pick. Rep. 80; Ward v. Fuller, 15 id. 185; Scanlan v. Wright, 13 id. 523; Burghardt v. Turner, 12 id. 534; Tracy v. Jenks, 15 id. 467, 468. *Maryland*: Blair v. Valliant, 4 Harr. & McHen. 62; Carroll v. Llewellyn, 1 id. 162; Cheney v. Watkins, 1 Harr. & John. 527; Hoddy v. Harryman, 3 Harr. & McHen. 581; Gittings v. Hall, 1 Harr. & John. 14; Smith v. Steele, 3 Harr. & McHen. 103; Crawford v. The State, 6 Harr. & John. 231; Carroll's ex'rs v. Tyler, 2 Harr. & Gill, 54; Conelly v. Bowie, 6 Harr. & John. 141; Hurn's lessee v. Soper, 6 Harr. & John. 276; Brooks v. Marbury, 11 Wheat. 79; Hall v. Gittings, 2 Harr. & John. 380; Owings v. Law, 7 id. 124; Dorsey v. Gassaway, 2 id. 402, 403; Bruce's adm'r v. Smith, 3 Harr. & John. 499; Gwynn v. Jones lessee, 2 Gill & John. 173; Dick v. Balch, 8 Peters' Rep. 30. *Pennsylvania*: Krider's lessee v. Nargong, 1 Dall. Rep. 268; McDill's lessee v. McDill, 1 Dall. Rep. 63; Morris' lessee v. Van Deren, id. 66; Dawning v. Gallagher, 2 Serg. & Rawle, 455; Foster v. Shaw, 7 Serg. & Rawle, 163; Griffith v. Black, 10 id. 160; Hellman, use of Hellman, 4 Rawle, 440; Craft v. Webster, id. 242; Jones v. Porter, 3 Pennsylv. Rep. 132; Barger's lessee v. Miller, 4 Wash. C. C. Rep. 280; Rhoades' lessee v. Selin, id. 715; Lanning's lessee v. Dolph, id. 624; Scott's lessee v. Leather, 3 Yeates' Rep. 184; Vickroy v. McKnight, 4 Binn. Rep. 204; Kerns v. Swope, 2 Watts' Rep. 75; McKeen v. Delancy's lessee, 5 Cranch Rep. 22; Talbot's lessee v. Simpson, 1 Peters' C. C. Rep. 188; Leazure v. Hillegas, 7 Serg. & Rawle, 313; Duffield v. Brindley, 1 Rawle's Rep. 91; Heister's lessee v. Fortner, 2 Binn. Rep. 44; Luffborough v. Parker, 12 Serg. & Rawle, 48; Fuhrman v. Loudon, 13 id. 386; Lodge v. Berrier, 16 id. 297; Petit v. Beshler, 2 id. 420; Milligan v. Dickson, 1 Peters' C. C. Rep. 433; McIntosh v. Ward, 5 Binn. Rep. 296; Shaller v. Brand, 6 id. 439; Whitmier v. Napier, 4 Serg. & Rawle, 290; Fellows' lessee v. Pedrick, 4 Wash. C. C. Rep. 477; Shield's lessee v. Buchanan, 3 Yeates' Rep. 219; James v. Gordon, 1 Wash. C. C. Rep. 338. *Ohio*: Atkinson's lessee v. Dailey, 2 Hamm. Rep. 212; Moore's lessee v. Vance, 1 Hamm. Rep. 1; Roads v. Symmes, id. 281; Cunningham's lessee v. Buckingham, id. 264; Johnston's lessee v. Haines, 2 id. 55; Allen's lessee v. Parish, 3 id. 107; Paine v. French, 4 id. 318, 320. *Vermont*: Bodge v. Parsons, 2 Verm. Rep. 456; Catlin v. Washburn, 3 id. 25; Pearl v. Howard, 1 D. Chip. Rep. 173; Allen v. Everts, 3 Verm. Rep. 11; Brooks v. Chaplin, id. 231; Galusha v. Sinclear, id. 394; Stevens v. Griffith, id. 448; Sawyer v. Adams, 8 id. 172; Middlebury College v. Cheney, 1 id. 336. *Tennessee*: Yarborough v. Beard, 1 Taylor's Rep. 25; Den, ex. dem. Hunter, v. Bryan, 2 Murph. Rep. 178; Den, ex. dem. Robinson, v. Barfield, id. 390; Miller's lessee v. Holt, 1 Tenn. Rep. 111; Lannum v. Brook's lessee, 4 Hayw. Rep. 121; Smith v.

Martin, 2 Tenn. Rep. 208; **Ross v. M'Lung**, 6 Peters' Rep. 283; **Craig's lessee v. Vance**, 1 Tenn. Rep. 132; **Glasgow's lessee v. Smith**, id. 155; **Patton v. Brown**, 1 Cooke's Rep. 126; **Gardenhire v. McDaniel**, 2 Yerg. Rep. 23; **Gordon v. Overton**, 8 id. 121; **Hightower's lessee v. Wells**, 6 id. 249; **Wilson v. Smith**, 5 id. 379; **Lipe v. Mitchell's lessee**, 2 id. 400; **Cox v. Bowman's lessee**, id. 108; **Smith v. Brown**, id. 238; **Malone v. Stephens**, id. 520. *New-Hampshire*: **Southerin v. Mendum**, 5 N. Hamp. Rep. 420; **Montgomery v. Dorian**, 6 id. 250. *Kentucky*: **Wells v. Wilson**, 3 Bibb's Rep. 264; **Sharp v. Wickliffe**, 3 Litt. Rep. 10; **Philips v. Ruble**, Litt. Sel. Cas. 221; **Morgan v. Bealle**, 1 Marsh. Ken. Rep. 310; **Hunt v. Owings**, 4 Monroe 20; **Young v. Ringo**, 1 id. 30; **Bank of Kentucky v. Haggin**, 1 Marsh. Ken. Rep. 606; **Breckenridges v. Todd**, 3 Monroe, 52; **Moore v. Farrow**, 3 Marsh. Ken. Rep. 41; **Anderson v. Turner**, 2 Litt. Rep. 237; **Winlock v. Hardy**, 4 id. 272; **Hog v. Perry**, 1 id. 171; **Womack v. Hughes**, Litt. Sel. Cas. 292; **McConnell v. Brown**, id. 459; **Taylor v. Shields' heirs**, 5 Litt. Rep. 295; **Coleman v. Casey**, 4 Bibb, 516; **Johnson v. Fowler**, id. 521; **Fowke v. Darnall**, 5 Litt. Rep. 316; **Elliot v. Piersol**, 1 Peters' Rep. 338, 339, 340; **McCulloch v. Myers**, 1 Dana, 522; **Daniel v. Bratton**, id. 210; **Miller v. Henshaw**, 4 id. 328, 329; **Nantz v. Bailey**, 3 id. 112, 113. *Alabama*: **Scott v. Rivers**, 1 Stewart & Porter, 19; **Mitchell v. Mitchell**, 3 id. 81; **McGregor v. Hall**, id. 397; **Toulmin v. Austin**, 4 id. 410. *New-Jersey*: **Fox v. Lambson**, 3 Halst. Rep. 275. *South Carolina*: **McMullen v. Brown**, 1 Harp. Rep. 76; **Purvis v. Robinson**, 1 Bay's Rep. 493; **Dingle v. Bowman**, 1 McCord's Rep. 177; **Turnipseed v. Hawkins**, id. 272; **Maxwell v. Carlisle**, id. 534; **Rochell ads. Holmes**, 2 Bay's Rep. 487; **Anderson v. Gilbert**, 1 id. 375; **Peay v. Pickett**, 3 McCord, 318; **Turnipseed v. Freeman**, 2 id. 269; **Linning v. Crawford**, 2 Bail. Rep. 296; see S. C. not S. P. id. 591. *North Carolina*: **Den**, ex. dem. **Hunter**, v. **Bryan**, 2 Murph. Rep. 178; **Den**, ex. dem. **Robinson**, v. **Barfield**, id. 390; **Horton v. Hagler's ex'r**, 1 Hawks' Rep. 48; **Park v. Cochran**, 1 Hayw. Rep. 410; **Garland's ex'rs v. Goodloe's adm'rs**, 2 id. 351; **Den**, ex. dem. **Burgess**, v. **Wilson**, 2 Dev. Rep. 306; **Den**, ex. dem. **Ridley**, v. **McGehee**, id. 40; **Moore v. Collins**, 3 Dev. Rep. 126; **Smith v. Wilson**, 1 Dev. & Batt. 40. *Louisiana*: **Phillips v. Flint**, 3 Mill. Lou. Rep. 146, 148, 149; **Las. Caygas v. Larionda's syndics**, 4 Mart. Lou. Rep. 293, 294; et seq. **Norwood v. Green**, 5 Mart. Lou. Rep. N. S. 175; **Lewis v. Beatty**, 8 Mart. Lou. Rep. N. S. 299; **Perron v. Maillan**, 10 Lou. Rep. (Curry) 520. *Virginia*: **Maxwell v. Light**, 1 Call, 117; **Kidd's adm'r v. Alexander**, 1 Rand. Rep. 456; **Ben v. Pete**, 2 id. 539; **Turner v. Stip**, 1 Wash. Rep. 319; **Currie v. Donald**, 2 id. 58; **Baker v. Preston**, 1 Gilmer, 235; **Givens v. Mann**, 6 Munf. 191; **Rowletts v. Daniel**, 4 id. 473; **Elliott v. Piersal**, 1 Peters' Rep. 338, 339, 340; **Sexton v. Pickering**, 2 Rand. Rep. 468; **Whitaker v. McIlhaney**, 4 Munf. 310; **Lee v. Tapscott**, 2 Wash. Rep. 281; **Hord v. Dishman**, 5 Call, 279; **Lockridge v. Carlisle**, 2 Leigh, 186; **Mann v. Givens**, id. 762. *Maine*: **Knox v. Silloway**, 1 Fairf. Rep. 201; **Woodman v. Coolbroth**, 7 Greenl. 181; **Hewes v. Wiswell**, 8 id. 94; see 9 Greenl. 170, 171; id. 132, 133; **Kent v. Weld**, 2 Fairf. Rep. 459. *Connecticut*: **Hayden v. Wescott**, 11 Conn. Rep. 129; **Cunningham v. Tracy**, 1 id. 252; **Pendleton v. Button**, 3 id. 406; **Stanton v. Button**, 2 id. 527; **Talcott v. Goodwin**, 3 Day's Rep. 264; **Swift's Ev.** 4, 5; **Hine v. Robbins**, 8 Conn. Rep. 342; **Welles v. Hutchinson**, 2 Root's Rep. 85. *Indiana*: **Doe**, ex. dem. **Wayman**, v. **Naylor**, 2 Blackf. Rep. 32.

In *New-York*, the revised statutes, so far as the subject of proving deeds &c., in the modes above adverted to is concerned, were passed December 24, 1827, but did not take effect until January 1, 1830. They make provision for recording every instrument falling within the general designation, "conveyance of real estate, within this state," (1 R. S. 756, § 1.) The term "conveyance" embraces all written instruments "by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and testaments, and leases for a term not exceeding three years." (Id. p. 763, § 33.) The term "real estate" is to be understood as co-extensive in meaning with "lands, tenements and hereditaments," and as embracing all chattels real, except leases for a term not exceeding three years: (id. § 36.) The provisions of the law, however, it is declared, "shall not extend to leases for life or lives, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectada: (id. p. 763, § 42.) Letters of attorney, or other instruments, containing a power to convey lands as agent or attorney for the owner of such lands, may be recorded; (id. p. 762, § 39;) and so may "every executory contract for the sale or purchase of lands." (Id.)

Before being admitted to record, the instrument is to be duly acknowledged, or its execution proved, and this properly authenticated. (1 R. S. 756, § 4. Id. 762, § 34.)

As to acknowledgments, or proof, and the effect thereof. The officers authorized to take acknowledgments or probate are the following. *Within the state*; the chancellor, justices of the supreme court, circuit judges, supreme court commissioners, judges of county courts, mayors and recorders of cities, and commissioners of deeds. But no county judge, or commissioner of deeds for a county or city, can take acknowledgments or proofs out of the city or county for which he was appointed. (1 R. S. 756, § 4.) *Out of the state, but within the U. States*; the chief justice and associate judges of the supreme court of the U. States—district judges of the U. States—judges or justices of the supreme, superior, or circuit court, of any state or territory within the U. States—and the chief judge, or any associate judge, of the circuit court of the U. States in the district of Columbia. But no proof or acknowledgment, taken by any such officer, will entitle the conveyance to be recorded, unless taken within some place or territory, to which the jurisdiction of the court to which he belongs, shall extend. (Id. p. 757, § 4, sub. 2.) Acknowledgments of *deeds and mortgages* may be taken, also, before the mayor of either of the cities of Philadelphia or Baltimore. This is by virtue of the act of April 23d, 1829, *infra*, which still continues in force. Conveyances of real estate made since March 10th, 1825, or to be made, by the treasurer of the state of Connecticut, may be acknowledged before the secretary of state, of the state of Connecticut. (1 R. S. 760, § 21.) *Out of the U. States*; if the parties executing the instrument shall be in any state or kingdom in Europe, or in North or South America, the same may be acknowledged or proved before any minister plenipotentiary, or extraordinary, or any *charge des affaires* of the U. States, resident and accredited within such state or kingdom. If the parties be or reside in France, the acknowledgment or proof may be taken before the consul of the U. States, appointed to reside at Paris: or if they be in Russia, then before the consul of the U. States appointed to reside at St. Petersburg. (1 R. S. 757, § 5.) If the party be within the united kingdom of Great Britain and Ireland, or the dominions thereto belonging, the acknowledgment or proof

may be taken before the mayor of London, the mayor or chief magistrate of Dublin or Liverpool, the provost or chief magistrate of Edinburgh, or the consul of the U. States appointed to reside at London. (Id. § 6.) Indeed, as to deeds and mortgages, consuls of the U. States, residing in any foreign port or country, have full power to take acknowledgments and proofs, without any qualification as to residence. (See the act of April 23d, 1829, *infra*.) So with respect to judges "of the highest court" of either Upper or Lower Canada. (See *id.*) Acknowledgments and proofs may also be taken out of the U. States, before any person specially authorized for that purpose by a commission under the seal of the court of chancery of this state. (1 R. S. 757, § 8.)

The acknowledgment is to be by the party or parties executing the instrument. (Id. p. 756, § 4.) The officer taking any acknowledgment, must know or have satisfactory evidence that the person making the same is the individual described in and who executed the instrument. (Id. 758, § 9.) In the case of a married woman residing within the state, her acknowledgment is not to be taken unless, in addition to the above requisites, she acknowledge on a private examination, apart from her husband, that she executed the instrument freely and without any fear or compulsion of her husband; and her estate will not pass by any conveyance unless so acknowledged. (Id. § 10.) But a married woman, not residing in the state, who joins her husband in any conveyance of real property within the state, may acknowledge the same as if she were sole; and it may, for the purpose of recording, be proved in like manner as if she were sole, by a subscribing witness. (Id. § 11.) See as to powers of attorney, executed by married women residing out of the state, act of May 11th, 1835, sess. 58, ch. 275, p. 315.

The proof of an instrument, preliminary to admitting it to record, is to be by a subscribing witness. The witness is to state his place of residence, and that he knew the person described in and who executed the instrument; but the proof is not to be taken unless the officer is personally acquainted with the witness, or has satisfactory evidence that he is the same person who was a subscribing witness to the instrument. (1 R. S. 758, § 12.) Provision is made for compelling a subscribing witness, residing in the county where application for probate is made, to appear and testify. (Id. § 13 and 14.)

The authentication of the acknowledgment or proof will vary according to circumstances. In all cases, however, a certificate of the officer taking the acknowledgment or proof, is required to be endorsed on the instrument, and signed by him; and this certificate is to set forth the matters above required to be done, known or proved, on such acknowledgment or proof, with the names of the witnesses examined before the officer, their places of residence, and the substance of the evidence given by them. (Id. 758, § 15.) The residence of the *identifying* witnesses, sworn before the officer, need not be set forth in the certificate. (Dibble v. Rogers, 13 Wendell, 536. Norman v. Wells, 17 id. 136.) Otherwise as to *subscribing* witnesses. (Id.) It should appear by the certificate that the subscribing witness saw the execution of the deed; for if he only heard the execution acknowledged, *semble*, that he is incompetent to prove it, and a certificate stating simply that the subscribing witness heard the party acknowledge it, would be held invalid, if objected to specifically on that ground. (Norman v. Wells, *supra*.) If the acknowledgment or probate is taken out of the U. States, before a consul, mayor, chief magistrate, minister, or *charge des affaires*, as provided by 1 R. S. 757, §§ 5, 6, *supra*, the certificate must be under the official seal of those officers respectively. (Id. p. 757, § 7.) Acknowledgments by the treasurer of Connecticut, mentioned su-

pra, are to be certified by the secretary of state, in the mode prescribed above, under the seal of that state. (Id. p. 760, § 21.)

The instrument being so acknowledged or proved, and duly certified, is entitled *prima facie* to be read in evidence without further proof. (1 R. S. 759, § 16; id. p. 762, § 39; id. p. 760, § 21. See *Morris v. Wadsworth*, 17 Wend. 103.) There is a qualification to this, however, where the acknowledgment or proof was taken before a judge of a county court, not of the degree of counsellor in the supreme court, or by a commissioner of deeds; in such cases, to be read in evidence in a county other than that for which the officer taking the same was appointed, there must be subjoined to the certificate, a certificate of the clerk of the county for which the officer was appointed, under his hand and official seal, specifying that such officer was, at the time he took the acknowledgment or proof, duly authorized to take the same, and that the clerk is well acquainted with the hand-writing of the officer, and verily believes the signature to the officer's certificate to be genuine. (Id. § 18.) As to the sufficiency of the clerk's certificate, see *Hall v. Gittings*, 2 Harr. & John. 390. But the latter section does not apply to any conveyance executed by the agent of the Holland Land Company, or by any agent of the Pultney estate, lawfully authorized to convey. (Id. § 19.)

The certificate of acknowledgment or proof is not conclusive, but may be rebutted, and its force and effect contested: and if it turns out that the proof was taken upon the oath of an interested or incompetent witness, the conveyance cannot be received in evidence, until duly established by other competent proof. (Id. § 17.) *Jackson, ex dem. Hardenburgh, v. Schoonmaker*, 4 John. Rep. 161. *Jackson, ex dem. Tracy, v. Hayner*, 12 id. 469, 471, 2. *Jackson, ex dem. Gibbs, v. Osborne*, 2 Wendell, 555. *Jackson, ex dem. Hungerford, v. Eaton*, 20 John. Rep. 480. See ante, p. 1249 of this note. So, the force of the acknowledgment or proof may be overcome by showing that the officer taking the same did so at a place to which his authority, in this respect, did not extend. (*Jackson, ex dem. Wyckoff, v. Humphrey* 1 John. Rep. 498. *Jackson, ex dem. Walsh, v. Colden*, 4 Cowen's Rep. 266.) See ante, pp. 1249, 1250, 1252, of this note.

An instrument acknowledged or proved before the revised statutes went into operation, and certified in such manner as to be entitled to be read in evidence under the laws in force when the said statutes took effect, is entitled to be read in evidence as if those statutes had not existed. (Id. p. 790, § 22.) If an instrument executed before the revised statutes took effect, shall not have been acknowledged or proved, this may be done under those statutes, in the same way and with the like effect as in respect to instruments subsequently executed. (Id. § 23.)

As to the record, &c. The record of the instrument is to be made in the clerk's office of the county, where the real estate to which it relates, is situated; (1 R. S. 756, § 1;) or if the real estate is within the city and county of New-York, then in the office of the register thereof. (Id. p. 763, § 43.) The same acknowledgment or proof, and the like authentication thereof, required to entitle the instrument to be read in evidence without further proof, are also necessary as a condition to its being admitted to record. (Id. 759, § 16. See id. p. 762, § 34.) Hence, the certificate of the officer who took the acknowledgment or proof, will generally be sufficient to entitle the instrument to be recorded. But we have seen, that where it is offered in evidence out of the county in which the officer taking the acknowledgment or proof resides, an additional certi-

cate of the county clerk is sometimes required. In such cases, the same certificate is requisite to allow the instrument to be recorded, out of the county of the officer's residence. (Id. 759, § 18.) The certificate or certificates upon which the instrument is admitted to record, are to be recorded along with it; and, unless this is done, the record will be invalid for all the purposes of evidence. (Id. § 20.)

Instruments acknowledged or proved, prior to the revised statutes, and certified so as to be entitled to be recorded under the laws in force when such statutes took effect, but which have not been so recorded, are allowed to be put on record in the proper office, in the same manner, and with the like effect, as if the revised statutes had not been passed. (Id. p. 760, § 22.) And conveyances executed before the revised statutes, and not already acknowledged or proved, may be proved or acknowledged and recorded under those statutes, and with the like effect, as if executed after such statutes went into operation. (Id. § 23.)

The record of a conveyance duly recorded, or a transcript thereof duly certified, may be read in evidence with the like force and effect as the original conveyance. (Id. p. 759, § 17. Id. p. 760, § 21. Id. 762, § 39. See *Morris v. Wadsworth*, 17 Wend. 103.) To entitle the transcript of any such record, and of the certificates upon which it was admitted to record, to be read in evidence, the same must be certified to be a true copy of such record, by the clerk of the county having the custody of the record, under the seal of the court of common pleas of that county, or by the register of the city and county of New-York, when such record shall be in his custody. (Id. p. 760, § 26.)

Neither the record nor the transcript thereof is to be regarded as conclusive; but may be rebutted, and the force and effect thereof contested, by any party to be affected thereby. And if it shall appear that the record was made upon proof by an interested or incompetent witness, this will destroy its effect as evidence. (Id. p. 759, § 17.) The record may be impeached by showing that it was made upon an insufficient or invalid acknowledgment or probate. (See *supra* p. 1243, 4, of this note.) As to what acknowledgments are invalid under the revised statutes, see *supra*, p. 1252, et seq.

Conveyances of real estate situated abroad. The law above noticed, relates to conveyances of real property situated within the state. It is also provided that "every conveyance of real estate situated without this state, heretofore made or hereafter made, and which shall be acknowledged or proved in the manner prescribed by the laws of this state, in relation to conveyances of lands within this state, may be read in evidence in any court without further proof thereof, in the same manner and with the same effect as if such conveyance related to real estate within this state; but this section shall not be construed to prevent the reading in evidence of any conveyance of lands within any other of the United States, which shall have been duly authenticated according to the laws of such states so as to be read in evidence in the courts thereof. (1 R. S. 761, § 27.) And note; the terms "conveyance of real estate" in the foregoing section, are co-extensive in meaning with the same terms as defined *supra*, p. 1252.

Acknowledgments or proof of instruments other than conveyances of real estate. By an act passed April 29th, 1833, every written instrument except promissory notes, bills of exchange, and last wills of deceased persons, may be proved or acknowledged in the manner provided by law for taking the proof or acknowledgment of conveyances of real estate; and the certificate of the proper officer endorsed thereon, shall entitle such

instrument to be read in evidence on the trial of any action, with the same effect and in the same manner, as if the instrument were a conveyance of real estate. (L. N. Y. sess. 56th ch. 271, p. 396, § 9.)

Though the former laws of New-York relating to the general subject of proofs, acknowledgments, and records of deeds, &c., are entirely obsolete in respect to conveyances made since January 1st, 1830, yet still they are necessarily often drawn in question, particularly when conveyances acknowledged, proved, or recorded under them, are sought to be given in evidence. We therefore subjoin a short reference to those most often needed in such cases, noting, in connection with them, such adjudications of our courts as will aid in construing and explaining them.

Act of Oct. 30th, 1710. (Van Schaack's L. N. Y. p. 82, §. 1 Smith & Liv. L. N. Y. p. 84. 3 Revised Statutes, 1st ed. app. p. 5, 6.) See Jackson, ex dem. Hardenbergh, v. Schoonmaker, 2 Johns. Rep. 230; 4 id. 161; Jackson, ex dem. Woodruff, v. Gilchrist, 15 id. 89; Van Cortlandt v. Tozer, 17 Wend. 340, et seq. *Act of Feby. 16th, 1771.* (3 Revised Statutes, 1st ed. app. p. 22. 2 Van Schaack's L. N. Y. p. 611.) See Jackson, ex dem. Woodruff, v. Gilchrist, 15 Johns. Rep. 89; Van Cortlandt v. Tozer, 17 Wend. 340, et seq.; Carver v. Jackson, ex dem. Astor, 4 Peters' Rep. 81, 2. *Act of March 8th, 1773.* (3 Revised Statutes, 1st ed. app. p. 23. 2 Van Schaack's L. N. Y. p. 765.) *Act of March 1st, 1787.* (3 Revised Statutes, 1st ed. app. p. 25. 2 L. N. Y. Jones & Varick, p. 92. 1 L. N. Y. Greenl. p. 386.) See Van Cortlandt v. Tozer, 17 Wend. 338, et seq. *Act of Feby. 26th, 1788.* (3 Revised Statutes, 1st ed. app. p. 26, 2 L. N. Y. Jones & Varick, p. 266. 2 L. N. Y. Greenl. p. 99.) See Van Cortlandt v. Tozer, 17 Wend. 338, et seq.; Jackson, ex dem. Parker, v. Phillips, 9 Cowen's Rep. 94. *Act of April 6th, 1792.* (3 Revised Statutes, 1st ed. app. p. 27, 2 L. N. Y. Greenl. 452.) *Act of March 9th, 1793.* (3 Revised Statutes, 1st ed. app. p. 27. 3 L. N. Y. Greenl. p. 72.) See Van Cortlandt v. Tozer, 17 Wend. 338, et seq. *Act of Jany. 8th, 1794.* (3 L. N. Y. Greenl. p. 100) See 3 L. N. Y. Greenl. 110; Id. 138; 3 L. N. Y. Web. Con. of Greenl. 470, 472, in connection with the act of January 8th, 1794; also Jackson, ex dem. Rieley, v. Livingston, 6 Johns. Rep. 149, 155, 6. *Act of Feby. 11th, 1797.* (3 Revised Statutes, 1st ed. p. 27. 3 L. N. Y. Greenl. p. 370.) See Bradstreet v. Clark, 12 Wend. 673, in which the then chief justice seems to have overlooked the latter statute. *Act of Feby. 12th, 1798.* (3 L. N. Y. Web. Con. of Greenl. 320.) See Jackson, ex dem. Ramson, v. Shepard, 2 Johns. Rep. 77; Jackson, ex dem. Dunbar, v. Todd, id. 300. *Act of Feby. 23d, 1798.* (3 Revised Statutes, 1st ed. p. 28. 3 L. N. Y. Web. Con. of Greenl. 328.) See Van Cortlandt v. Tozer, 17 Wend. 338, et seq. *Act of April 6th, 1801.* (3 Revised Statutes, 1st ed. app. p. 30. 1 L. N. Y. Kent & Radcliffe, p. 478.) See Van Cortlandt v. Tozer, 17 Wend. 338, et seq.; Jackson, ex dem. Rieley, v. Livingston, 6 Johns. Rep. 149; Jackson, ex dem. Ramson, v. Shepard, 2 id. 77. Also see the cases *infra*, cited in connection with the act of April 12th, 1813. *Act of April 7th, 1806.* (3 Revised Statutes, 1st ed. app. p. 32. 4 L. N. Y. Webster, 615.) *Act of Jany. 29th, 1811.* (6 L. N. Y. Webster, p. 95. 3 Revised Statutes, 1st ed. app. p. 32.) *Act of April 9th, 1811.* (3 Revised Statutes, 1st ed. app. p. 33. 6 L. N. Y. Webster, p. 922.) *Act of April 12th, 1813.* (3 Revised Statutes, 1st ed. app. p. 34. 1 R. L. N. Y. Web. & Van. p. 369.) See Van Cortlandt v. Tozer, 17 Wend. 338, et

seq. ; Jackson, ex dem. Parker, v. Phillips, 9 Cowen's Rep. 94 ; Jackson, ex dem. Merritt, v. Gumaer, 2 id. 552 ; Duval v. Covenhoven, 4 Wend. 563 ; Roberts ads. Jackson, ex dem. Webb, 1 Wend. 478 ; James v. Morey, 2 Cowen's Rep. 246 ; Jackson, ex dem. Barclay, v. Hopkins, 18 John. Rep. 487 ; Troup v. Haight, 1 Hopk. Ch. Rep. 239 ; Gould v. Gould, 7 Wend. 364 ; Jackson, ex dem. Gibbs, v. Osborne, 2 Wend. 555 ; Jackson, ex dem. Kellogg, v. Vickroy, 1 id. 406, 412 ; Jackson, ex dem. Wood, v. Harrow, 11 John. Rep. 434. *Act of Feby. 4th*, 1814. (3 L. N. Y. sess. 37th, p. 9.) See act of January 8th, 1794, supra, in connection with this act. *Act of April 12th*, 1816. (3 Revised Statutes, 1st ed. app. p. 36. 4 L. N. Y. sess. 39th, p. 118. *Act of March 8th*, 1817. (3 Revised Statutes, 1st ed. app. p. 36. 4 L. N. Y. sess. 40th, p. 58.) *Act of March 24th*, 1818. (3 Revised Statutes, 1st ed. app. p. 37. 4 L. N. Y. sess. 41st. p. 44.) See Jackson, ex dem. Montgomery, v. Chapin, 5 Cowen's Rep. 485 ; Jackson, ex dem. Parker, v. Phillips, 9 id. 94. *Act of April 14th*, 1820. (3 Revised Statutes, 1st ed. 199. 5 L. N. Y. sess. 43d, p. 248, § 3.) See acts of January 8th, 1794, and of February 4th, 1814, supra ; Jackson, ex dem. Yates, v. How, 19 John. Rep. 80 ; Jackson, ex dem. Parker, v. Phillips, 9 Cowen's Rep. 94 ; Jackson, ex dem. Hungerford, v. Eaton, 20 John. Rep. 478. *Act of April 17th*, 1822. (3 Revised Statutes, 1st ed. app. p. 45. 6 L. N. Y. sess. 45th, p. 261.) See James v. Morey, 2 Cowen's Rep. 246. *Act of April 19th*, 1823. (6 L. N. Y. sess. 46th, p. 244.) *Act of April 23d*, 1829. (L. N. Y. 1929, sess 52, p. 348.)

Deeds, and other instruments, acknowledged or recorded in neighboring states, are sometimes proved under the laws of congress. Where the acknowledgment or record is the act of a court, and partakes of the nature of a judicial proceeding, it has been treated as within the provisions of the law of May 26, 1790, stated and considered ante, note 771, p. 1125, et seq. Thus, in Kentucky, a power of attorney was produced, purporting to have been executed by the plaintiff in Virginia ; it had been acknowledged by the plaintiff in a county court of the latter state, and the acknowledgment ordered to be certified ; and held, that the record of the acknowledgment and order, duly certified according to the requisitions of the law of congress above referred to, sufficiently proved the execution of the power without further evidence ; and this, though the power itself had not in fact been recorded. (Rochester v. Toler, 4 Bibb's Rep. 106. See Calvert v. Fitzgerald, Litt. Sel. Cas. 388, 390, 391.) A copy of the record of a deed, acknowledged in a court of a neighboring state, and recorded there, was held to come within the above act of congress, in Strode v. Churchill, 2 Litt. Rep. 75, 6. The main question was, as to the sufficiency of the authentication. It was attested by a clerk, who styled himself clerk of the superior court of law of F. county, and keeper of the records of the *late* district court, (the district being composed of the counties of F., B., H., & S.,) in which latter court the deed was acknowledged and recorded ; the clerk's attestation, moreover, was under his private seal, he stating in his attestation that no official seal had been provided ; the presiding judge of the superior court certified that the attestation of the clerk was in due form of law : and this authentication was held complete. See as to the attestation of the clerk and the seal of the court, ante, note 771, p. 1130, 1. The certificate of the judge, chief justice, or presiding magistrate, is indispensable under the act of 1790. (See Johnson v. Fowler,

4 Bibb's Rep. 521 ; ante, note 771, p. 1131, et seq. ; *Brown v. Adair*, 1 Stewart & Porter, 49.)

The record of an instrument in a public office, not appertaining to a court, the record being in no sense a judicial proceeding, requires a different kind of authentication. Such record must be authenticated according to the act of congress of April 27, 1804, stated ante, note 803, p. 1166. In noticing the case of *Henthorn v. Doe*, 1 Blackf. 157, in the note referred to, we said that the copy of the Virginia patent, there in question, was held inadmissible because of the omission of the governor to state in his certificate that the attestation of the register was in *due form*. On a closer examination of the case, it appears that the point was not decided, though the court conceded such to be the current of authority. Indeed, there seems as much reason for insisting upon a compliance with this part of the requisition of the above act, as there is for insisting upon an observance of the corresponding provision in the act of 1790 ; and in the latter case, the decisions render that portion of the certificate which relates to *due form* &c., indispensable. (See ante, note 771, p. 1132.) Under the act of 1804, the keeper of the record must add his seal to his attestation, if there be a seal ; and to the certificate of the governor, if that is also used, must be annexed the great seal. (*Phillips v. Flint*, 3 Mill. Lou. Rep. 146, 148, 9. Id. 151, S. P.) In Tennessee, a copy of a deed of marriage settlement was offered, taken from the records of the register in Onslow county, North Carolina ; it was authenticated in every respect according to the act of congress of 1804, save that no official seal was annexed to the register's certificate ; but the court said they knew that by law there was no official seal belonging to the register's office in that state, and so the authentication was held complete. (*Hackney v. Williams*, 6 Yerg. 340.) Quere, however ; should not the officer in general certify on this point ? (See ante, note 771, p. 1130.) A certificate by the presiding justice of the court of the county or district where the recording office is kept, will not be vitiated by its containing superfluous matter, if the substance of what is required by law be stated therein. (*Hackney v. Williams*, supra.) The recording officer's official character is not be certified by the clerk of the county or district court ; and if such certificate be appended, it will be treated as a mere nullity. (Id.) When the certificate of the presiding justice of the county or district court is used, the clerk or prothonotary of the court is to certify to *his* official character ; and the clerk's certificate should show that the person certifying as presiding justice is "duly commissioned and qualified." (Id.) The clerk's certificate must, moreover, be "under his hand and the seal of his office." (Id. Act of Congress, April 27, 1804. 3 L. U. States. 621, § 1.) As to authentications under the act of 1804, see further, *Ewings v. Savary*, 4 Bibb, 424 ; *Johnson v. Fowler*, id. 521 ; *Bruce's adm'r v. Smith*, 3 Harr. & John. 499.

As to the grade and force of this species of evidence, the act of congress of 1804 provides, that records authenticated according to its provisions, shall have such faith and credit accorded to them, in every court of the United States, as they have by law or usage in the courts of the state whence they come. (See ante, note 808, p. 1166.) It seems, that unless the law or usage of the state whence the record comes be proved, the court will act upon its own laws. Hence, if according to the *lex fori*, a copy of a similar domestic record would be admissible for any cause, it will be held equally so when coming from another state, unless the *lex loci*, giving it a different effect, be af-

firmatively shown. (Norwood v. Green, 5 Mart. Lou. Rep. 175, 6.) In Alabama, a copy of a deed certified in due form from the records of Wilkinson county, Georgia, was offered as secondary evidence; and the court held, that to authorize its being read, the party must show that, by the laws of Georgia, such instruments were required to be recorded, and that the recording officer had authority to certify copies. (Mitchell v. Mitchell, 3 Stewart & Porter, 81.)

In respect to the mode of proving deeds or writings executed in one country, relating to property in lands situated in another, strictly foreign, the courts of the latter are governed entirely by their own laws. Hence, if the power of taking acknowledgments, &c. is conferred by such laws upon a foreign notary, his certificate will be recognized as effectual to the extent defined by the authority under which the certificate is made; but, independent of some authority of this character, his certificate is not evidence. (Griffeth v. Black, 10 Serg. & Rawle, 160.) Most of the United States have their peculiar local statutes or usages on this subject; and when a law exists conferring the power of authenticating instruments executed abroad, on officers resident in another state or country, none, except such as are named in the law, will be recognized as possessing the power. (Glasgow's lessee v. Smith, 1 Tenn. Rep. 156.)

We have before had occasion to cite several cases relating to the power of a notary abroad, in taking the acknowledgment or probate of instruments, so as to dispense with formal proof of execution in other states or countries. A notary, as such merely, has no more authority in this respect, it should seem, than any private individual. His certificate as to foreign protests, is accredited upon general principles of commercial policy and convenience; but even the *lex mercatoria* does not recognize him as possessing authority to certify the execution of instruments, either upon acknowledgment of the party, proof by witnesses, or otherwise. (See Las Caygas v. Larionda's Syndics, 4 Mart. Lou. Rep. 235, 6. See ante, note 704, p. 1052, 3; Phillips v. Flint, 3 Mill. Lou. Rep. 146; Ex parte Church et al. 1 Dowl. & Ryl. 324.) In Las Caygas v. Larionda's Syndics, 4 Mart. Lou. Rep. 283, a power of attorney given at Trinidad, in the island of Cuba, was sought to be established, as authority to sue in Louisiana. It was executed before a notary of the former place, and it appeared that, according to the Spanish law, which prevailed there, the original, or *protocole*, is registered in the notary's office, whose duty it is to keep it, and to give a certified copy, known to the Spanish laws under the appellation of *copia original*, which, when duly authenticated, is treated there as an original. Such a copy was offered; it was certified in the customary mode, under the notary's hand and *signo*, accompanied by a certificate of three persons, stating themselves to be of the *cabildo* of the city, attesting the official character of the notary, and that faith is and ought to be given to his certificate, as such; the seal of the college of notaries of Havana was also affixed; and in addition to this, the plaintiff offered to prove by a witness, the hand-writing of the notary, and his official character. The parish court rejected the evidence; but, on appeal to the supreme court, the decision was reversed. The latter distinguished between notarial acts done under the *lex mercatoria*, and such as the certificate in question. Some difficulty occurred, they said, whether to consider the instrument offered as an original, or a copy from the record. It was, in truth, what is called by the Spanish jurists, an original, known to the laws of Spain as a public act, carrying with it its own faith and credit, and making full proof in the tribunals of that country. (Id. p. 286.) But the question

was, how such instruments were to be considered when transmitted to a foreign country. Are the courts of the latter, bound to require other testimony of their truth and genuineness, than that which they bear on their face? No stress seems to have been placed upon the seal of the college of notaries, or upon the certificate attesting the notary's official character; but the court appear to have disregarded these entirely. They were of opinion, and so held, that the only thing necessary to give the certified copy the same credit in the courts of Louisiana which it would have in those of Spain, was proof that the person certifying it was a public notary of the place whence it came, and that the certificate attached to it was really his. (Id. p. 287.) This proof, they said, might be made by a certificate under the national seal, attesting that the person certifying the instrument was a notary by the king's appointment, and, if the dispute had any relation to his right to fulfil the duties of the office claimed by him, it would be the best evidence admissible in the case. But for all other purposes, proof of his being a notary *de facto* would be sufficient; and this might be made by witnesses, as well as by a certificate under the national seal. If the witness offered, therefore, could testify that the person authenticating the power was a notary, &c., and that from a knowledge of his hand-writing, it was he who certified and signed it, this would be sufficient. (Id. p. 287, 8.) See *Phillips v. Flint*, 3 Mill. Lou. Rep. 149. In *Ex parte, Church et. al. v. Dowl. & Ryl.* 324, the certificate of an American notary, under his notarial seal, of the execution of a power to sue in England, was held incompetent evidence to authenticate the power; and this, although the notarial certificate was verified by the British consul, whose hand-writing was identified. The court said they could only act upon the affidavit of the subscribing witness.

The above case of *Las Caygas v. Larionda's syndics*, may be regarded as going the full length of giving effect to the *lex loci* respecting the mode of proof, with the single qualification, that the court is not bound to take judicial notice of the official character and signature of the officer. In New-York, however, a somewhat different notion seems to have been entertained. There, the plaintiff brought an action to recover money paid by him as surety for the defendant in a bond entered into at *Caraccas*. A copy of the bond certified and signed by a notary of that place was offered, and the local law shown to be the same as stated in *Las Caygas v. Larionda's syndics*. The court deemed it unnecessary to say definitively, whether the *lex loci* ought so far to prevail, as to require these notarial copies to be admitted in the same manner as in the Spanish tribunals. They inclined to think them not evidence *per se*; and yet, that they were by no means to be entirely disregarded. The testimony given was sufficient, they said, to account for the non-production of the original; and the copy was, therefore, held admissible, as forming a part of the inferior evidence to be resorted to in its stead. As to the credit due specifically to the copy, the court said, "It appears to be a part of the official duty of the notary to give copies; he is especially entrusted with that power; and in giving such copies he acts under his oath of office. The instrument is executed before him in his official capacity, and an official certified copy necessarily implies that he saw the instrument executed. In what respect does this differ from an examination upon a commission? He can only swear he saw the instrument executed, and that the copy furnished by him is under oath. Besides we ought to be cautious in declaring that we will receive nothing short of the examination of the notary, under a commission, as there is no mode of enforcing such examination; nor

is a sworn copy, proved by a person who has compared it with the original, any higher or better evidence than that furnished by the notary, which is a copy under his oath of office." It was therefore received, along with sundry declarations of the defendant going strongly to authenticate the instrument alleged. (*Mauri v. Heffernan*, 13 John. Rep. 58, 73, 4, 5.

NOTE 875—p. 464.

In general, the execution by all the parties should be proved, before the instrument is received as evidence. But there are exceptions. Thus, a joint and several bond, where it was not understood to be offered as general evidence in respect to all the parties, but only as to T., one of the obligors, being connected with a title derived from him, was held properly permitted to go to the jury, upon proof of T.'s execution alone. (*Conrad v. The Atlantic Ins. Co.* 1 Peters' Rep. 398, 451.) So, in New-Jersey, to prove a binding to service, with a view of establishing the settlement of a pauper, it is not necessary to show the execution of the indenture by the master; it is enough that its execution on the part of the apprentice be shown. (*Kingwood v. Bethlehem*, 1 Green's Rep. 227.)

NOTE 876—p. 465.

The general rule, requiring the subscribing witness to be produced, will be found recognized in the following, among numerous other cases. *McPherson v. Rathbone*, 11 Wend. 136. *Willoughby v. Carleton*, 9 John. Rep. 136. *Pearl v. Allen*, 1 Tyl. Rep. 4. *Whitaker v. Salisbury*, 15 Pick. 534. *Jackson, ex. dem. Edson, v. Gager*, 5 Cowen's Rep. 333. *Clark v. Sanderson*, 3 Binn. Rep. 192. *Ingram v. Hall*, 1 Hayw. Rep. 206, 207. *Jackson, ex. dem. Varick, v. Waldron*, 13 Wend. Rep. 178. *Bradshaw v. Bennett*, 5 Carr. & Payne, 48. *Petit v. McAdam*, 2 Serg. & Rawle, 420. *Handy v. The State*, 7 Harr. & John. 42. *Hogland v. Sebring*, 2 South Rep. 105. *Clarke's lessee v. Courtney*, 5 Peters' Rep. 319. *Laythorp v. Bryant*, 1 Bing. N. C. 421. *Hatfield v. Montgomery*, 2 Porter's Rep. 58. *Bennett v. Robinson's adm'r*, 3 Stewart & Porter, 227.

The testimony of such witnesses, is said to be the best of which the nature of the case admits; as they are supposed to know more of the facts attending the execution, than others. (See *McMurtry v. Frank*, 4 Monroe, 39; *Roberts v. Teunell*, 3 id. 250; *Handy v. The State*, 7 Harr. & John. 48, 49; *McPherson v. Rathbone*, 11 Wend. 136; *Pelletreau v. Jackson*, id. 110; *Whitmore v. Brooks*, 1 Greenl. Rep. 59; *Jones v. Blount*, 1 Hayw. Rep. 238; *Baker v. Blount*, 2 id. 404; *Cooke v. Woodrow*, 5 Cranch, 13; *Simmons v. The State*, 7 Hamm. Rep. 116.) Another reason for the rule has been given, viz: that the witnesses who subscribe at the time, are agreed upon by the parties, to be the only witnesses to prove the instrument. (See *Henry v. Bishop*, 2 Wend. 576; *Clark v. Sanderson*, 3 Binn. Rep. 194, 196, 198; *McMurtry v. Frank*, 4 Monroe, 39; *Ingram v. Hall*, 1 Hayw. Rep. 206, 207; *Handy v. The State*, 7 Harr. & John. 49; *Barnes v. Trompowsky*, 7 T. R. 262;

Simmons v. The State, 7 Hamm. Rep. 116.) Though this, in New-York, has been repudiated as to instrument not under seal, (**Henry v. Bishop**, *supra*. **Hall v. Phelps**, 2 John. Rep. 452. See the next succeeding note.)

In Kentucky, the court of appeals, proceeding upon the ground that the subscribing witnesses are agreed upon by the parties as the first to be called in order to prove the fact of execution, have held, that a person who executed an attested note under seal, as attorney for another, was not competent to prove its execution, unless the absence of the subscribing witness was first excused. (**McMurtry v. Frank**, 4 Monroe, 39, 40.) See also **Barry v. Wilbourne**, 2 Bail. Rep. 91; **Barton v. Keith**, 2 Hill's Rep. 537. In **Jackson, ex. dem. Ellice, v. Britton**, 4 Wend. Rep. 507, it is said, in the marginal note, that one of two attorneys executing an attested deed, may prove its execution by himself, but not by his co-attorney; as to the latter, the subscribing witness must be called. Such, indeed, was the decision at the circuit, as appears from the report at p. 508, 509, but the supreme court gave no opinion upon the point, deeming it unnecessary. (Id. p. 511.) See **Lessee of Peters v. Condron**, 2 Serg. & Rawle, 80. Even where the instrument is only signed by the party who seeks to avail himself of it, it seems, in general, necessary to call the subscribing witness. (See **Bradshaw v. Bennett**, 5 Carr. & Payne, 48.) In **Willoughby v. Carleton**, 9 John. Rep. 136, the grantee, in an attested deed of lands, was offered to prove its execution; and the court held his testimony inadmissible, until the absence of the subscribing witnesses was accounted for. (See **McConnell v. Brown**, Litt. Sel. Cas. 462, 463, stated post note 878, p. 1264; also **Pickett v. Claiborne**, 4 Call's Rep. 99.) But in a prosecution for forging an instrument, e. g. a note purporting to be attested by witnesses, the prosecutor may in the first instance resort to the testimony of the apparent maker, without calling upon the attesting witnesses. (**Simmons v. The State**, 7 Hamm. Rep. 116.)

The rule calls for such witnesses as attested the execution relied on. Others, who subscribed afterward, though present at the execution, cannot prove it, unless the absence of those who subscribed at the time is duly excused. Hence, where S., whose name appeared upon the instrument as one among several subscribing witnesses, testified that he saw the party execute it, and saw the other witnesses subscribe; that the instrument had ever since been in his possession; that he did not subscribe his name as a witness to the execution, at the time, but had done so since the beginning of the trial; held, that he could not prove the execution, until the non-production of the other subscribing witnesses was accounted for. (**Henry v. Bishop**, 2 Wend. 575.) See **Homer v. Wallis**, 11 Mass. Rep. 309. If a person acknowledges the execution of an instrument (e. g. a deed) to a witness, who thereupon with his assent attests it, no matter it seems how long after the execution, such witness is within the general rule and must be called, provided that is the execution sought to be established. The witness in such case is fully competent, though he did not see the party sign, &c. (**Munns v. Dupont**, 3 Wash. C. C. Rep. 32, 42. **Kingwood v. Bethlehem**, 1 Green's Rep. 228. **Jackson, ex. dem. Parker, v. Phillips**, 9 Cowen's Rep. 94, 113.) But the rule does not call for persons whose names have been put to the instrument without the assent of either the witness himself, or the parties. Nor for such as could not be examined if called on. See post p. 475, 476, of the text, and notes.

One of the subscribing witnesses is sufficient to prove the instrument, though there

are several. (Jackson, ex. dem. Edson, v. Gager, 5 Cowen's Rep. 385. Fitzhugh v. Croghan, 2 J. J. Marsh. Rep. 434. Russell v. Coffin, 8 Pick. 143, 149, 150.)

NOTE 877—p. 465.

See S. P. Hoogland v. Sebring, 1 South. Rep. 105; McConnell v. Brown, Litt. Sel. Cas. 462, 463; Kingwood v. Bethlehem, 1 Green's Rep. 226, 227; Johnston assignees, &c. v. Knight, 1 North Car. Law Repos. 93; Johnson v. Mason, 1 Esp. Rep. 89.

This rule has been relaxed, in New-York, as to certain instruments not under seal. Thus, a promissory note was allowed to be proved by the acknowledgment of the maker, against whom it was sought to be established, without calling the subscribing witness. (Hall v. Phelps, 2 John. Rep. 451.) And Spencer J. said, that the confession of a party of his having given a note, or other instrument, precisely identified, is as high proof as that derived from a subscribing witness; and that "the notion, that those who attest an instrument are agreed upon to be the only witnesses to prove it, is not conformable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity." (Id. 452.) But, notwithstanding the broad and sweeping *dicta* of this case, it is questionable whether the rule established by it extends to other than *negotiable paper*. (See per Kent, C. J., in Fox v. Reil, 3 John. Rep. 478, 479; per Spencer, C. J., in Shaver v. Ehle, 16 id. 202; per Savage, C. J., in Henry v. Bishop, 2 Wend. 576.) At all events, the admission must be clear and explicit, referring to the very instrument, or the subscribing witness must be called. Accordingly, where a person called on the maker of a note, payable to A. or bearer, and requested payment, but did not show him the note, nor state to him its amount or date, and the maker acknowledged he had given A. a note, saying he would pay it at a future day; held, that this was not sufficient proof of the note to dispense with the subscribing witness. (Shaver v. Ehle, 16 John. Rep. 201, 202.) With respect to *sealed instruments*, the doctrine of the text has been steadily adhered to in New-York; and an acknowledgment of the party of his having executed such an instrument, will not supersede the necessity of calling the subscribing witness. (Fox v. Reil, 3 John. Rep. 477. Henry v. Bishop, 2 Wend. 575.)

In Kentucky, the doctrine in the text has been followed as to unsealed, as well as sealed instruments; and where an attested promissory note was offered in evidence, which had been admitted as genuine by the party, in his answer to a bill in chancery, held, that the subscribing witness must nevertheless be called. (Roberts v. Tennell, 3 Monroe, 247, 250.) So in Ohio. (Zerly v. Wilson, 3 Hamm. Rep. 42.) Further, as to the distinction between sealed and unsealed instruments, see the cases, post note 879.

NOTE 878—p. 465.

The doctrine of the text is undoubtedly the result of the best considered cases on this subject, though, as we saw ante, note 860, p. 1211, 1212, there are several *dicta*

which look very much like allowing instruments, not the foundation of the action, but coming in collaterally, to be proved by inferior evidence.

The English rule as laid down by our author, was recognized and acted upon in *Roberts v. Tennell*, 3 Monroe, 247, 250. See also, *Jackson, ex. dem. Bowman, v. Chistman*, 4 Wend. 277. In *Beale's ex'rs v. The Commonwealth*, for the use of Smedley, 11 Serg. & Rawle, 305, an action was brought on a recognizance, against the sureties of a coroner, for that the latter had refused to sell on a *venditioni exponas*, after a return of levy on a *fi. fa.* The return to the *fi. fa.* was signed by D. M. for the coroner, and the plaintiff sought to show by the acts of D. M., and other oral evidence, that he was a deputy of the coroner: but it appearing that D. M.'s appointment was in writing, attested by subscribing witnesses, and the writing in court, held, that it must be proved, and that, for this purpose, the subscribing witnesses were indispensable. See also *Beale's ex'rs v. The Commonwealth*, for the use of Worrell, id. 299, 303, 304. How far these cases are consistent with the general rule on the subject of proving official character, see ante, notes 426, 427, p. 554, 555; also ante, note 475, p. 627. In *McConnell v. Brown*, Litt. Sel. Cas. 459, the only fact material to be proved was, that a certain deed was executed prior to the time when an execution was delivered to the sheriff. The deed itself (which was read in evidence, as a recorded deed, without proof by the attesting witnesses,) bore date anterior to that time, and the presumption of its having been executed on the day of the date, was not repelled by any proof in the cause. But the party saw fit to fortify the legal presumption, as to the time of actual execution, by the testimony of the grantee, who was disinterested; his testimony, however, was objected to at the circuit, on the ground that the subscribing witnesses alone were competent to give testimony; but the objection was overruled, and he was permitted to testify. On the case coming before the court of appeals, Boyle, C. J., delivering the opinion of the court on this point, said, that every matter in relation to the execution of an instrument can be proved only by the subscribing witnesses, if they can be produced, and are capable of being examined; that it is the same whether the instrument be the foundation of the action, or comes in collaterally, &c. "It is true that French's testimony, (the grantee,) as to the time of the execution of the deed in question here, was immaterial. But the immateriality of his testimony is a reason rather for excluding, than for admitting it; for the circumstance that testimony is immaterial, is in itself, a good objection to its admissibility. The circuit court, therefore, erred in admitting French's testimony." (Id. 462, 463.) See per Lord Ellenborough in *Wardell v. Fermor*, 2 Campb. Rep. 234. In *Brashear v. Burton*, 4 Bibb's Rep. 442, the same court which decided *McConnell v. Brown*, supra, laid down a doctrine entirely opposite. They there gave it as their opinion, that the plaintiff, who claimed title to certain negroes under a bill of sale under seal, and attested by subscribing witnesses, might prove the instrument by the vendor, (he not being interested,) without accounting for the subscribing witnesses; and they said, that the rule calling for the subscribing witnesses, was confined to cases where the deed was directly in issue, and did not apply when it came in question incidentally. (Id. 443.)

In Maine, where a witness swore to certain facts, contrary to his own admission in a written contract made by him with the party against whom he was called; held, that such party might read the contract in evidence, without calling the subscribing

witness thereto, the witness on the stand testifying that his signature to it was genuine. The court place the decision on the peculiar circumstances of the case, the paper being offered merely in the light of a declaration by the witness, inconsistent with his previous testimony. (*Drew v. Wadleigh*, 7 Greenl. Rep. 94.)

NOTE 879—p. 466.

We have seen how far the general rule has been relaxed in New-York as to unsealed instruments, ante, note 877, p. 1263. No distinction is made between sealed and unsealed instruments, in respect to the necessity of accounting for the subscribing witnesses, in South Carolina; (*Townsend v. Covington*, 3 McCord, 219;) nor in New-Jersey; (*Williams v. Davis*, 1 Penn. Rep. 177;) the latter was the case of a negotiable promissory note; and held, that the subscribing witnesses must be called or accounted for, before resort to any other evidence. So also in Kentucky; (See *Roberts v. Tennell*, 3 Monroe, 247, 250, stated ante, note 877, p. 1263;) and in New-Hampshire; (*Farnsworth v. Briggs*, 6 New-Hamp. Rep. 561;) in Pennsylvania; (*January v. Goodman*, 1 Dall. Rep. 208;) and there, attested receipts for money or property have been adjudged to come within the general rule. (*Heckert v. Haine*, 6 Binn. Rep. 16. *McMahan v. McGrady*, 5 Serg. & Rawle, 314.) So in Vermont: (*Pearl v. Allen*, 1 Tyl. Rep. 4;) Alabama; (*Bennett v. Robinson's adm'r*, 3 Stewart & Porter, 227;) and Ohio; (*Simmons v. The State*, 7 Hamm. Rep. 116. *Zerby v. Wilson*, 3 id. 42.)

NOTE 880—p. 466.

See per Kent, C. J., in *Fox v. Reil*, 3 John. Rep. 477; *Grady v. Sharron*, 6 Yerg. 320.

The admission of the execution of the instrument on a former trial, will be considered a concession for the purpose of that trial merely, and therefore will not dispense with the necessity of producing the subscribing witness on a subsequent trial. This was held in respect to an attested receipt of property. (*Pearl v. Allen*, 1 Tyl. Rep. 4.)

NOTE 881—p. 466.

Where there are two or more subscribing witnesses, and one is incompetent, being interested, you cannot resort to proof of their hand-writing, without accounting for the absence of the others. (*Davison's lessee v. Bloomer*, 1 Dall. Rep. 123. *Whittemore v. Brooks*, 1 Greenl. Rep. 57. *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277.)

There are several cases recognizing the doctrine, that where the witness' interest arises subsequent to the attestation, so as to exclude him from testifying, proof of his hand-writing will be received. In *Godfrey v. Norris*, 1 Strange, 34, the attesting witness had, subsequent to his attestation, been appointed administrator of the obli-

gee in the bond sued upon, and so was plaintiff; yet held, that proof of his hand-writing was enough. So, where the witness after the attestation married the plaintiff who sought to establish the instrument. (*Bulkley v. Smith*, 2 Esp. Rep. 697.) And in these cases, it seems, proof of the hand-writing of the witness, without any further evidence, will suffice, in the first instance, to allow the instrument to be read to the jury, though it is usual for greater caution to add corroborating circumstances. (See the above cases. Also *Hamilton's lessee v. Marsden*, 6 Binn. Rep. 45. *Ellis v. Hatfield*, Mart. N. Car. Rep. 41. *Lautermilch v. Kneagy*, 3 Serg. & Rawle. 202. See *Bell v. Cowgell*, 1 Ashm. Rep. 7; *Godfrey v. Norris*, 1 Strange, 34; *Bulkley v. Smith*, 2 Esp. Rep. 697; *Mitchell v. Johnson*, 1 Mood. & Malk. 176; *Crowell v. Kirk*, 3 Dev. 357.) In *Bell v. Cowgell*, 1 Ashm. Rep. 7, a subscribing witness whose hand-writing was proved on the part of the defendant in order to establish the execution of an assignment, had become special bail for the defendant, and so rendered himself incompetent. But the court held, that notwithstanding he had incapacitated himself by his own means, evidence of his hand-writing was properly admitted; and it was likened to the case of *Godfrey v. Norris*, supra. See also *Nelius v. Brickell's adm'r.* 1 Hayw. Rep. 19; *Hovill v. Stephenson*, stated infra.

It is otherwise, where the party seeking to prove the instrument, has given the witness an interest, under circumstances which do not rebut all idea of an intent to embarrass the other party in his proofs, or defraud him. Where there is ground for a suspicion that it was done in order to be let in to give secondary evidence, the case, in point of principle, would seem to range along with those where a party, with the like purpose, has voluntarily destroyed the better evidence in his possession. (See ante, note 861, p. 1216.) In *Hamilton v. Williams*, 1 Hayw. Rep. 139, the plaintiff sued upon a bond which had an endorsement upon it, purporting that the instrument had been assigned to the subscribing witness; and the plaintiff insisted upon being allowed to prove the witness' hand-writing. *Macay, J.*, inclined to the opinion that such testimony would be inadmissible, but stayed the judgment until the question should be further argued before more of the judges. All we can ascertain in relation to the final disposition of the case, is a brief entry in 2 Hayw. Rep. 101, as follows—"This case coming on, *Moore, J.*, was of opinion that the witness was incompetent." In *Hall v. Bynum*, 2 Hayw. Rep. 328, a similar question arose. *Hall*, assignee of *John Short*, brought debt on a bond executed by *Bynum*. The bond was originally given to *James Short*, and *John* was the attesting witness. *James* had assigned it to *John*, and *John* to the plaintiff. The question was, whether the bond was sufficiently proved by evidence of the hand-writing of *John Short* and that of *Bynum*, the obligor. *Hall, Judge*, after argument, said, that the case was something like *Godfrey v. Norris*, supra, but not at all like the case where the subscribing witness dies, &c.; for these disqualifications are not brought about by the agency of the obligee. "Here it is; and, by such means, a forged bond may be easily established against any one, without swearing to a falsity. The subscribing witness writes the name of the obligor, and the payee or obligee assigns to him; and then, some person acquainted with the hand-writing of the subscribing witness swears to it. Proof of the hand-writing of the obligor is liable to a similar objection; for if the proof of his hand-writing will do, then by a like assignment to the witness, something that he knew for the advantage of the obligor would be kept back." The case was argued afterward again, but the above opin-

ion was adhered to, and the proof held incompetent. The same was afterward deliberately determined, where the subscribing witness himself, being the assignee of the bond, was plaintiff in the cause. The court laid down the rule very broadly. They said, the subscribing witness is selected by the parties to bear testimony to their contract, in case a dispute should arise; that his production has been dispensed with in cases of necessity only; as, where he is dead, has removed beyond the process of the court, become infamous, or interested *by operation of law*. But the necessity in the present case, it was observed, "arises entirely from the act of the person, (or at least with his concurrence,) who offers the lesser evidence, which certainly cannot and should not form an exception to the general rule." (Johnston assignee, &c. v. Knight, 1 Murph. Rep. 293.) A like case was subsequently brought before the court, on the single question, whether the instrument might not go to the jury upon proof of the acknowledgment of the obligor that he had executed it. And held, that it could not. (Johnson assignee, v. Knight, 1 North Car. Law Repos. 93.) In Alabama, the same general doctrine was held, where the subscribing witness to a note took an assignment thereof, and sued upon it. (Bennet v. Robinson's adm'r. 3 Stewart & Porter, 227.) The case of Howill v. Stephenson, 5 Bing. 493, furnishes an instance where the common pleas in England acted upon a doctrine similar to that recognized by the above cases. The action was on a charter party. At the trial it appeared that the attesting witness was, by agreement with the plaintiff subsequent to the attestation, admitted to a share of the profits which the plaintiff expected to arise from the bargain. The witness being called by the plaintiff was objected to by the defendant, and rejected; it was next proposed to prove his hand-writing, but this was objected to also, and the objection allowed; whereupon the plaintiff not being able to prove the charter party, was nonsuited. It seems, also, that the witness refused to release his interest. On proceedings afterward taken to set aside the nonsuit, Best, C. J., delivered the opinion of the court, affirming the decision of Park, J., who tried the cause, and discharging the rule for setting aside the nonsuit. He did not question the authority of Godfrey v. Norris, or Bulkley v. Smith, *supra*; but on the contrary, he said, "we should be disposed to extend the principle of those decisions to the case of a man entering into partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that, in all these cases, such evidence should be received, as otherwise, parties must lose the rights secured by the instruments attested, or forego accepting of situations most important to their welfare. It would be a hard thing, if the law were to say, that a man should not become an executor, or administrator, or accept a beneficial partnership, without giving up debts due to the estates in which he has acquired an interest. But, in the present case, *the witness has only obtained an interest in the contract which he was to prove, and that interest he derived immediately from the plaintiff who proposed to call him.* The plaintiff cannot complain that his witness is disqualified, when he himself has been the cause of the disqualification." The learned chief justice remarked upon the circumstance of the witness having refused to release his interest, as an evidence of the deep bias which his mind had probably received, and the danger to be apprehended from such testimony. "It would be improper," he adds, "to allow a plaintiff to give such an interest to a person, in the particular transaction in which he is obliged to call him as a witness, as is likely to bias

his testimony." He regarded the case of *Forrester v. Pigou*, cited ante, p. 138 of the text, as stronger than the present. "The plaintiff in that case gave the witness an interest after the cause of action accrued, without the privity of the defendant, and yet the court would not allow the defendant to call him. If a plaintiff in such a case as this, had a right to say, you must either allow me to call a witness whom I have rendered interested to support my claim, or allow me to prove his hand-writing, you put a defendant under the necessity of having a case proved against him by interested testimony, or giving up the opportunity of obtaining a knowledge of any circumstances that occurred at the time of the execution of the instrument, by the cross examination of the attesting witness." (S. C. 3 Moore & Payne, 146. See per Richardson, C. J., in *Farnsworth v. Briggs*, 6 N. Hamp. Rep. 563, 4.)

Further, in respect to the mode of proving attested instruments, where the witness is interested, see post, note 894.

NOTE 882—p. 466.

Such is the general rule. The power should be produced and proved, so that it may be seen whether there was authority for the act done, and also whether the act has been performed in a proper manner. (*M'Murtry v. Frank*, 4 Monroe, 39, 41. *Talman v. Emerson*, 4 Pick. Rep. 160. *White v. Skinner*, 13 John. Rep. 307. *Yarborough v. Beard*, 1 Tayl. Rep. 25. Per Walworth, Chancellor, 11 Wend. 125. *Corbin v. Jackson*, 14 id. 619. See *McConnell v. Bowdry's heirs*, 4 Monroe, 392. *Newman v. Chapman*, 2 Rand. Rep. 93.) But where, in an action against the East London Water-works Company, the plaintiff tendered in evidence a deed, signed by the chief clerk and solicitor of the company, held, that proof of his being such, entitled the deed to be read. (*Doe, ex dem. M'Leod, v. East London Water-works Company*, 1 Mood. & Malk. 149, 150.) Otherwise, as to a sealed instrument for the payment of money, executed by a clerk in a store in the name of his principals, the clerk being, (according to the statement in the report,) "their general agent, &c." In order to authorize him to execute an instrument under seal, his authority, it was held, must be by deed. (*McMurtry v. Frank*, 4 Monroe, 41.) The same rule applies to partners, assuming to bind each other by instruments under seal, except in a few instances. (*Trimble v. Coons*, 2 Marsh. Ken. Rep. 375. 3 Kent's Comm. 47, 8, 3d ed., and the cases cited in notes (a.) and (b.) at the latter page.) But one partner may be bound by a deed, executed on behalf of the firm, by his co-partner, provided there be either a previous parol authority, or a subsequent parol adoption of the act. (3 Kent's Comm. 48, 3d ed. *Cady v. Shepherd*, 11 Pick. Rep. 400. *Brutton v. Burton*, 1 Chitt. Rep. 707. *Skinner v. Dayton*, 19 Johns. Rep. 513. *Gram v. Seton*, 1 Hall's Rep. N. Y. C. P. 262. *Darst v. Roth*, 4 Wash. C. C. Rep. 471.)

A deed is good, though signed by a third person in the party's name, if done in his presence, and by his request. (*Rex v. the inhabitants of Longnor*, 4 Barn. & Adol. 647.) But, in such cases, the person who wrote the name should be called, it has been held, to prove it. (*M'Kee v. Myers' ex'rs.* Addis. Rep. 31.) See, however, ante, note 423, p. 553.

A power to execute a deed will, in many instances, be presumed. See ante, note 311, pp. 361, 2, 3, 4, 5. In most cases, where the deed would be evidence as an ancient deed, without proof of execution, the power under which it purports to have been executed, will be presumed. (Per Parker, C. J., in *Talman v. Emerson*, 4 Pick. 162. *Inman v. Jenkins*, 4 Greenl. Rep. 248. *Robinson v. Craig*, 1 Hill's Rep. 389. *Doe, ex dem. Clinton, v. Phelps*, 9 Johns. Rep. 169. *Doe, ex dem. Clinton, v. Campbell*, 10 id. 475.) In respect to the doctrine requiring powers to be shown, as applicable to the case of public officers and others executing deeds under particular statutes, or the judgment decree or order of some court, &c., see post, note 891.

NOTE 883—p. 467.

The following extract from an opinion delivered by Haywood, J., in which he explains the requisites of a deed, possesses sufficient merit to justify its insertion, and is well worth the attention of the student. The question in the case was, principally, whether an attesting witness was necessary; but the learned judge took a wide range, considering, 1st. the origin of reducing contracts to writing, 2nd, the origin of sealing, with the uses that have been made of it at different periods, and 3rd, the origin of delivery.

"I. All writers agree that the northern nations of Europe, who spread themselves over the southern and western parts of it, were an illiterate people, who despised all arts but those of war. The Saxons who founded the heptarchy in England, and afterwards the English monarchy, were part of those people—they had, in general, no knowledge of letters—their laws and customs, their legal ceremonies, were preserved and transmitted to others and to posterity by tradition only. To keep up a military spirit, and to have a band of warriors always ready at command, it was the universal practice of the conquering leaders of these nations to divide the conquered country into allotments, which were parcelled out to their followers: first, at the will of the lord or leader; next, for the better encouragement of agriculture, for life; and, last of all, for ever or in fee. About the time when it began to be usual to make these grants for life, the christian religion, under the auspices of the papal see, was propagated in England by St. Augustine and others, and was soon adopted and received as the national religion. Its priests were men of some learning—they here, as in all other places where they have been received, began to grasp at temporal advantages—they inculcated upon the minds of the people, that it was an act of the most meritorious piety to provide for the maintenance of the ministers of God. This doctrine had its effect, and donations of allotments of land began to be made to the church, also for life: but this life was supposed to be perpetual, as the church never died. The donations of these allotments, for want of a better method of perpetuating the transaction among the laity, who knew nothing of letters, had always been made by livery of seizin, done in the most solemn form, to impress it on the mind, before a number of the co-vassals or tenants of the lord; who in case of a dispute, were assembled in the lord's court, and determined, chiefly by the remembrance which these impressions had made, between the parties. The presumption was, that if some who were present, from

length of time, had forgotten some of the circumstances or conditions annexed to the donation, others of them might remember them, and so, by the united remembrance of all together, might, in the end, ascertain the true state of facts. This, by the way, I suspect was the origin of juries, and of the unanimity required in their decision. Each juror contributed the circumstances lodged in his mind to the general stock of information which formed the verdict; and, by conference with his fellows brought to their recollection the circumstances which he remembered, and the others, or some of them, had forgotten, until at length the whole transaction was renovated in the minds of all. This mode of conveyance answered the purpose sufficiently, when donations were for the life of an individual only; for it would seldom happen that he would survive all the other *pares* of the lord's court, who were present at the investiture. But when donations were made for life to a churchman, for the benefit of his church, and it was a received maxim that the church never died, this method no longer answered the purpose as to them; for the donation might have continuance, and the conditions upon which it was made, might come in question, after every one of the *pares* present at the investiture were no more, and then the allotment might be liable to be resumed by the lord; all lands included in his territory or manor, not granted to one of his vassals, belonging to him; and, after the death of all the *pares*, no evidence remained of the investiture, much less of the conditions annexed thereto. It became necessary, therefore, when the church was concerned, to have some other mode of perpetuating the transaction than mere livery of seizin; and the clergy being the learned part of the community, devised the mode of reducing the terms of the donation to writing. Sullivan 82. And when the lord, on account of sickness, the distance of the land from his place of residence, his being employed in some other business, or some other cause, could not go upon the land to make livery, then the writing containing the terms of the donation was solemnly delivered, before the peers of the court also, in lieu of the land; to the end that, being delivered before them in so solemn a form, they might be witnesses of the investiture of the land mentioned therein, and might be able upon trial to ascertain the identity of the paper delivered, should the dispute happen in their time. This was not indeed a complete investiture of itself; it was termed the improper investiture, and bound the lord to make a more formal livery of seizin of the land contained in the deed at a future day, and was a sufficient security to the donee in the *interim*. Experience evinced the safety and certainty there was in reducing these landed contracts into writing in the case of churchmen, and the laity, wishing to be as secure as possible in their possessions, adopted by degrees the same method; which afterwards, when these allotments were extended to the heirs of the possessor, became equally necessary for the laity as the clergy, and from that time, deeds of feoffment, to accompany the livery of seizin, became generally used, though the livery of seizin was good without them; and these contracts in writing, being found so advantageous in perpetuating the terms and conditions of a landed donation, were, by degrees, converted to the purpose of perpetuating other contracts, that concerned only personal estate, which formerly, amongst the unlettered Saxons, were completed by shaking of hands only. 2 Black. Com. 448.

"II. The preserving the remembrance of a landed contract, having thus become general in the times of the Saxon government in England, and the general illiterature of the laity of all ranks prevailing universally, it was customary for them to put some

mark, usually the sign of the cross, to identify, as well as they could, the writing they had agreed to; and this was done *coram paribus*, who, upon the trial, might remember it, or be able to distinguish it from some circumstance attending the making the deed or the mark itself. But upon the Norman conquest, it became the policy of the conqueror and his sons to abolish the Saxon customs, and for this purpose to draw as many causes as possible to be determined in the *curia regis*, where the judges were Normans, Sulliv. 339, 343, 369, 374, where the *pares* of the neighborhood were frequently not called upon to decide between the litigants, as they uniformly were in the courts of Saxon institution, the county court, hundred court, &c. About this period the Bishop was separated from the Sheriff in his county court; and it was established as a rule, that the county court had not cognizance of any demand of more than forty shillings value; the consequence of which must have been, that all causes were carried into *curia regis*; and it must frequently have happened also, that the marks affixed to the deeds, for want of the *pares*, were incapable of any distinction, and of course any proof of the identity of the instrument. This produced an inconvenience. The greatest men among the laity could not write their names, so as to give a proof of identity that way, and being under the necessity of providing some more certain criterion of identity, than that of the sign of the cross, they introduced for the first time into England, the practice of impressing their writings with a seal. Sulliv. 374. *Terms de ley, verbo Fait.* Gilb. Law of Evid. 17, 18, 20, 78. The seal exhibited the emblem which its owner had affixed to his person, when covered in the field with his coat of mail; and which, being portrayed upon some conspicuous part of his dress, served to designate his person. These symbols came to be very much in use at the time of the crusades to the holy land, in the time of Richard I. and after, and were continued by the knights and other persons, who then used them by way of distinction in their families after their return home. The seal, therefore, of any distinguished person, could immediately be known by inspection only. This method of sealing, however, was not introduced all at once, but by degrees. It was at first only used by such as were entitled to those distinguishing symbols; by the nobility and gentry only. For Lucie, chief justice of Henry 2, reprimanded a common man, who had made use of a seal, saying, that belonged to the nobility only. *Terms de ley, ubi supra*, and several other books. But it is to be remarked, that about this period, and for some time before, the common people had but little use for seals, as they could have but few contracts. The conquest had introduced the maxim of non-alienation without the consent of the lord. A great number of them were villains, who could not acquire property at all, but for their masters: and as to the feudal tenants, they were continually harassed by attending their lords in war. Commerce had not yet began to flourish and increase the personal property of the nation. The old law authors of those times have scarcely a chapter upon personal property. 2 Bl. Com. 385. And even when the doctrine of non alienation began to wear away imperceptibly, the common people, being not entitled to any family distinction, had no seals, and were obliged to contract as formerly was used before the introduction of sealing. The uncertainty of such a method begat, in combination with other circumstances peculiar to those times, the practice of conveying by fine; where the whole transaction, with the precise terms of the conveyance, were recorded in one of the King's courts, and obviated completely any future controversy respecting the execution of a deed.

At length, however, the eyes of the nation began to be opened to their true interest; trade flourished; agriculture was encouraged; personal property increased; lands, or part of them at least, began to be freely alienated; they were made liable to answer the debts of the merchant, and as to part of them, the debts of any other proprietor. Contracts, both for real and personal property, became frequent among all ranks of men. The necessity of authenticating their written contracts became urgent; they of course used the best mode then known. They broke through the privileges of the nobility and gentry, and made seals with such impressions as each man's fancy suggested to be the properest mark for distinguishing his contracts. By the time of Edward 3, seals were in general and common use. *Terms de ley, ubi supra.* Cunningham, Title deeds, who cites Perkins, 229, and *sequentia*. And it became a rule of law that a deed could not be constituted without a seal; and the method of signing with the sign of the cross, or some other mark, had gone into total disuse. Thus it seems clear, that the seal was originally introduced in the place of signing, as an evidence of the identity of the writing, which contained the party's agreement, and afforded a full proof thereof by the inspection of its impression only; and signing by the party was held unnecessary and useless. In reality it could contribute but little to the proof of the writing, as long as the illiterateness of the people continued; which was until some time after the introduction of printing into England, in the time of Edward 4, insomuch that, as late as the time of Henry 7, the being able to read was held to be a legal proof of a man being a clergyman, or clerk in orders. (4 Bl. Com. 360.)

"This universal use of seals, however, produced its inconvenience, when every man who made a contract was obliged to use a seal to authenticate it. Many of those seals were not known to the jurors, and they could not determine in many instances on the authenticity of the instrument upon the inspection of the seal only. They were under a necessity therefore, to call upon those who were supposed to know the seal which the party used, to say whether that was the impression of his seal or not; and upon this evidence they decided, and sometimes upon the comparison of the seal with the impressions upon other instruments which were proved to be sealed by the party. But still, in contemplation of law, these seals were held to contain an intrinsic evidence in themselves of the contract to which they were affixed; and therefore, as well as for the purpose of being compared, the rule of law was that they should be carried out by the jury. (Gilb. Law Evid. 20.) But with respect to those seals which still retained sufficient distinction in themselves, as the great seal, the seals of the courts of justice, the seals of corporations, and some others, no proof as to them was required or perhaps was allowed. They still continued to answer the genuine purposes of seals at their first introduction, and were full evidence of themselves. The people began at length to forget the original use of this institution, and to seal with any impression they could get; and the law, rather than invalidate the whole transaction, left it to the jury to decide whether that was the seal of the party or not. In this country the people have departed still further from the true use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal. To the first of these abuses the law has conformed, and will now deem the sealing to be sufficient, if found by the jury to be the seal of the party. For fear of destroying some contracts improperly made at first, it has relaxed from strict propriety, and the practice of sealing with any impression has become general; and is

now from necessity, allowed to be good in every instance. Cunn. verbo *deeds* cites Perkins, 129, 34. Cro. Car. 149. Gib. Law Evid. 20. But still the contemplation of law is in conformity to the ancient use of seals. They are deemed the signs of authenticity, are supposed to have an intrinsic evidence in themselves, and for that reason are carried out by the jury. Gib. Law Evid. 17, 20, cites Sid. 145. Hard. 118. Plow. Com. 411. And Sir Edw. Coke, speaking of deeds, page 6. b. says, "also the deed may receive credit *per collationem sigillorum, scripturæ, &c.*" and Baron Gilbert, in his note upon 2 Bac. Ab. 494, says, "the seal appearing, it must be presumed to be put there by the parties to the deed;" and cites Leo. 25; Owen, 23; and Bend. 1.

"In the reign of Henry 7, and Henry 8, learning, and the art of writing, had become much more general than in former times, and by this time also seals had become much less a mark of distinction and proof of the individual contract made by the parties, than in former reigns: but the rule, that the deed must be authenticated by the party's seal, had passed into settled law. In order, therefore, to give a surer proof of the seal which proved the writing that contained the agreement of the party, subscribing his name at the foot of the instrument, immediately after its conclusion, and prefixed to the seal, in the same place and in the party's own hand-writing, began to be used. Noy. 163. And although it was held in conformity to the rule then established, and which has ever since continued, that such a signature was not necessary to the essence of the deed; yet where the jury could not decide with respect to the deed, upon inspection of the seal merely, nor be satisfied by a witness who knew the impression, nor by a comparison of the seal in dispute with other seals made use of by the same party, they were allowed to form their judgment upon the hand-writing of the party prefixed to the seal; and that was the *scripturæ* intended by Sir Edward Coke, in the passage above cited, where, speaking of the doctrine of deeds, and of presumption, he says, "also the deed may receive credit, *per collationem sigillorum, scripturæ, &c., et super fidem cartarum, mortuis testibus erit ad patriam, de necessitate, currendum.*" (Co. Litt. 6 b.) It may be here supposed he meant the hand-writing of the witnesses; but this is not his meaning, for he says expressly, in the very next page, that the clause of *his testibus* is not essential to the deed; and in page 6, a, he says, "very necessary it is," by which he means advisable or prudent, "that witnesses should be underwritten or endorsed for the better strengthening of deeds," (not that it is absolutely necessary to make them valid;) "and their names, if they can write, written with their own hands," not that they must necessarily be subscribed with their own hands. Even at this day, there were many witnesses who could not write their own names, and their names were to be endorsed; and when these witnesses, namely, witnesses who had not subscribed their names in their own hand-writing, could not be found or were dead, then the deed was to receive credit *per collationem sigillorum et scripturæ*, coupled together. This proves the position, that the signature of the party was used as a proof of the seal. If it was not evidence of the seal, then it was in vain to prove the hand-writing at all; for that of itself was totally unessential to the deed, and made no part of its essence, as the same author had said in the page last preceding, and as is held to be law at this day. Salk. 462. pl. 2. And, that the proof of the signature of the party, when admitted, is used as a proof of the seal, is avowed in terms almost unequivocal, by Baron Gilbert, in his law of evidence, 99, 103, where he says, "for

though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is not full proof of the deed, for the delivery is necessary to the essence." Does not this manifestly imply, that the proof of the hand-writing, proves every thing, which is of the essence of the deed, but delivery only : and of course that it proves the seal ? With respect to an attested sealed instrument, it is the common practice in the English courts, where the witnesses are not to be found, to prove both the hand-writing of the witnesses and of the party. Bl. Rep. 532, *Forbes, executors, &c. v. Wale*, such proof admitted, before Lord Mansfield, to be given. 2 Brown's Ch. Rep. 536, 538, the same proof admitted before the Lord Chancellor, and stated by the counsel opposed to the fact it meant to establish, to be evidence in the common form. The same proof must also have been admitted in the case of *Gould and Jones*, reported in Bl. Rep. 384, as may be seen by having recourse to the case itself ; and the same kind of proof was clearly admitted in the case of *Coghlan and Williamson*, reported in 1 Doug. 93. But why in all those cases is the proof of the party's signature held necessary, if proof of the witnesses hand-writing proves both sealing and delivery, and not the delivery only ; From the reason of the thing itself, and more especially from the great weight of these combined authorities, it seems to be a conclusion fairly warranted, that at this day, whatever it might have been formerly, the seal is in some instances proved by the signature of the party. This holds in all those instances where the signature of the party is admitted to be proved : and that the seal always since its first introduction, has been used as an evidence of the writing in which the party has deposited his agreement.

" III. With respect to the delivery, I have no more to add to what has been already said relative to its coming into use instead of the livery of seizin, and being, like that, made in solemn form *coram paribus*, to the end it might make the deeper impression in their minds, than that this solemn delivery of the deed *coram paribus* being found to be well calculated to make the desired impression in the case of landed contracts ; and also, from the same solemnity, to excite in the party a reflection upon the subject he was engaged in, it was continued in other contracts ; and, like the seal, was considered an essential ingredient to the constitution of the deed. Here it may not be improper to remark upon the excellence of this institution when once established, though introduced gradually and for other purposes, in preventing all manner of surprize upon the party. It was first to be written ; this necessarily employed some time ; he had the interval for reflection ; it was to be read over to him if he requested it : then the wax was to be prepared and melted ; next a seal to be procured ; then an impression to be made : thus gradually approaching to the final act, still giving time for reflection, and exciting by each new act still greater apprehensions ; and last of all, lest the former precautions might not be sufficient to put him upon reflection, he was called to go before the *pares* of the neighbourhood, and make a solemn delivery of the instrument. After all these ceremonies were complied with, it was scarcely possible to believe that the party was circumvented by fraud, or surprized into what he had done. After the *pares* were disused, and the authority of the county and hundred courts diminished, I apprehend a delivery before the *pares* went out of use, but that a delivery of the contract was still used as a sign of the party's assent to the contract contained in the deed, and has ever since been deemed necessary to give it its final validity.

“Such seems to be the origin and progress of the several circumstances of writing, sealing and delivery of deeds, which came into use, not all at once, but at different periods of time ; and were used for perpetuating, authenticating and proving the complete and final assent of the party to his contract. Any other concomitant circumstances, besides those, though they have been sometimes used, and said to be incident to deeds, as signing by the party, subscription by witnesses, and many other, as may be seen in Co. Litt. 7, a., yet they have never at any period of time, been held material to the essence of the deed ; unless perhaps in some instances, where such circumstances have been required by statute ; and that these are the only necessary circumstances is proved by all law writers both ancient and modern. Co. Litt. 7, a, says, “I have termed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment. For if such a deed be without premises, *habendum, tenendum. reddendum*, the clause of *warranty*, the clause of *in cujus rei testimonium*, the date and clause of *hiis testibus* ; yet the deed is good : for if a man by deed gives lands to another and his heirs, without more saying, this is good, if he put his seal, deliver it, and make livery accordingly.” Wood, in his Institutes, adds, “where livery of seizin is necessary,” importing, as Lord Coke clearly did also, that if it were not a deed of feoffment, but a deed of some other kind, then putting the seal and delivering the writing, would make it a good deed. The same definition is given, and the same circumstances only mentioned as necessary, in 2 Rep. 4, 5. 10 Rep. 92. 3 Bac. Abr. 393. 2 Bac. Abr. 493, who cites 2 Roll’s Abr. 21. 1 Nelson’s Abr. 623. Terms de ley, verbo *Fait*. Co. Litt. 171, b. Gilb. Law of Ev. 78. Shepperd’s Touchstone of Common Assurances, and many others.

“After the production of this concurrent testimony of so many authors, it seems scarcely necessary to say that the subscription of witnesses in their own hand-writing to a deed, was never held necessary to its constitution. The reasons already assigned for the first introduction of seals, and their continuance for a long time afterwards, namely, the illiterature of the laity, proves also that the subscription of witnesses was not used during that long period, which commenced soon after the conquest and continued to the time of Henry VII. and Henry VIII. Even the *Magna Charta* of King John, given at Runningmead in the year 1215, mentions the archbishops, bishops, barons, &c., not particularly naming them ; and in the end is attested in this manner, *testibus supra dictis et multis aliis* ; and lest any thing should be added or subtracted from the form of the writing, he thereto put his seal. Bl. Law Tracts, 35, 36. In 1216, the first charter of Henry III. is attested thus, *testibus omnibus prenominationis, et multis aliis*. I infer from this, that in a matter of so much moment, they certainly used the best method of attestation then known or used, and as they did not subscribe their names, it is an evidence that the subscription of witnesses in their own hand-writing was not then practised. The attestation of private debts was in the same manner—the names of the witnesses were underwritten or endorsed, and this was used only as a memorandum to show who of the *pares* were present, to the end they might be called upon and associated to the jury, upon the trial of the issue, when the deed was denied. Vide Co. Litt. 6, a. and b., and sometimes it was said, *teste comitatu, hundredo*, &c. 2 Bl. Com. 307. I apprehend the practice of subscribing by the witnesses came into use at the same time with the subscribing by the party ; at a time when the law respecting deeds was already firmly established, and when both these

circumstances were held unessential, though perhaps both of them at the time might be useful; the signature of the party to prove his seal, and that of the witnesses, when they could not be found, to prove the delivery of the deed. For when it was proven by his own signature to be the seal of the party, there arose a very strong presumption from the proof of the hand-writing of the witness, that they had been present at the delivery. But this kind of proof was only resorted to when positive testimony could not be procured, and was not in the party's power to produce. To proceed a little further, the statutes of 2 Edw. II. and 9 Edw. III. speaking of the trial upon the issue *non est factum*, says, "the witnesses shall be summoned where there are witnesses named in the deed, but if they do not appear at the day appointed, the trial shall proceed notwithstanding their absence." Hence the conclusion follows, that in those days there were some deeds without witnesses named in the deed, and as to them there was no delay of trial. Secondly, that there were other deeds wherein witnesses were named, and that as to them, the trial could not be in their absence, for they were to be summoned and to make part of the jury. Thirdly, this statute directs that they shall be summoned as usual, but in case of their non appearance the trial shall nevertheless go on by the jury that are present. Fourthly, that there was some other method then used of proving a deed than by the witnesses named in the deed, or else this statute operated injustice by ordering the trial to proceed upon the first default of the witnesses (who perhaps might be convened at another day) and by so doing render the deed invalid and void; and this it is unfair to presume. That it could be proved by other means, is held by Lord Coke, 121, b., where he assigns reasons why the law requires the proof of a deed in pleading to the court, to wit, that it may be proved by the witnesses, or other proof, if denied. This opinion is strongly confirmed by some modern decisions, where the rule of law is held to be, that a witness shall not be permitted to deny his own attestation. The true meaning of which rule is, that if he does deny it upon the trial, the deed may be proved by others who were not attesting witnesses, and whose names were neither subscribed nor endorsed. Doug. 216. 4 Burr. 2225. This proves beyond all possibility of doubt, that the attestation of witnesses is not necessary; for if the delivery may be proved by persons who did not attest, in case of an attested deed, can there be any solid reason assigned why they may not prove the delivery in case of an unattested deed, where there are no witnesses to deny their attestation, and by that means bring a suspicion on the instrument? Upon this point I think it may be affirmed in perfect consonance with the rules of law, that at this day the attestation of witnesses, either by endorsing or underwriting their names in the hand-writing of the drawer of the deed, or by a subscription of their names in their own hand-writing, is in no wise essential to the validity of the deed; and from all these premises we may also infer some other conclusions.

"If writing, sealing, and delivery, be the only essential parts of a deed, and the law deems it valid without the further ceremony of a subscription by witnesses, then there must be some other competent means of proving the deed otherwise than by subscribing witnesses. It would be absurd to attribute validity to an instrument that had these essential parts, and yet say it should not be read to benefit the party producing it, unless proved by subscribing or endorsed witnesses." (Ingraham v. Hall, 1 Hayw. Rep. 193, 4 et seq.)

In several of the states, there are statutes prescribing the requisites of certain deeds. In these cases the instrument must conform to the statute, whatever that may

be. Thus, in Ohio, a statute requires that a deed for the conveyance of lands shall be signed and sealed by the grantor, in the presence of two witnesses, who shall subscribe the said deed, attesting the acknowledgment of the signing and sealing thereof, &c.; and held, that a deed attested by one witness only, does not convey the title. (*Courcier v. Graham*, 1 Hamm. Rep. 350.) See, as to the statute in New-Hampshire, *French v. French*, 3 New-Hamp. Rep. 234; *Smith v. Chamberlain*, 2 id. 440; and in respect to the statutes in several other states, see Kent's Comm. 451 to 459.

In New-York, it is required that every grant in fee or of a feehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; and if not duly acknowledged, previous to its delivery, according to the provisions of 2 R. S. 746, et seq., its execution and delivery shall be attested by at least one witness; or, if not attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged. (2 R. S. 738, § 137.)

NOTE 884—p. 467.

The late Chancellor Kent, in his Commentaries, says, "The common law intended by a seal, an impression upon wax or wafer, or some other tenacious substance, capable of being impressed." And he adds, "According to Lord Coke, a seal is wax, with an impression; *sigillum est cera impressa, qui a cera sine impressione non est sigillum*. 3 Inst. 169." (4 Kent's Comm. 453, 4, 3d ed.) In *Warren v. Lynch*, 5 John. Rep. 239, the learned author, then chief justice, strongly urged the definition of Lord Coke as the true one, though he admitted that the law had not declared of what materials the wax shall consist; and whether it be a "wafer, or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material." (Id. 245, 6.) But an English writer, of high reputation, has laid down the doctrine that it is not necessary an impression should be made on wax, or wafer, in order to constitute sealing. If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper, with an intent to seal it, he maintains it is clearly sufficient, though no impression appear on the instrument. (1 Sug. on Pow. 6th Lond. ed. 300, l. No. 45 Law Lib. Phil. See S. P., Sug. on Pow. 236, 1st Am. from 3d Lond. ed.)

The respect which the common law, at this day, pays to sealing, is principally on account of the solemnity of the ceremony, and the deliberation which it both imposes and evinces. Hence, Mr. Sugdens questions the propriety of Lord Kenyon's decision in *Sprange v. Barnard*, 2 Bro. C. C. 685. That was the case of a feme covert, executing a will under a power, which latter required the will to be sealed. She first wrote her will on unstamped paper, and then, thinking it material her will should be upon stamps, she wrote it on stamped paper, and afterwards fixed the two papers together with a wafer. His lordship held the stamp to be equivalent to a seal, without having, he said, recourse to the wafer, which annexed the stamped paper to the former. (1 Sug. on Pow. 299, 300, 6th Lond. ed. No. 45, Law Lib. Phil.)

In many parts of this country, the rule requiring an impression upon wax has been disregarded to such an extent as to allow a flourish with a pen at the end of the party's signature, or a circle of ink, or a scroll, to come in the place of a seal. This diver-

sity has given to the entire course of adjudication on the subject of sealing, and the evidence necessary to establish the fact, a character somewhat local; and we shall, therefore, present the doctrine as held in several of the states, more in detail than would otherwise be necessary.

In Pennsylvania, the seal has been said to be mere matter of form, and a written or ink seal, as it is called, is good. (*McDill's lessee v. McDill*, 1 Dall. Rep. 63. *Alexander v. Jameson*, 5 Bing. Rep. 240, et seq. *Long v. Ramsay*, 1 Ser. & Rawle, 72.) The usual mode is to make a circular, oval, or square mark, opposite to the name of the signer; but the shape is immaterial. Something, however, there must be, intended for a seal, and the writing must be delivered as a deed. Although in the body of it is said, that the party has put his hand seal to it, and there is a corresponding clause above the names of the subscribing witnesses, as, "signed, sealed and delivered in presence of," &c.; yet, if there be nothing opposite the name of the party, to indicate an intention of sealing, but only a flourish under his name, it will not be regarded as a sealed instrument, unless there is affirmative proof that it was delivered as such. (*Taylor v. Glaser*, 2 Ser. & Rawle, 502.)

In Maryland, from the earliest period of their judicial history, a scrawl has been considered as a seal. It is not necessary that the scrawl be adopted by the maker, by a declaration in the body of the instrument. It is enough if it be affixed at the time of the execution and delivery. The fact of the clause of attestation not appearing in the usual form of "signed, sealed and delivered," can, in reason, make no difference; for the question always is, is the seal of the obligor? and if he has delivered it with the scrawl attached, it is his seal, and must be so considered: for whether an instrument be a specialty, must always be determined by the fact, whether the party affixed a seal; not upon the assertion of the obligor in the body of the instrument, or by the form of attestation. And where the instrument exhibits a scrawl, (e. g. "(sl.*)" opposite the party's signature,) and there is nothing to show it was not attached when it was executed, the presumption always will be, that the seal was affixed at the time of its execution. (*Trasher v. Everhart*, 3 Gill & John. 234.) See *Stabler v. Cowman*, 7 id. 234.

In South Carolina, an ink scroll, as thus, "A. B. (L. S.*)" is good as a seal. (*Rolph v. Gist*, 4 McCord, 267. *United States v. Coffin*, Bee's Adm. Rep. 140.) Where a person makes use of a well known symbol, or cipher, which has usually been employed for the purpose of a seal, and no other, the court will presume that it was annexed for that purpose; and this, even though no intention to seal be indicated in any other part of the instrument. Otherwise, where a cypher or scroll of an unusual or insignificant character is used, and the intention to seal is not otherwise manifest. (*Rolph v. Gist*, 4 McCord, 271.) Proof *aliunde* is admissible; and in all cases, unless the intention to seal can be presumed from the face of the instrument after the party's hand-writing is shown, such proof is necessary. (Id.)

In Virginia, a scroll, thus, "A. B. (L. S.*)" is good as a seal. (*Jones v. Logwood*, 1 Wash. Rep. 42. *Baird v. Blaigrove*, id. 170. *Currie v. Donald*, 2 Wash. Rep. 63.) But, if there is nothing in the body of the instrument showing an intention to seal it, it will not be considered a deed, notwithstanding the scroll opposite the maker's name. (*Austin's adm'r v. Whitlock's ex'r*, 1 Munf. 487.) And it seems, in such case, that evidence *aliunde* to prove that it was delivered as a deed, is

inadmissible. (Per Tucker, J. id. 491; but see *Taylor v. Glaser*, 2 Ser. & Rawle, 504, per Tilghman, C. J.; *Anderson v. Bullock*, 4 Munf. Rep. 442.)

In Alabama, the same doctrine has been held as in Virginia; and there, a writing with a scroll opposite the signer's name, thus, "A. B. (sealed,)" is not a sealed instrument, unless its character as such is indicated in the body or attestation clause. (*Lee v. Adkins*, 1 Alab. Rep. 187.)

In New-Jersey, the doctrine of the common law as above stated in our extract from Kent's Commentaries, has been fully recognized. (See *Force v. Craig*, 2 Halst. Rep. 274. *Hopewell v. Amwell*, 1 id. 169. *Perrine v. Cheeseman*, 6 id. 174.) But they have a statute by which a scroll is substituted for a seal, as it respects instruments for the payment of money. (*Perrine v. Cheeseman*, supra.) And, where an instrument coming within the statute, e. g. a promissory note, ends with the words, "Witness my hand and seal," &c., and has a flourish under the name of the maker, proof of his hand-writing is sufficient evidence for the jury to presume that the flourish was put there by way of seal. (*Force v. Craig*, supra.) But otherwise, where the instrument does not, in the body of it, or the attestation clause, purport to be a deed. (*Newbold v. Lamb*, 2 South. Rep. 449.)

In Indiana, they have likewise a statute, but the precise extent of it we are unable to learn. A scrawl, thus, "A. B. seal,)" has been held equivalent to a seal, when set opposite the name of the maker of a promissory note, though in the body of the instrument nothing was said about a seal; and it is remarked in the case, that ink seals have the same effect as if they were of wax or wafer. Probably the statute is general. (*Vanblaricum v. Yeo*, 1 Blackf. 322, 3. 4 Kent's Comm. 453, n. 3d ed.) An instrument containing the words *sealed with my seal*, &c. but having no seal on it, is not a deed. (*Deming v. Bullitt*, 1 Blackf. Rep. 241.)

In Kentucky, seals were formerly with wax only; but now, by statute, a scrawl is made a substitute for the seal. (*Bohanans v. Lewis*, 3 Monroe, 376.)

Several other states have statutes prescribing what shall be deemed a seal. (See 4 Kent's Comm. 452, 3, and note c.) Indeed, in the southern and south-western states, from New-Jersey inclusive, an ink seal of some sort has been allowed as a substitute (with certain limitations and qualifications) for the *cera impressa* of Lord Coke; sometimes upon the ground that the common law required nothing more, sometimes upon local custom or usage, and in other instances putting the matter expressly upon some local statute. (See 4 Kent's Comm. 452, 3, and the notes, 3d Am. ed.)

In the eastern states the courts have generally professed to follow the English decisions. (4 Kent's Comm. 452, 3, 3d Am. ed.) In Vermont, a seal must be of wax, or wafer, or some adhesive substance, capable of receiving an impression. A mere ink seal or scroll will in no case be allowed, it seems, as a substitute. It is for the court to decide what constitutes a seal; and the jury are then to determine whether that which the court adjudges to be a seal, has been affixed to the instrument. (*Beardeley v. Knight*, 4 Verm. Rep. 471. See *Mattocks v. White*, cited id. p. 479, by Williams, J.)

In Massachusetts, it seems, a scroll is not a seal; (*Commonwealth v. Griffith*, 2 Pick. 18;) though the point was not directly adjudged.

In N. York, the rule is settled, that an ink seal will not do. A seal must, it seems, be upon wax, wafer, or some other tenacious substance, capable of being impressed.

(*Warren v. Lynch*, 5 Johns. Rep. 239. *Andrews v. Herriot*, 4 Cowen's Rep. 508. But see *Meredith v. Hinsdale*, 1 Cain. Rep. 362.)

We have seen by several cases *supra*, that considerable force is given to the attestation clause, where a question arises upon the point of sealing. If the attestation purports that the instrument was designed to be sealed, and there is any thing affixed to the instrument, or appearing upon it, which, by law, may be regarded as a seal, *prima facie* it shall be taken to be a deed, and proof of the party's signature by the subscribing witnesses, if there are such, or in any other legitimate mode, will be presumptive evidence that he sealed it. So, it seems, are all the cases. (See *supra*; also *Ball v. Taylor*, 1 Carr. & Payne, 417.)

Best, C. J., has said, that in such case, if on inspection he found no seal, he should hold the proof to be defective. (*Ball v. Taylor*, *Supra*.) But the learned author of *Sugden on Powers* has laid down the law differently. He says, that a deed stated in the attestation to have been sealed and delivered, will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper; for if a seal, stick, or other instrument used, be impressed upon paper with intent to seal, that is enough. (1 *Sugden on Powers*, 300, 1, 6th Lond. ed. No. 45, Law Lib. Phil. See also the same work in one vol. 1st Am. from the 3d Lond. ed. p. 236, 7; *Math. Pres. Ev.* 39.) The American cases are by no means agreed, as we have already seen, whether this is so, where the instrument does not, in the body of it, or in the attestation clause, purport to be a sealed instrument, and there is only an ink scroll for a seal opposite the party's name. (See *supra*, p. 1278, 9.) Further, see the next succeeding note.

NOTE 885—p. 467.

See *McDill's lessee v. McDill*, 1 Dall. Rep. 63.

In Kentucky, where, as we have seen in the next preceding note, a scrawl is substituted for a seal, it has been held, that if there be a scrawl, (thus, "G. B. (seal,)"') opposite to the name of one of the makers of a note signed by two persons, though there be none opposite to the other, the court cannot, upon inspection, pronounce that the instrument was not sealed by both; and this, though it was drawn so as to purport a promise by one only, and concluded as follows: "Witness my hand and seal," &c. (*Bohanans v. Lewis*, 3 Monroe's Rep. 376.) In North Carolina, where an instrument is signed by two persons and but one seal is affixed, it is to be taken to be the seal only of him whose name is nearest to it; but it may be shown by proof aliunde to be the seal of both; and if the instrument contain words purporting that it was designed to be the deed of both parties, the seal shall be taken to be the seal of both. (*Yarborough v. Monday*, 2 Dev. Rep. 493.) In Maryland, the like general doctrine has been held, except that the court refused to give effect to words in the attestation clause, plainly indicating an intent to seal by both parties. (*Stabler v. Cowman*, 7 Gill & Johns. 284.)

NOTE 886—p. 467.

See S. P. 3 Kent's Comm. 47, 8, 3d Am. ed.; *Mackay v. Bloodgood*, 9 Johns. Rep. 285; *Ludlow v. Simonds*, 2 Cain. Cas. in Err. 42. Lord Lovelace's case, W. Jones, 269. Co. Litt. 230, 1, b. *Fitchthorn v. Boyer*, 5 Watts' Rep. 159.

In the case of one partner executing a deed for himself and his co-partner, it seems that the presence of the co-partner, not signing, is not essential. His previous assent to, or his subsequent adoption of the act, distinctly proved, will bind him. (See *Cady v. Shepherd*, 11 Pick. 405, and ante, note 882 p. 1268, together with the cases there cited to this point.)

NOTE 887—p. 467.

The case cited in the text was an action of debt on the bond; and it is put as a query in the marginal note, whether evidence of the custom, in such instances, is admissible in order to establish the fact of sealing, or to prove the instrument a deed. This point was left undetermined by the court.

Some American cases speak quite distinctly on this subject. In *Meredith v. Hinsdale*, 2 Cain. Rep. 362, the supreme court of New-York held, that if, by the local usage or law of another state or country, a scroll was a good substitute for a seal, an instrument executed there, in that mode, might be sued on as a deed in New-York. This was afterward denied, as to instruments made abroad to be executed in New-York; and held, that in determining their character, as whether sealed or unsealed, the *lex fori* and not the *lex loci* must govern. (*Warren v. Lynch*, 5 Johns. Rep. 239. See *Thompson v. Ketcham*, 4 id. 285. 2 Burr. 1078, 2 Johns. Rep. 94.) Then came the case of *Andrews v. Herriot*, 4 Cowen's Rep. 509, which entirely overruled *Meredith v. Hinsdale*, and determined that, in all cases, where the question was merely as to the remedy, e. g. whether covenant or assumpsit was the proper form of action, the *lex fori* must control in respect to the seal. Such also is the law in Maryland. (*Trasher v. Everhart*, 3 Harr. & Gill. 234.) And in Kentucky. (*Steele v. Curle*, 4 Dana, 381, 383.)

NOTE 888—p. 468.

A ceremonious or formal delivery need not be shown. (*Woodman v. Coolbroth*, 7 Greenl. Rep. 184. *Hughes v. Easten*, 4 J. J. Marsh. 573. *Goodrich v. Walker*, 1 Johns. Cas. 250.)

To constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke. (*Frisbie v. McCarty*, 1 Stewart & Porter, 61. See *Maynard v. Maynard*, 10 Mass. Rep. 458.) The delivery need not be to the party, but may be to another person by sufficient authority from the party; or, it may be to a stranger, for and in behalf and to the use of the party, without authority; and in either case, if unconditional, the deed will take effect *instantly*. (*Alsop v. Swathel*, 7

Conn. Rep. 503. Verplank v. Sterry, 12 Johns. Rep. 536, 546, 551, 2. Jackson, ex dem. Eames, v. Phipps, id. 418, 421. Souverbye v. Arden, 1 Johns. Ch. Rep. 240. Cook's adm'r. v. Hendricks, 4 Monroe, 503. Raymond v. Smith, 5 Conn. Rep. 559. Doe, ex dem. Garnons, v. Knight, 8 Dowl. & Ryl. 348, 364, 5. Chess v. Chess, 1 Pennsylv. Rep. 32. McKinney v. Rhoades, 5 Watts' Rep. 344. Burns v. Hatch, 3 N. Hamp. Rep. 304. Daniel v. Bratton, 1 Dana, 210. Church v. Gilman, 15 Wend. 656. Inlow v. 'The Commonwealth, 6 Monroe, 74.) A deed may be delivered by depositing it in the post office, directed to the party for whom it was made. (M'Kinney v. Rhoades, 5 Watts' Rep. 343.) Or, by depositing it in the proper office to be recorded as an executed deed, if accepted afterward by the grantee. (Frisbie v. McCarty, 1 Stewart & Porter, 61.) See Daniel v. Bratton, 1 Dana's Rep. 210. But a deed signed, sealed and deposited, to be kept or held by the depositor, subject to the order of the depositor, is not delivered, either actually, or constructively; on the contrary, the terms of the deposit exclude the idea of a delivery. (Alsop v. Swathel, 7 Conn. Rep. 500.)

A deed delivered to a third person, either as an *escrow*, i. e. upon some condition to be performed by the grantee, or upon any other condition or contingency, will, in many cases, after the condition has been complied with, or the contingency happened, take effect from the time of the first delivery. But, until the performance of the condition, or the happening of the contingency, there is no delivery, and the deed is inoperative: This general doctrine, and various distinctions to be observed in its application, will be found in the following cases. Ruggles v. Lawson, 13 John. Rep. 285. Beckman v. Frost, 18 id. 544. S. C. in chancery, 1 John. Ch. Rep. 288. Cook's adm'r. v. Hendricks, 4 Monroe, 500, 502, 503. Bickford v. Daniels, 2 N. Hamp. Rep. 71. Raymond v. Smith, 5 Conn. Rep. 559. Jackson, ex dem. Gratz, v. Catlin, 2 John. Rep. 248. Hatch v. Hatch, 9 Mass. Rep. 307. Wheelwright v. Wheelwright, 2 id. 447. Commonwealth v. Selden, 5 Munf. 160. Shed v. Shed, 3 N. Hamp. Rep. 432.

Where a deed was deposited in court, and tendered to the grantee through a bill in chancery, and the grantor died subsequently, whereupon the suit was revived by his representatives, who obtained a decree that the grantee accept the deed; held, that the deposit of the deed, under such circumstances, was, in substance, a conditional delivery of it, to take effect if the grantee should accept it, or the court should decree an acceptance; and that, on such acceptance or decree, the deed would take effect from the time of the tender in the bill. (Cook's adm'r v. Hendricks, 4 Monroe, 502, 503, 504.)

To constitute a good delivery, the consent of the maker of the deed is essential. If the circumstances go to show that he did not consent, it is not his deed, even though he signed and sealed it, and was bound by a previous contract to deliver it. (Woodman v. Coolbroth, 7 Greenl. Rep. 181.) So, if the grantor was insane when the alleged delivery took place; for, in that case there could be no consent. (Chess v. Chess, 1 Pennsylv. Rep. 32.) But the consent of an agent, to whom a deed is sent for the mere purpose of delivering it, and who has no other power given him, seems not important. Accordingly, where a deed was transmitted by the grantor from abroad, to an agent where the land lay, to be there recorded, held, that the agent being only the selected instrument of transmission, the delivery to him for the grantee

should be deemed a delivery to the latter the instant the deed came into the clerk's office for registration; and this, whether the agent consented to the recording or not. (*Daniel v. Bratton*, 1 Dana, 210.) Where there is proof of an act of delivery, the intent is presumed; and it lays with the party who would make the delivery conditional, or who asserts that the deed was not designed to be delivered, to show the fact by clear and explicit testimony. (*Souverby v. Arden*, 1 John. Ch. Rep. 240, 252.)

The consent of the grantee is also requisite to complete a delivery. (Per *Lansing, C. J.*, *Jackson, ex dem. McCrea, v. Dunlap*, 1 John. Cas. 114, 116. *Harrison v. The Trustees of Phillips Academy*, 12 Mass. Rep. 461. *Jackson, ex dem. Pintard, v. Bodle*, 20 John. Rep. 184. *Church v. Gilman*, 15 Wend. 656.) A., residing in New-York, agreed with B., in Massachusetts, to give him a deed of lands as security for a debt, and A., on his return home, executed and acknowledged a deed to B., and left it at the clerk's office to be recorded; but neither B. nor any person in his behalf was present to receive the deed. B. died the next year, and A., subsequent to his death, sent the deed to the son, (probably the heir,) of B. Held, that as there had been no acceptance of the deed on the part of B., there was no delivery. (*Jackson, ex dem. Eames, v. Phipps*, 12 John. Rep. 418.) So, where A. signed and sealed a deed to his son, leaving it with the scrivener with directions to be recorded, which was done; and the deed, at the grantor's request, remained with and was retained by the scrivener till the son's death, when the father claimed and cancelled it, the son having known nothing of the transaction. Held, no delivery—for the act of registering a deed does not amount to a delivery, and the son never consented to accept it. (*Maynard v. Maynard*, 10 Mass. Rep. 456.) See *S. P. Barnes v. Hatch*, 3 N. Hamp. Rep. 304.

The point of consent, or an intention to accept the deed, on the part of the grantee, will in many instances be presumed, where nothing to the contrary is shown; for the law intends that a man will accept what is for his benefit. (See ante, note 298, p. 303, and the cases there cited. Also per *Bailey, J.*, delivering the opinion in *Doe, ex dem. Garnons, v. Knight*, 8 Dowl. & Ry. 348; *Stirling v. Vaughan*, 11 East 623; *McKinney v. Rhoades*, 5 Watts' Rep. 344; *Waller v. Todd*, 3 Dana, 513; *Church v. Gilman*, 15 Wend. Rep. 656; *Jackson, ex dem. Pintard, v. Bodle*, 20 John. Rep. 184; *United States v. Wilson*, 7 Peters' Rep. 150.)

The reception and detention of an instrument sent by mail, e. g. a bond given by a post master to the post master general, is evidence of an acceptance of it. (*The Post Master General of the United States v. Norvell*, 1 Gilp. Rep. 106.) So, as to acceptance by a corporation. No written evidence is requisite. (*Bank of the U. States v. Danbridge*, 12 Wheat. 64. *Union Bank v. Ridgley*, 1 Harr. & Gill, 324, 417, 418.) And the return of the bond, after having been kept a considerable length of time, (e. g. from July till September,) it appearing that it was returned in order to obtain an additional surety, is by no means conclusive evidence, as in favor of the sureties defending against an action brought on the bond, that it had not previously been accepted. The Post Master General of the United States *v. Norvell*, supra. In such cases, however, it is for the jury to decide, whether there had been an acceptance before the bond was returned. (*Id.*) See further, as to official bonds, *Westerhaven v. Clive*, 5 Hamm. Rep. 136, 138; *Fullerton v. Harris*, 8 Greenl. 393.

An actual refusal to accept a deed when offered, is not conclusive evidence of non-delivery. The refusal may be retracted. Accordingly, if A. deliver a deed to B. as an escrow, to deliver to C., who refuses to receive it, upon which B. leaves the deed, and C. brings an action upon it, he may recover. (13 Vin. Abr. 29, tit. "Deeds" pl. 2. *Taw v. Berry*, Dyer, 167, b. *Cook's adm'r v. Hendricks*, 4 Monroe, 502, 503, 504.)

The acts and circumstances which shall be taken as sufficient evidence of delivery, are various. A delivery is frequently presumed. (Math. Pres. Ev. 39.) It is seldom, indeed, that a party is able to show a distinct formal act of delivery. The delivery may, therefore, be inferred from words without acts, or from acts without words, or from both combined. (*Hughes v. Easten*, 4 J. J. Marsh. 572, 3. *Goodrich v. Walker*, 1 John. Cas. 250. *Verplank v. Sterry*, 12 John. Rep. 536. *Folly v. Vantuyl*, 4 Halst. 152. *M'Kinney v. Rhoades*, 5 Watt's Rep. 344. *Byers v. M'Clanahan*, 6 Harr. & John. 250, 255, 6. *Gardner v. Collins*, 4 Mason, 398.) The grantor's acknowledgment of the deed preparatory to recording it, is not in itself a delivery, but is cogent evidence of it. (*McConnell v. Brown*, 4 Litt. Sel. Cas. 466. *Sicard's lessee v. Davis*, 6 Peters' Rep. 124. *Scrugham v. Wood*, 15 Wend. 545, stated *infra*, p. 1285, 6.) It may, however, be rebutted by evidence tending to show that in fact there was no delivery. (See *Powers v. Russell*, 13 Pick. 69, 75.) The placing of a deed on record by the grantor, is not a delivery of it, but only evidence tending to prove it. (See *Barns v. Hatch*, 3 N. Hamp. Rep. 304; *Maynard v. Maynard*, 10 Mass. Rep. 458, stated *supra*; *Frisbie v. McCarty*, 1 Stewart & Porter, 61; *Daniel v. Bratton*, 1 Dana's Rep. 210; *Chess v. Chess*, 1 Pennsylv. Rep. 32.) It may show the intent of the grantor, *prima facie*, to deliver, yet still, if acceptance on the part of the grantee is wanting, the delivery, as we have seen, is incomplete. (See the cases *supra*, p. 1282, 3, to this point.) A delivery of a deed duly acknowledged, to the register of deeds, aided by a subsequent possession of the deed by the grantee, will be evidence of a delivery to the latter. (*Maynard v. Maynard*, 10 Mass. Rep. 458.) Indeed, it would seem that, in all cases, where a deed, apparently regular on its face, and purporting to have been completed by delivery, is found in possession of the grantee, obligee, &c., or some person for, or claiming through him, it shall be taken, *prima facie*, to have been duly delivered. For things shall be presumed legally and properly in their existing state, till the contrary be shown. (See *ante*, note 298, p. 295; also, *Hughes v. Easten*, 4 J. J. Marsh. 573; *Fisher v. Kean*, 1 Watts' Rep. 278; *Clarke v. Ray*, 1 Harr. & John. 318; *Sigfried v. Levan*, 6 Ser. & Rawle, 311; *Curtis v. Hall*, 1 South. Rep. 148; *Trasher v. Everhart*, 3 Gill & John. 246, 7; *Force v. Craig*, 2 Halst. Rep. 272; *Per Haywood, J.*, in *Ingram v. Hall*, 1 Hayw. Rep. 209; *Mallory v. Aspinwall*, 2 Day's Rep. 280; *Sicard's lessee v. Davis*, 6 Peters' Rep. 124, 136, 7; *Gardner v. Collins*, 3 Mason, 398; *Leshner's lessee v. Levan*, 2 Dall. 96; *Miller's estate*, 3 Rawle, 317; *Union Bank of Maryland v. Ridgley*, 1 Harr. & Gill, 326; *Flagg v. Mann*, 1 Sumn. Rep. 489; *Ward v. Lewis*, 4 Pick. 518; *Whitaker v. Salisbury*, 15 id. 534, 542, 3.) See S. P. as to an award. *Lansdale v. Kendall*, 4 Dana, 613. Where a deed of marriage settlement was signed and sealed, and laid on the table, and the marriage took place immediately thereafter, in the presence of all the parties, and the deed, without any other delivery, was taken by the wife, and kept in her possession till her death; held, under the circumstances, a good delivery, though the true

tee named in it never had the deed in his possession. (*The Trustees of the Methodist Episcopal Church v. Jaques*, 1 John. Ch. Rep. 450.) But simply proving that a deed was signed, attested and laid on the table, without a delivery to any person, and in the absence of the grantee, obligee, donee, &c., will not make out a delivery, unless the person for whose benefit it was designed, or some person for or under him, appears to be or to have been in the lawful possession of it. (*Hughes v. Easten*, 4 J. J. Marsh. 573.) See *Powers v. Russell*, 13 Pick. 69, 75, 6. Proof that a grantor some time before the delivery set up, but after the deed was made, declared his intention to deliver it, accompanied by the fact of the grantee having been allowed to enter into possession of the land soon after the deed was signed, has been excluded as furnishing no reasonable or probable presumption that the contemplated delivery occurred. (*Hale v. Hills*, 8 Conn. Rep. 39.) The grantor standing by, after the instrument is signed and sealed, and suffering the other party to take it, is sufficient evidence of delivery. (*Goodrich v. Walker*, 1 John. Cas. 250.) Where a deed is introduced by the person who signed it, as evidence of any fact to be derived from its existence as having been duly delivered, proof of signing and sealing is not enough. This alone will not, under such circumstances, warrant the presumption of delivery. (*Clarke v. Ray*, 1 Harr. & John. 323.) And where the proof was, that a deed by the father to his son was signed &c. by the former, laid on the table, where it remained all night, and in the morning the father took it up and put it away; held, no evidence of delivery. (*Ward's ex'rs. v. Ward*, 2 Hayw. Rep. 226.)

It is not, however, indispensable to a delivery that the maker should have transferred the possession of the instrument. Accordingly, where a person signed and sealed a mortgage to secure a debt, and declared in the presence of the attesting witnesses that he delivered it as his act and deed, but kept it in his possession, the mortgagee not being present, but it appearing clearly that it was intended by the mortgagor to have the instrument take effect immediately as a deed duly delivered, the court of king's bench were strongly inclined to regard the delivery complete. (*Doe, ex dem. Garnons, v. Knight*, 8 Dowl. & Ryl. 348. S. C. 5 Barn. & Cress. 671.) See also *Barlow v. Heneage*, Prec. Ch. 211; *Clavering v. Clavering*, id. 235; 2 Vern. 273; 1 Bro. P. C. 112; *Nuldred v. Gilham*, 1 P. Wms. 577; *Boughton v. Boughton*, 1 Atk. 625. On the above authorities, said Bayley, J., delivering the opinion in *Doe, ex dem. Garnons, v. Knight*, supra, "it seems to us, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery except the keeping the deed in the hands of the executing party, and nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and delivery to the party who is to take under it, or to any person for his use, is not essential." (8 Dowl. & Ryl. 364.) So, where a bond from a father to his daughter was signed and sealed, and the father, holding the bond in his hand, said to the daughter, "here is your bond; what shall I do with it?" and then, on the daughter's answering something which the witness could not recollect, the father added, "I will take care of it for you." Held, a sufficient delivery, though the bond never came to the daughter's possession. (*Folly v. Vantuyt*, 4 Halst. Rep. 153.) Many other American cases are to the same effect. See *Bunn v. Winthrop*, 1 John. Ch. Rep. 329; *Jones v. Jones*, 6 Conn. Rep. 111; *Souverbye v. Arden*, 1 John. Ch. Rep. 240. Where a deed of lands to trustees was prepared for execution, read, signed by both parties, and acknowledged as their deed before a com-

missioner, it was held to be a complete and valid deed, notwithstanding the witnesses present at its execution concurred in testifying, that there was no transmission of the deed from the grantor to the grantees, and notwithstanding also, the deed, after the death of the grantor, was found among his private papers. (*Scrugham v. Wood*, 15 Wend. 545.) But a bond of a guardian to the judge of probate, signed and sealed, but retained by the guardian till his death, when his administrator took it and filed it in the probate office, was held unavailing as against the sureties in the bond, for want of delivery. (*Fay v. Richardson*, 7 Pick. 91.) Where a deed was executed and acknowledged by the grantor, but retained by him with the grantee's consent, as security for the consideration money, who said he would not take it till that should be paid, but before the money was paid, the grantor died with the deed in his possession, having devised the premises by his last will; held, that there was no delivery to or acceptance of the deed by the grantee proved, and, therefore, nothing passed by it. (*Jackson, ex dem. M'Crea, v. Dunlap*, 1 John. Cas. 114.) Where, however, land had been sold at sheriff's sale, and the sheriff returned the sale, acknowledged the deed to the purchaser, but retained it as security for part of the purchase money, and the vendee took possession of the premises and held them for four years; this was adjudged strong evidence of delivery. (*Hartman v. Stahl*, 2 Pennsylv. Rep. 223.)

The party's confession that he had delivered the instrument, is of course evidence against him of the fact of delivery. (*Sicard's lessee v. Davis*, 6 Peters' Rep. 136, per Marshall, C. J.) But the confession must import that he delivered it, as his deed; and where the party acknowledged that he had delivered it as a form to aid in drawing another instrument, held, no evidence of delivery. (*Asberry v. Calloway*, 1 Wash. Rep. 72.)

An unconditional delivery of a deed, once fairly made, cannot be revoked by any act of the party executing. (*Woodman v. Coolbrooth*, 7 Greenl. Rep. 131.) See *Frisbie v. McCarty*, 1 Stewart & Porter, 61. Nor can the party, by any subsequent words, explain his intent to have been otherwise, or alter the nature and effect of the delivery. (2 Stark. Ev. 272, 6th Am. ed. *Verplank v. Sterry*, 12 John. Rep. 551, 2, per Spencer, J.) Declarations of the grantor made subsequent to the delivery, offered with a view of showing the nature of the delivery to be otherwise than the act itself imports, cannot be received as against those claiming in virtue of the deed. (*Souverbye v. Arden*, 1 John. Ch. Rep. 240. *Chess v. Chess*, 1 Pennsylv. Rep. 32.)

NOTE 889—p. 468.

The seal of a corporation may be impressed directly on the paper; wax or wafer is not necessary. (*Beardsley v. Knight*, 4 Verm. Rep. 479.)

We have seen that these seals do not prove themselves, but are to be identified by some person who saw them affixed, or who knows them from their impression. (See ante, p. 386, of the text, in connection with the cases cited ante, notes 716, 717, p. 1062. *Ang. & Ames on Corp.* 115, 116.)

It is not necessary that a corporation deed should say, "sealed with our common seal," or the like. (*Ang. & Ames on Corp.* 115.) But it must purport to be the deed of the corporation. And, where a corporation authorized its president to execute a

deed of lands belonging to the corporation, and he executed one, naming the corporation as grantors, but attested it thus: "In witness whereof I, O. Spencer, president, have hereunto set *my hand and seal*," &c., signing his own name as president, opposite the seal, which exhibited no impression; held, that it was to be considered as the individual deed of the president, and not that of the corporation. (*Hatch's lessee v. Barr*, 1 Hamm. Rep. 390, 394.)

In general, proof of the seal in any way as the seal of the corporation, the instrument being in possession of the party, will prove the delivery. (Ang. & Ames on Corp. 116.) And its being affixed to the deed, is presumptive evidence that it was done by proper authority. (*Darnell v. Dickens*, 4 Yerg. 7, 9. See also the cases ante, notes 716, 717, p. 1062. *The President Managers & Company of the Berks & Dauphin Turnp. Co. v. Myers*, 6 Ser. & Rawle, 15) The latter case establishes that the affixing of the seal, when done by less than a legal quorum of the board for the transaction of business, binds the corporation, provided the act was authorized or directed by a legal quorum: and whether such authority existed is a question for the jury, under all the circumstances. The seal appearing, is *prima facie* evidence of its having been regularly affixed, but not conclusive. (See *id.* 16. *St. Mary's Church*, 7 *id.* 530, per Tilghman, C. J.)

NOTE 890—p. 468.

See 1 Sugden on Vendors, (6th Lond. ed.) 294, et seq. Nos. 34, 5, &c., Law Lib. Philadel.

The American doctrine on the subject of the execution of instruments under powers, will be soundly summed up in 4 Kent's Comm. 329, et seq. 3d ed.

As to the doctrine in equity, and where that court will interfere to save rights which would otherwise be lost by reason of a defective execution of a power in the particulars adverted to in the text, see Sugden on Vendors; also 1 Story's Equity, 185, 6, &c.; 4 Kent's Comm. 339, et seq. 3d ed.

NOTE 891—p. 472.

How far this doctrine has been applied to the case of orders, process of arrest, mittimus, &c., made or issued by magistrates, will be seen by several cases, ante, note 694, where we considered the general subject of jurisdiction. Doubtless, if the power or jurisdiction of an inferior magistrate, making an order, or issuing process, do not appear upon its face in some way, the officer to whom the execution of it is entrusted, may legally decline acting under it. (See *id.* p. 1012.) If, however, the power or jurisdiction be set forth, so that the order or process is apparently valid, the executive officer will be protected, though it turn out that, in fact, there was no jurisdiction. (See *id.* p. 1008, 1009; also *Isaacs v. Camplin*, 1 Bail. Rep. 411.) Where a statute authorized a magistrate to issue a distress warrant, on the application of a landlord, and then required constables, &c., to execute the same; held, that the officer executing the process, it being apparently regular, was justified, though

no rent was due. It would be contrary to all legal analogy, say the court, to make an officer acting in obedience to the injunctions of law, under a process emanating from competent authority, responsible for the improper act of the person at whose instance it issued. (*Roberts v. Tennell*, 4 Litt. Rep. 286, 288.)

Upon a kindred principle, where one officer is required to give a deed, or do any other act, upon the faith of a return made to him by another, the former shall be protected though the return be false. (See ante, note 741, p. 1087; *Jackson, ex dem. Clark, v. Morse*, 18 John. Rep. 441.) But, unless the statute expressly saves the rights of the grantee in a deed so given, by making the return or the deed conclusive, the sale may be avoided by an impeachment of the return. (*Id.*)

Proceeding upon the doctrine stated in the text, the supreme court of Connecticut have held it essential to the validity of an order of the court of probate for the sale of land by an executor or administrator, that it should show on its face the facts requisite as preliminary to the making of the order; e. g. that the debts and charges allowed, exceed the personal estate, &c.; (*Wattles v. Hyde*, 9 Conn. Rep. 10, 14; see *Griffin v. Pratt*, 3 id. 513; also the cases cited ante, note 620, pp. 863, 864, 868, 869, 870; *Lockwood v. Sturdevant*, 6 Conn. Rep. 373; *Watson v. Watson*, 10 id. 77.) The reason given is, that the court of probate, in these cases, exercises a special and limited jurisdiction. And in respect to all proceedings of a like character, the adjudications in that state are very rigid in requiring jurisdiction or the power of acting to appear on the face of the writing; e. g. certificates of commissioners of an insolvent debtor's estate, when invoked as a protection to the sheriff in an action for an escape; (*Starr v. Scott*, 8 Conn. Rep. 480; see ante, note 694, p. 1008;) warrants for collection of military fines, &c. (*Hall v. Howd*, 10 Conn. Rep. 514.) And several decisions in England favor the same doctrine. They are particularly rigid in respect to commitments on summary convictions by inferior magistrates, requiring the offence to be clearly set forth. (See *Wickes v. Clutterbuck*, 2 Bing. 483; see ante, note 694, p. 1007, 1008.) So, *semble*, as to an order of justices for the removal of a pauper, which must show their authority on its face. (*The King v. Inhabitants of Chilverscoton*, 8 T. R. 178.) See *The King v. The Inhabitants of Moor Critchell*, 2 East's Rep. 66. So, where a special power is delegated by statute to persons to take private property for public uses. (*Rex v. Croke*, 1 Cowp. 26.) See *Doe, ex dem. Lemon, v. Chunn*, 1 Blackf. Rep. 336.

It will not be impertinent to consider here a few cases relating to deeds, executed under powers of a public nature. Many of the adjudications on this subject proceed upon local statutes, and derive their reasons from some peculiar phraseology contained therein. These we shall mainly disregard, and notice such only as seem to stand upon principles of a somewhat general character.

It has already been seen in the text at p. 466, and by several cases ante, note 882, p. 1268, that if a deed purport to have been executed under a power and is sought to be used in evidence, the power must be shown. The principle of the rule, and the rule itself, apply no less to deeds executed under a power derived from some court, or statute, than to deeds under powers given by individuals. (See per *Walworth, Chancellor*, in *Jackson, ex dem. Webb, v. Robert's ex'rs*, 11 Wend. 425; *Carlisle's lessee v. Longworth*, 5 Hamm. Rep. 370, 374, 375; *Nancarrow v. Weathersbee*, 6 Mart. Lou. Rep. 347, 348, 349.) Thus, in deraigning title under a deed of trustees, &c., appointed by a decree of the court of chancery, or other court, it will be

necessary to prove the decree, so that the trust reposed, or power granted, may be seen, and the legal performance of it tested. (*Shilknecht v. Eastburn's heirs*, 2 Gill & John. 114.) See also *Magruder v. Peter*, 4 id. 323, 332; also ante, note 659, p. 918, et seq., where several cases illustrating the general doctrine still further, will be found.

So, as to deeds executed by executors or administrators, under an order or decree of the surrogate's court or other tribunal exercising similar authority. And as these are courts of limited and inferior jurisdiction, not only the decree, but their power to make it will have to be shown with great particularity; (see ante, note 620, p. 862, 863, 864, et seq.; *Newcomb's lessee v. Smith*, 5 Hamm. Rep. 450;) and, in Connecticut, it is essential that the facts necessary to the exercise of the power, appear *on the face of the decree*. (See supra.) In Kentucky, by statute, the county court has power to appoint commissioners, to convey for infant heirs; and held, that in making title under the deed of the commissioners, the record appointing them must be produced, and this must show a compliance with all the requisitions of the statute. (*Burnett v. Higgins*, 4 Dana, 567. *Griffeth v. Dicken*, id. 565.)

The general doctrine applies to other deeds, executed under an authority derived from a judgment or decree. Thus, in deraining title under a sheriff's deed, it is generally necessary to show the judgment and execution. (See ante, note 738, p. 1078, et seq.; *Jackson, ex dem. Webb, v. Roberts ex'rs*, 11 Wend. 422, 425, per Walworth, Chancellor; *Allain v. Preston*, 4 Miller's Lou. Rep. 12; *Stevens v. Robertson*, 3 Monroe, 99; *Smith v. Moreman*, 1 id. 154.)

So, with respect to deeds of land by collectors of taxes and others acting under statutory authority. A purchaser making title under such a deed, will be obliged to show the proceedings of the officer, prior to its execution, such as to entitle him to convey. A leading case on this subject is *Williams v. Peyton's lessee*, 4 Wheat. Rep. 77, where the doctrine is fully explained. The defendant, in that case, claimed the land as a purchaser at a sale made for non-payment of a direct tax imposed by act of congress of July 14th, 1798, c. 92. (See id. 80, n. (a).) The plaintiff was the original patentee. On the trial, the defendant proved the tax on the land in dispute to have been assessed against the plaintiff, and also gave in evidence the deed from the officer: he further proved that there were tenants on the land, and that the plaintiff had not paid the tax nor redeemed the land; and then claimed that this evidence was enough, *prima facie*, to show that the land had been duly advertised by the collector, and that the latter had performed the other requisites of the law of congress, so as to authorize the deed. But the court, Marshall, C. J., delivering the opinion, held otherwise; saying that, as the collector has no general authority to sell lands at his discretion for non-payment of tax, but a special power to sell in particular cases described by the act, those cases must exist, or the power does not arise. It is a naked power not coupled with an interest; and, in all such cases, the law requires that every prerequisite to the exercise of that power, must precede its exercise; the agent must pursue his power or his act will not be sustained by it. As to the deed being evidence of the acts which ought to have preceded it, it was said, that the party who sets up a title must furnish the evidence necessary to sustain it; that if the validity of the deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be to prove any matter of record on which the

validity of the deed might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. A person should examine these facts before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. Therefore, the deed, in such cases, is unavailing entirely, until the performance of the pre-requisites to the giving of it be affirmatively shown. (*Id.* 79, et seq. See also, *Stead's ex'rs. v. Course*, 4 Cranch, 403; *Parker v. Rule's lessee*, 9 *id.* 64.) This doctrine has been followed in Tennessee; (*Michie v. Mullin's lessee*, 5 Hayw. Rep. 90;) and in New-York; (*Jackson, ex dem. Cook, v. Shepard*, 7 Cowen's Rep. 88.) The same principles are applicable, in the latter state, to the case of a deed by the comptroller or other officer, unless a statute intervenes to alter the rule. (*Jackson, ex dem. Watson, v. Esty*, 7 Wend. 143. *Jackson, ex dem. Clark, v. Morse*, 18 John. Rep. 441. *Comstock v. Beardsley*, 15 Wend. 343.) So, also, in Virginia. (*Christy v. Minor*, 4 Munf. 431. *Nalle v. Fenwick*, 4 Rand. 585.) In Kentucky, the law presumes, in the first instance, that the register, giving a deed of lands sold for taxes, has complied with all the pre-requisites to entitle him to do so. Hence the onus of showing that the lands had not been advertised was thrown upon the party resisting the deed. (*Hickman v. Skinner*, 3 Monroe, 210, 211.) The court proceed upon the general doctrine of presumption in favor of official acts, noticed ante, note 298, p. 296, 7. It is difficult however, to apply that doctrine to such cases, consistent with the decisions above quoted from the New-York and United States court reports; and hence, *Hickman v. Skinner*, *supra*, may be regarded as of questionable authority. In Ohio, a deed from the county auditor, for lands sold for taxes, cannot be received, without transcripts of the various records of the proceedings on which the sale was founded. (*Carlisle's lessee v. Longworth*, 5 Hamm. Rep. 370, 1, 2, 3, 4, 5.) And a collector's deed, in that state, was formerly (whatever may be the case now) no evidence of title, unless the claimant proved every requisition of the law had been strictly complied with. But it might be received to show the extent of possession claimed under it, without such preliminary proof. (*Dresback v. M'Arthur*, 7 Hamm. Rep. 153, 4.) In New Hampshire, a collector's deed of lands sold for taxes is not to be received, unless the party asserting it shows that the collector complied with all the substantial pre-requisites of the statute. "In no case," say the court, "can a jury be permitted to presume from the mere production of a collector's deed, and from proof of possession under it, that the sale was legal. Very few of those sales have been found to be legal. The presumption is, in fact, against their validity." (*Waldron v. Tuttle*, 3 N. Hamp. Rep. 340. See S. C. & S. P. 4 *id.* 375.) As to similar deeds in Tennessee under their local law, see *Conrad v. Darden*, 4 Yerg. 307; *Francis' lessee v. Washburn*, 5 Hayw. Rep. 294; *McCarrall's lessee v. Weeks*, *id.* 246. See also, for the doctrine in Louisiana, *Winter v. Thibodeaux*, 8 Lou. Rep. (Curry) 193; *Reeves v. Towles*, 10 *id.* 286; *Smith v. Corcoran*, 7 *id.* 46; *Nancarrow v. Weathersbee*, 6 Mart. Lou. Rep. N. S. 347.

In Indiana, where a statute authorized a town collector of taxes to sell, but was silent as to a conveyance; held, that he had no power to give a deed, and that a purchaser under him acquired no title. (*Doe, ex dem. Lemon, v. Chunn*, 1 Blackf. Rep. 336.) *Quere.*

In order to make title under a deed of town lands purporting to have been executed by the trustees of the town, held, that it was necessary to prove, not only that the persons signing it were trustees, at the time, but that they constituted a majority of the board. (*Owings v. Iles*, 3 *Monroe*, 236.) See as to deeds by a board or special committee of a corporation having a corporate seal, ante, note 889, p. 1286, 7.

Indentures of apprenticeship, made by a court of another state, acting under a peculiar local statute, cannot be received to show a valid binding to service, unless the statute under which the proceeding took place be given in evidence. This is requisite that the court may see that it warrants the proceeding. (*Potter v. Hyndman*, 1 *Harringt. Rep.* 123.)

The deeds above spoken of must follow the power delegated, and must be adapted to its execution. Therefore, where an administrator empowered to sell under a decree of the probate court in Connecticut, executed a quit claim deed of all *his interest*, &c.; held, that as he had no interest, the deed was entirely inoperative; and this though the deed recited his power under the decree, described him as administrator, and he signed it with that addition to his name. (*Griswold v. Bigelow*, 6 *Conn. Rep.* 258. Also, per *Hosmer, C. J.*, in *Lockwood v. Sturdevant*, id. 373, 387. See 4 *Kent's Comm.* 334, 5.) In respect to this doctrine as to deeds given by an officer of a corporation, see *Hatch's lessee v. Barr*, 1 *Hamm. Rep.* 390, stated ante, note 889, p. 1286, 7.

One case in Connecticut, went so far as to require, as indispensable to the validity of deeds of administrators, under an authority from the probate court, that they should set forth, not merely the power in virtue of which the act was done, but show the reasons or grounds upon which it was granted, as well as the proper exercise of it. (*Lockwood v. Sturdevant*, 6 *Conn. Rep.* 373.) *Hosmer, C. J.*, who delivered the opinion in this case, cites authorities which do not seem to maintain the doctrine he advanced. And, in a later case, the court agreed in overruling that decision so far as it related to the requisites of the deed. (*Watson v. Watson*, 10 *Conn. Rep.* 77.)

It is undoubtedly usual for administrators, in deeds given by them, to recite the power under which they act; though a general reference to it will answer. (*Langdon v. Strong*, 2 *Verm. Rep.* 234.) And, it seems, where no power is recited or referred to specifically and directly, the deed will be good, if a sufficient power be shown to have existed. (Id. p. 255. *Griswold v. Bigelow*, 6 *Conn. Rep.* 269, per *Hosmer, Ch. J.*, citing 1 *Hob.* 160. 4 *Kent's Comm.* 344, 5.) The character, however, in which the person giving the deed acted, should appear on its face. (*Semble, Langdon v. Strong*, supra. *Inman v. Jackson*, 4 *Greenl. Rep.* 248. *Watson v. Watson*, 10 *Conn. Rep.* 77, 87.) And, in New-York, where an executor or administrator sells under an order of the surrogate, he is required by statute, to set forth in the conveyance, at large, the original order authorizing a sale, and the order confirming the same and directing the conveyance. (2 *R. S.* 44, 2d ed. § 31.)

The deed of a collector of taxes need not set forth a compliance with the statute, as to the acts to be done by him before giving the deed. It seems enough, that the character in which he professes to give the deed appear. (Said in *Inman v. Jackson*, 4 *Greenl. Rep.* 248. See *Hickman v. Skinner*, 3 *Monroe*, 211.)

A sheriff's deed, it has been said, should show some authority for selling, and its character. (Per *Edmonds*, senator, in *Jackson, ex dem. Webb, v. Roberts' ex'rs.* 11

Wend. 435.) It has been held, however, that a recital of the execution is no necessary part of a deed; and hence, that a mis-recital or mere variance will not vitiate, if a sufficient power to sell be in fact proved. (Jackson, ex dem. Martin, v. Pratt, 10 John. Rep. 381. See *McGuire v. Kouns*, 7 Monroe, 386; *Glasgow's lessee v. Smith*, 1 Tenn. Rep. 144, 149.) So as to the judgment. (Jackson, ex dem. Hill, v. Streeter, 5 Cowen's Rep. 529.) As to contradicting the recital of the power in a sheriff's deed, see Jackson, ex dem. Webb, v. Roberts' ex'rs. 11 Wend. 422. In respect to these recitals in New Jersey and Tennessee, see *Den v. Downam*, 1 Green's Rep. 141, 2. *Rogers v. Jennings' lessee*, 3 Yerg. 308.

One reason given by Daggett, C. J., in *Watson v. Watson*, 10 Conn. Rep. 77, *supra*, why nothing more is requisite than that the deed of an executor, &c., should identify the order, and exhibit the capacity in which the grantor acted, is, that this answers every valuable purpose; inasmuch as if a more extended recital were demanded, it would not supersede the necessity of proving the facts. Such seems to be the general doctrine. The recital of the power is not evidence, except upon the same principles which govern in respect to recitals in other cases. (See *id.*; also, *Inman v. Jackson*, 4 Greenl. Rep. 248; *Harlow v. Pike*, 3 *id.* 440.) See *ante*, note 869, p. 1255, et seq. So as to recitals in the deed of a collector of taxes. (*Inman v. Jackson*, 4 Greenl. Rep. 248. *Williams v. Peyton's lessee*, 4 Wheat. Rep. 77. Jackson, ex dem. Cook, v. Shepard, 7 Cowen's Rep. 88. Jackson, ex dem. Watson, v. Esty, 7 Wend. 148. *Harlow v. Pike*, 3 Greenl. 440. *Smith v. Corcoran*, 7 Lou. Rep. (Curry) 50. *Michie v. Mullin's lessee*, 5 Hayw. 90.) In respect to recitals in deeds of sheriffs, we have before remarked, that they do not supersede the necessity of proving the power under which he acted, viz., the judgment and execution. (See *ante*, note 738, p. 1081; *Per Walworth*, chancellor, 11 Wend. 425; *Per Edmonds*, senator, *id.* 433, 4, 5, 6, 7; *Per Seward*, senator, *id.* 439; *Rogers v. Jennings' lessee*, 3 Yerg. 308.)

We have seen *ante*, note 882, p. 1269, that in the case of ancient deeds, admissible as such, without proof of execution, the power under which they were given will be presumed. This principle, however, has been held not to apply to instances where the power is matter of record; (e. g.) deeds given under the order of a court; (*Green v. Blake*, 1 Fairf. Rep. 16, 18;) grants by a legislative committee, &c. (*Tolman v. Emerson*, 4 Pick. 160, 162.)

In respect to the presumptions allowed in favor of the acts of sheriffs, and other mere ministerial officers, after their power has been shown, see *ante*, note 298, p. 293, 4; *Rogers v. Jennings' lessee*, 3 Yerg. 308; *Reeder v. Barr*, 4 Hamm. Rep. 459.

As to presumptions arising from lapse of time, possession, &c., in favor of titles derived under sales, like those above spoken of, generally, see *ante*, note 311, p. 355, et seq., and particularly at p. 361, 2, 3, et seq.

NOTE 892—p. 473.

See ante, note 695, p. 1030, and id. p. 1027, et seq., as to the conformity which must exist between the submission and the award, generally. See also *Smith v. Spencer*, 1 McCord's Ch. 92; *McCullough v. Myers*, Hard. 197.

At p. 1033, 4 of that note, we saw, that the power of the arbitrators having been once executed by making and publishing an award, it is at an end, and they have no right to make another. See, to the same point, *Lansdale v. Kendall*, 4 Dana, 613; *Martin v. Oneal*, 2 Litt. Rep. 54; *Cleveland v. Dixon*, 1 J. J. Marsh. 228. Nor can they alter the one made. (*Caldwell on Arb.* 69, 70.) Further, in respect to the validity of awards as depending upon various circumstances, see the note above referred to; also *Thomas v. Harrop*, 1 Sim. & Stu. 524; *Haggett v. Welsh*, 1 Sim. 134. A submission by a husband of a controversy concerning his wife's land, can only affect *his* interest. (*Milner v. Turner's heirs*, 4 Monroe, 247. See ante, note 695, p. 1035.)

NOTE 893—p. 473.

S. P. Pedler v. Paige, 1 Mood. & Rob. 258.

NOTE 894—p. 473.

A party may call a subscribing witness interested against him so as to exclude him from testifying, and compel him to give evidence; (*Price v. Wood*, 7 Monroe, 223;) but he is not obliged to do so. He may show his interest, and then resort to proof of his hand-writing. (See ante, note 881, p. 1265, et seq.) And where the witness' interest is in favor of the party, he may do the same thing. He is not obliged to call him in order to see whether the other party will object. (*Crowell v. Kirk*, 3 Dev. 357, per *Ruffin, J.*) But the incompetency of the witness must be shown. The court have no right, on inspection and from the identity of name merely, to infer that the subscribing witness is a party to the instrument, and allow evidence of his hand-writing. (*Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277, 8, 233.)

NOTE 895—p. 473.

It is to be presumed, in the first instance, that the subscribing witnesses were present, and attested all that their signature to the instrument purports. (See *Sigfried v. Levan*, 6 Serg. & Rawle, 311; *Whitaker v. Salisbury*, 15 Pick. 544.) Hence, they cannot be dispensed with, on the mere suggestion of the party that they know nothing of the execution. (See *Whitaker v. Salisbury*, supra.) But where there was distinct evidence that they were not present at the execution, and not the slightest probability that their testimony could throw any light on that question, the court allowed the execution to be proved, as if the instrument had not been attested. (*Taylor v. Meekly*, 4 Yeates' Rep. 79.) See *Harding v. Cragie*, 8 Verm. Rep. 501, 508.

The circumstances enumerated in the text have been very uniformly held sufficient to dispense with the subscribing witnesses.

Where the *absence* of the subscribing witness is relied on, it is not necessary that he should be out of the country; but, absence beyond the process or jurisdiction of the court, is enough to allow a resort to inferior evidence. (Clark v. Sanderson, 3 Binn. Rep. 192. Jackson, ex dem. Edson, v. Gager, 5 Cowen's Rep. 383. M'Pherson v. Rathbone, 11 Wend. 98, 9. Pelletreau v. Jackson, id. 123. S. C. in error under title of Jackson, ex dem. Varick, v. Waldron, 13 id. 178. Homer v. Wallis, 11 Mass. Rep. 309. Sluby v. Champlin, 4 John. Rep. 461. Engles v. Bruington, 4 Yeates' Rep. 345. Hempstead v. Bird, 2 Day's Rep. 293. Ungles v. Graves, 2 Blackf. Rep. 191.) In North Carolina it has been held, that a mere *temporary absence* will not answer, even though the witness be sick also. (Gordon v. Payne, Martin's N. Car. Rep. 72. Harvey v. Jones, id. 41.) It is not required that a commission be sent, if the witness is out of the state, or at any place where his personal attendance before the commissioners cannot be enforced. (See the cases *supra*, particularly Clark v. Sanderson, and what is there said by Yeates, J., at p. 196, 7; also Irving v. Irving, 2 Hayw. Rep. 27, 8; Sentney v. Overton, 4 Bibb, 445; Den v. Van Houten, 5 Halst. Rep. 270; Jones v. Coopridger, 1 Blackf. 47 and note (1) at p. 48, 9; Ford v. Hale, 1 Monroe, 23; Barfield v. Hewlett, 4 Miller's Lou. Rep. 118; Crouse v. Duffield, 12 Mart. Lou. Rep. 539; Lynch v. Postlethwaite, 7 id. 69, 209.) Otherwise, in Vermont, where the witness' residence is known, and he lives within a reasonable distance from the place of trial. (Rich v. Trimble, 2 Tyl. Rep. 349.) A similar doctrine has been held in Tennessee. (Love v. Payton, 1 Tenn. Rep. (Overton) 255, Shepherd v. Goss, id. 487.) But, in the latter state, the rule is now in accordance with the general course of adjudication in other states. (Stump v. Hughes, 5 Hayw. Rep. 93. Irving v. Irving, 2 id. 27, 8.) In a case of absence from the state, you may, in general, resort at once to the next best evidence. But, if the witness is in the state, so that you can oblige him to appear before the commissioners, it is otherwise. (Hautz v. Rought, 2 Ser. & Rawle, 349.) In New-York, where the trial was in Onondaga county, and a subscribing witness was in Dutchess, who, from age and ill health, was shown incapable of attending as a witness, held, that the instrument could not be established by proof of the witness' hand-writing; but his examination under an order of the court, or under the statute, should have been taken, as then he might have been cross-examined. (Jackson, ex dem. Bond, v. Root, 18 John. Rep. 60.)

If there is ground for presuming that the witness' absence from the state is collusive and was procured by the party in order to be let in to give secondary evidence, the testimony of the witness will not be dispensed with. (See per Tilghman, C. J., and Yeates, J., in Clark v. Sanderson, 3 Binn. Rep. 195, 198.)

If the witness cannot be found upon diligent enquiry, it is the same as if he were proved dead or technically absent. (Clark v. Sanderson, 3 Binn. Rep. 192. Jackson, ex dem. Edson, v. Gager, 5 Cowen's Rep. 383. Jackson, ex dem. Woodruff, v. Cody, 9 id. 140. Ingram v. Hall, 1 Hayw. Rep. 207. Jackson, ex dem. Bond, v. Root, 18 John. Rep. 60, 66. Whittemore v. Brooks, 1 Greenl. Rep. 59, 60. Sluby v. Champlin, 4 John. Rep. 461. Baker v. Blount, 2 Hayw. Rep. 404. Jackson, ex dem. Lansing, v. Chamberlain, 8 Wend. 620. Note, to Jones v. Coopridger, 1 Blackf. Rep. 49. Spring v. South Carolina Ins. Co. 8 Wheat. 269.)

What shall amount to diligent enquiry is a question to be decided by the court, and depends so much upon the circumstances of each case, that no rule very generally applicable can be laid down with regard to it. The principle to be extracted from the cases seems to be, that the court must be satisfied that a diligent and bona fide search for the subscribing witness, has been made. (Per Tracy, senator, in Jackson, ex dem. Varick, v. Waldron, 13 Wend. 199.) The rules and practice of the courts leave this point with some latitude of discretion. (Per Kent, C. J., in Jackson, ex dem. Livingston, v. Burton, 11 John. Rep. 65.) But this means a sound legal discretion—a discretion itself the subject of review. (Per Tracy, senator, Jackson, ex dem. Varick, v. Waldron, supra.) The requisition for the subscribing witnesses is not, however, to be pushed beyond a reasonable extent; and if the party show that he has neglected nothing in the way of search, enquiry, &c., which afforded a rational hope of procuring them, this is all that the law will exact. (Conrad v. Farrow, 5 Watts' Rep 537.)

In the following cases it was held that due diligence had been used:—Where enquiry appeared to have been made for the subscribing witness to a bond, at the house of the obligor and obligee, without being able to obtain any intelligence of such a person. (Cunliffe v. Sefton, 2 East, 183.) So, where proof was adduced that diligent inquiry was made at the witness' usual residence, and that the inquirer was told, as well there as by the witness' father, that he had absconded to avoid his creditors and was not to be found. (Crosby v. Percy, 1 Taunt. Rep. 364.) Also, where it appeared that the witness had been a pauper in R., and that inquiry had been made there of the selectmen, overseers of the poor, and others, who said that the witness had gone to see his relations in C., out of the state; it being shown further by another witness that, about eighteen days before, he saw the attesting witness get into a stage, and understood he was going to C. (Dudley v. Sumner, 5 Mass. Rep. 444.) So where, a fortnight before the trial, fruitless inquiry was made of the clerk and agent of the witness; five or six days before the trial, a like inquiry was made at his house, of his wife and servant, but without obtaining any information; and a bailiff from whom the witness had escaped swore that he had searched and could not find him. (Morgan v. Morgan, 9 Bing. 359.) And where it was shown that the witness had been enquired after, at the request of the attorney, (by one who knew him, but who had not seen him for eighteen months,) at coffee-houses, and other places where he thought he might hear of him, and without success; held sufficient, without showing inquiry made of the parties who executed the agreement. (Evans v. Curtis, 2 Carr. & Payne, 296.) Where it appeared that a witness once resided at a particular place within the jurisdiction of the court, several years ago, faithful and fruitless inquiries made there, to ascertain where she removed to, have been held sufficient. (Pelletreau v. Jackson, 11 Wend. 110, 112, 123. See S. C. on error under title Jackson, ex dem. Varick, v. Waldron, 13 Wend. 178.)

Sometimes the witnesses' past residence at any one period cannot be identified. A party finds names subscribed to the attestation clause, without a visible ligament of connection with any thing else in the known world. This is apt to be so in regard to old transactions; and it may, sometimes, be so too with those of more recent date. In such cases, where no particular avenue to a knowledge of them promises to be more productive than another, it is hard for a party to determine what to do. Clearly at

most, nothing more would be required of him than that he should go where the instrument was executed, if he can ascertain the place, or where the party or parties executing it resided, and, if he was unsuccessful in his inquiries, that would seem sufficient. (See *Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140.) See *M'Gennis v. Allison*, 10 Ser. & Rawle, 199; *Anon. Godbolt*, 326; *Gresl. Eq. Ev.* 178. In *Jackson, ex dem. Woodruff, v. Cody*, supra, the inquiry was, principally, at the place where the deed described the grantor as residing; and there was also an advertisement inserted in a newspaper of that place; and nothing appearing to show that further inquiry would have been likely to prove availing, it was deemed sufficient. The advertisement in the newspaper was probably well enough, but not necessary. (See per *Le Blanc, J.*, in *Cunliffe v. Sefton*, 2 East, 183, 188; Per *Mansfield, C. J.*, in *Crosby v. Percy*, 1 Taunt. Rep. 365, 6.) If the person enquiring, in such case, should ascertain that the witness resided or was seen at some subsequent period, at a particular place, enquiry should doubtless appear to have been made there, if that was within the jurisdiction of the court, and there was no evidence that the witness had left such place; but if he only received vague information, such as, that a person of that name had left, and "gone down the river," or "over the mountain," &c., it will not be required that he should have followed him. (*Conrad v. Farrow*, 5 Watts' Rep. 536, 537, 8.) See *Whittemore v. Brooks*, 1 Greenl. Rep. 59. Where enquiry was made among the former acquaintances of the witness, fourteen miles from where she was last known to live, who had not heard of her for thirty years, and it appeared that the family in which she resided had left the state many years ago; held, that a reasonable presumption of her death or absence was made out; though enquiry at the place of her last known residence would have been more satisfactory. (*Jackson, ex dem. Lansing, v. Chamberlain*, 8 Wend. 620, 623, 4.) In *Cooke v. Woodrów*, 5 Cranch, 13, the subscribing witness "had, upwards of a year ago, left the district of Columbia;" before he left he declared his intention of going "to the northward, that is to say, to Philadelphia or New-York, and said he had a wife in New-York." The witness went from said district to Norfolk; when he got there, he declared he should go on farther south, but where was not known; and the person testifying to these facts, said he had not heard of the subscribing witness for the last twelve months. The cause was tried in the circuit court of the district of Columbia; and besides what is stated above, it was shown that a subpoena had issued to the marshal of the district, and that the marshal could not find the witness in the district. The circuit court refused to allow inferior evidence to be given under these circumstances, which decision was affirmed on error; and per *Marshall, C. J.*, who delivered the final opinion—"In the present case, it does not appear to the court that the testimony of the subscribing witness could not have been obtained, if proper diligence had been used for that purpose. It does not appear that the witness had ever left Norfolk. It is not stated that any inquiry concerning him had been made there. If such inquiry had been made, and he could not be found, evidence of his hand-writing might have been permitted." (Id. p. 14.) In *Wardell v. Fermor*, 2 Camp. Rep. 292, a person who had been clerk to the witness swore, that the latter disappeared about a year ago, and had not since been heard of; another swore that he had repeatedly called at the witness' office in Seething Lane, without being able to learn any tidings of him. But no evidence was given of an inquiry at the house the witness had occupied at Sydenham.

Lord Ellenborough said it was possible the witness might have been shut up there all the time, and that his attendance might have been enforced by a subpoena; and therefore refused to allow inferior evidence without some further account of him. (*Id.* 283, 4.)

The party should make his enquiry and search in proper season. (See *Mills v. Twist*, 8 John. Rep. 121, stated *infra*.) He should likewise, in order that there may be no doubt as to the bona fides of the search, carry with him a subpoena. (See *Whittemore v. Brooks*, 1 Greenl. Rep. 59.) But, where the only subscribing witness to a receipt had made a deposition, and seven days before the trial went out of the jurisdiction of the court, not having been subpoenaed, but without the party being apprised of his intention; held, that his hand-writing might be proved. (*Hamilton v. McGuire*, 2 Serg. & Rawle, 478.) Otherwise, it seems, where there is ground for supposing collusion between the witness and the party seeking to introduce the inferior evidence. (See *Gresl. Eq. Ev.* 178, 9; also *infra*.)

The necessity of an actual inquiry may be superseded by presumptions arising from the circumstances. Thus, where an attested instrument was executed out of the state, the court presumed the witnesses resided there, and allowed inferior proof. (*Barfield v. Hewlett*, 4 Mill. Lou. Rep. 118. *Crouse v. Duffield*, 12 Mart. Lou. Rep. 539.) In a case tried in 1812, where a deed executed at New-York 44 years previous, to which A. & M. were subscribing witnesses, was offered, and S., a merchant of N. Y., testified that he had lived in that city before and since the date of the deed, that he knew A., whose hand-writing he identified, but did not know M., and had made no inquiry after him; held, that the impossibility of procuring the witness might be presumed. (*Jackson, ex dem. Livingston, v. Burton*, 11 John. Rep. 64.) In *Wardell v. Fermor*, 2 Campb. 282, proof of a commission of bankruptcy against the witness, and that he had not surrendered, though the commission had issued twelve months before, was held sufficient, *prima facie*, to allow secondary evidence. "As W., (the witness) did not appear to his commission," said Lord Ellenborough, "I must presume he was out of the kingdom. Had he been at S. (the witness' last residence,) at the time fixed for his surrender, I must suppose he would have surrendered, to save himself from a capital felony." (*Id.* 284, 5.) But, where the enquirer swore he had learned that the attesting witness kept out of the way to avoid an arrest; held, not sufficient, though he was the son of the opposite party. (*Pytt v. Griffith*, 6 Moore, 538.) See note to *Booker v. Bowles*, 2 Blackf. 93.

In some cases the courts, in determining the amount of diligence to be required in searching for the witness, seem to have placed stress on the circumstance that the paper attested by him was comparatively unimportant in the cause. (See per Mansfield, C. J., delivering the opinion in *Crosby v. Percy*, 1 Taunt. Rep. 364, 5, 6. *Gresl. Eq. Ev.* 178.) But in *Wardell v. Fermor*, 2 Camp. Rep. 282, 284, Lord Ellenborough said, in allusion to the dictum in *Crosby v. Percy*, *supra*, "I am disposed to treat whatever falls from the learned chief justice of the common pleas with the greatest respect; but I do not see how secondary evidence is to be admitted or rejected according to the nature of the deed to be proved. It must depend upon the possibility of procuring the attendance of the attesting witness; not upon the testimony he is likely to give." See also, *McConnell v. Brown*, Litt. Sel. Cas. 461, 2, 3, stated *ante*, note 878, p. 1264.

An evident design of the witness fraudulently to withhold his testimony from the party requiring it, will, many times, be a circumstance of considerable importance, in determining whether further efforts to procure him should have been made. (*Baker v. Blount*, 2 Hayw. Rep. 404.) See *Kay v. Brookman*, 3 Carr. & Payne, 555; *Burt v. Walker*, 4 Barn. & Ald. 697; *Gresl. Eq. Ev.* 178. Particularly if there be ground for supposing collusion between the witness and the party against whom he is to testify. (*Mills v. Twist*, 8 John. Rep. 121. *Hill v. Phillips*, 5 Carr. & Payne, 359. *Gresl. Eq. Ev.* 178.) Indeed, if it be shown that the witness is kept out of the way, at the instance of such party, this would seem of itself, a sufficient ground for allowing the other side to prove the witness' hand-writing. (See per *Borough & Park, Js.*, in *Pytt v. Moore*, 6 Moore, 539; Per *Heath, J.* in *Gibson v. Minet*, 1 H. Black. 623; Per *Haywood, J.* in *Ingram v. Hall*, 1 Hayw. Rep. 207.) But this will not be presumed from the mere fact that the witness is the son of the party against whom he is sought to be used. (*Id.*) Where the witnesses were the defendant's sons, (one of whom, however, was of age, and not living with him,) and the plaintiff did not attempt to subpoena them till the day previous to the circuit, when he inquired of the defendant concerning them, who told him that they had gone on a journey a few days before to the west, which was false, one of them having been seen at his house on the same day or the night previous; held, that these facts were not sufficient to lay a foundation for proving the execution of the instrument by inferior evidence; and this, notwithstanding an officer had been employed by the plaintiff, who, on the day after his interview with the defendant, made diligent search and could not find the witnesses. These facts, say the court, would have been a sufficient excuse for not bringing on the trial; and might, perhaps, be ground for a rule to help the party, if the same deception should be repeated. They speak of *Cunliffe v. Sefton*, and *Crosby v. Percy*, supra, as the strongest in favor of a relaxation of the rule, but regard them as by no means reaching the principal case; for in the latter, timely and sufficient diligence was not shown. (*Mills v. Twist*, 8 John. Rep. 121.) See *Pytt v. Griffith*, 6 Moore, 538.

The enquiry must be *bona fide*. Where there is reason to suspect collusion between the party seeking to give secondary evidence, and the witness, a rigid account of him will be required. (See per *Tilghman, C. J.*, and *Yeates, J.* in *Clark v. Sanderson*, 3 Binn. Rep. 195, 198; *Crosby v. Percy*, 1 Taunt. 365.)

Parties to the suit, and persons interested, according to the rule almost universally recognized in the United States, are competent to testify on the question of due search, absence, death, &c., as to a subscribing witness; and, indeed, in respect to most of the facts necessary for the admission of evidence of the subscribing witness' hand-writing. Interest, or the fact of the person called being a party to the record, cannot, in general, operate as a ground of exclusion, if he is competent in other respects. (See the cases cited ante, note 122, p. 138, also, ante, note 861, p. 1217, 1218.)

The rule as to the nature of the testimony admissible with a view of proving the death, absence, &c., of the subscribing witnesses, will not, we apprehend, be found materially different from that which prevails where similar facts are required to be established in other cases. How far hearsay may be received on these preliminary questions, does not appear to be very accurately defined in any of the numerous decisions under this head. They generally exhibit, however, a good deal of latitude in

this particular, allowing the person making search for the witness to detail nearly every thing which he was told by those of whom he inquired. The case of *Doe, ex dem. Johnson, v. Johnson*, 2 Chitt. Rep. 196, speaks directly to this point. There, evidence was given of the witness having gone to sea upwards of twenty years ago, and that he had not since been heard of, except that some time back he called on his brother; the party also showed that the brother had been applied to, and that he said he knew nothing of it. Garrow, B., who tried the cause, adjudged the evidence insufficient to admit proof of hand-writing, and a verdict was taken with liberty to move to set it aside. Phillips accordingly moved; and referred to *Crosby v. Percy*, supra, to show that the brother's answer, upon enquiry of him, was admissible. But, per Lord Ellenborough—"The answer in that case was that a party had absconded to avoid his creditors; besides which, other circumstances induced the court to admit secondary evidence; here, the evidence of what the brother said clearly could not have been received, since it was a fact; but the evidence that enquiries were frequently made, and the parties knew nothing of the man, might certainly have been admitted." (Id. 197.) Phillips further contended that, in cases of written instruments, evidence is always given of answers to enquiries as to the existence of papers, and of search made after them. *But by the Court*: "The evidence of what the brother said cannot certainly be admitted, whilst the brother himself could have been called. The only evidence admissible, is the general evidence that unsuccessful enquiries were made, but not the particular facts." The evidence was held sufficient, however, independent of the brother's answer. (See S. C. somewhat differently stated at p. 474, of the text, in note. And see also per Cowen, J., in *Vandyne v. Thayer*, 19 Wend. 162, 165.) Where general answers to enquiries made concerning a person are given in evidence, it is doubtless proper for the other side to go into particulars, and show precisely what answers were given, so as to test the bona fides and diligence of the search. Further on this subject, see the notes under the head of hearsay.

NOTE 896—p. 474.

1 Stark. Ev. 327, 6th Am. ed. See *Love v. Payton*, 1 Tenn. Rep. (Overt.) 255.

The subject of the text viz., what will be sufficient to dispense with the necessity of producing subscribing witnesses so as to allow you to prove their hand-writing, may receive additional illustration from some cases cited ante, note 441, p. 576, 7, 8. See also, ante, notes 654, 5, p. 933.

NOTE 897—p. 474.

In cases proper for resorting to the hand writing of the subscribing witness, the presumption in general is, that what he has attested did take place; and hence, proof of his hand writing will, ordinarily, make out the execution sufficiently to allow the instrument to be read in evidence. (*Sigfried v. Levan*, 6 Serg. & Rawle, 311. *Miller's estate*, 3 Rawle, 317, 318. *Pelletreau v. Jackson*, 11 Wend. 110. *McPherson v. Rathbone*, id. 96. *Lush v. Druse*, 4 id. 313. *Ingram v. Hall*, 1 Hayw. Rep. 207.

Somerville v. Sullivant, 1 Call's Rep. 560, 561. *Jackson, ex dem. Varick, v. Waldron*, 13 Wend. 178. *Carroll v. Norwood*, 1 Harr. & John. 174, 175. *Ross v. Gould*, 5 Greenl. Rep. 204. *Whittemore v. Brooks*, 1 id. 63, note. *Mott v. Dougherty*, 1 John. Cas. 230. *Sluby v. Champlin*, 4 id. 461. *Jones v. Brinkley*, 1 Hayw. Rep. 20. *Jones v. Blount*, id. 238. *Lautermilch v. Kneagy*, 3 Serg. & Rawle, 202. *Hamilton v. Marsden*, 6 Binn. Rep. 45. *Smith v. Chamberlain*, 2 N. Hamp. Rep. 440. *Parker's ex'rs v. Fassit*, 1 Harr. & John. 337. *Jackson, ex dem. Bond, v. Root*, 18 John. Rep. 60, 66. *Murdock v. Hunter's rep's*, 1 Brock. Rep. 135. *Gilliam's adm'r v. Perkinson's adm'r*, 4 Rand. 325. *Farnsworth v. Briggs*, 6 N. Hamp. Rep. 561. *Clark's lessee v. Courtney*, 5 Peters' Rep. 319. *Den v. Van Houten*, 5 Halst. Rep. 273. *Patterson v. Tucker*, 4 id. 322. *Winn v. Patterson*, 9 Peters' Rep. 674, 675, 676.) How far the rule will need to be qualified, as it respects deeds, where the instrument does not purport in the body of it, or in the attestation clause, to have been sealed, and the only evidence of an intent to seal is an ink scroll opposite the party's name, may be gathered from several cases, ante, note 884, p. 1277 et seq.

Before being allowed to prove the instrument by evidence of the witness' hand writing, the non-production of all the witnesses, if there be more than one, must be duly accounted for. (*Jackson, ex dem. Edson, v. Gager*, 5 Cowen's Rep. 383. *Davison's lessee v. Bloomer*, 1 Dall. Rep. 123. *Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140. *Jackson, ex dem. Bond, v. Root*, 18 John. Rep. 60. *Hautz v. Rough*, 2 Serg. & Rawle, 349. *Whittemore v. Brooks*, 1 Greenl. 57, 59. *Shepherd v. Goss*, 1 Tenn. Rep. 487. 1 Stark. Ev. 328, 6th Am. ed. *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277. *Stump v. Hughes*, 5 Hayw. Rep. 93. *Jones v. Coopridger*, 1 Blackf. Rep. 47, 49, note (1.) *Booker v. Bowles*, 2 id. 90.)

Where all the witnesses to a deed or other instrument are dead, or absent, &c., there being several, proof of the hand writing of one of them will, *prima facie*, suffice to allow the instrument to be read. (*Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140. *Fitzhugh v. Croghan*, 2 J. J. Marsh. Rep. 434. *Jackson, ex dem. Livingston, v. Burton*, 11 John. Rep. 64. *Dudley v. Sumner*, 5 Mass. Rep. 444. *Jackson, ex dem. Bond, v. Root*, 18 John. Rep. 60. *McFerran v. Powers*, 2 Serg. & Rawle, 44. *Jackson, ex dem. Boyd, v. Lewis*, 13 John. Rep. 504. 1 Stark. Ev. 328, 6th Am. ed. *Jones v. Coopridger*, 1 Blackf. Rep. 49, note (1.) *Kelley v. Dunlap*, 3 Pennsylv. Rep. 136. See *Mott v. Dougherty*, 1 John. Cas. 230; *Hamilton v. McGuire*, 2 Serg. & Rawle, 478; *Kingwood v. Bethlehem*, 1 Green's Rep. 226, 227; *Coulson v. Walton*, 9 Peters' Rep. 62; *Jackson, ex dem. Lansing, v. Chamberlain*, 8 Wend. 620.) Otherwise, however, in South Carolina, (*Sims v. De Graffenreid*, 4 McCord, 253, and see the cases *infra*, cited from the reports of that state;) in Kentucky, (*semble*, *Robards v. Wolfe*, 1 Dana, 155, stated *infra*;) and Louisiana. (See *infra*.)

The authentication of an instrument in this way, whether by proof of the hand writing of one or all of the attesting witnesses, though sufficient generally to allow it to go to the jury, is by no means conclusive upon them; (*Somerville v. Sullivant*, 1 Call's Rep. 560;) for if there are suspicious circumstances, casting doubt upon the transaction, they may not be satisfied by the testimony; and hence, it is strongly recommended that proof of the hand-writing of the party be superadded. (See per *Tilghman, C. J.*, in *Clark v. Sanderson*, 3 Binn. Rep. 192, 195, 196; also per *Walworth*,

Chancellor, and Tracy, Senator, in *Jackson, ex dem. Varick, v. Waldron*, 13 Wend. 183, 184, 197, 198; *Bell v. Cowgell*, 1 Ashm. Rep. 7; *Hamilton v. Marsden*, 6 Binn. 45; *Lautermilch v. Kneagy*, 2 Serg. & Rawle, 202; *Hamilton v. McGuire*, 2 id. 478; *Murdock v. Hunter's rep's*, 1 Brock. Rep. 135, 140, et seq.; *Spring v. The South Carolina Ins. Co.*, 8 Wheat. 268; *Farnsworth v. Briggs*, 6 N. Hamp. Rep. 561; *Ungles v. Graves*, 2 Blackf. Rep. 191.) In Maryland, it is said to be "usual" to add proof of the hand-writing of the party to that of the subscribing witnesses. (*Handy v. The State*, 7 Harr. & John. 49.) 'Though this seems not indispensable. (*Carroll v. Norwood*, 1 id. 174.) Where the witness' hand-writing cannot be very satisfactorily proved, or where he is a marksman merely, it is then, doubtless, necessary to prove the hand-writing of the party, or other circumstances equivalent. (See *Nelius v. Brickell's adm'r*, 1 Hayw. Rep. 19; *Engles v. Bruington*, 4 Yeates' Rep. 346; *Gilliam's adm'r v. Perkinson's adm'r*, 4 Rand. 325; *Gregory v. Baugh*, id. 636, per Green, J.)

Where there is fair ground for a dispute as to the identity of the party executing, proof beyond that of the hand-writing of the subscribing witnesses may become necessary. (See the text, at p. 474, 475, and the next succeeding note.) In a recent case in Kentucky, an action was brought on an injunction bond, to which the defendant pleaded *non est factum*; the bond was attested by the clerk, and it became a question, whether the attestation of the clerk did not prove the bond: the court held it did not. But even were it otherwise, they said, and the attestation was to be considered so far official as to prove the signature to be genuine, that does not identify the defendant, and prove him the person who executed. For, there may be two men of the same name. The defendant ought not to be required to prove he was not the person who executed, &c. (*Robards v. Wolfe*, 1 Dana's Rep. 155.) *Quere*, however. Most of the American cases, *supra*, when they have either required or recommended proof beyond the hand-writing of the witnesses, have done so upon the ground, that it would furnish additional assurance of execution; and not with a view to the identity of the party. Indeed, so far as merely identifying the party was concerned, courts have usually assumed, that identity of name was sufficient, in the first instance, as presumptive evidence of identity of person. And so are the majority of the English cases, notwithstanding the opinion of Bayley, J., in *Nelson v. Whittall*. (See the next succeeding note.) *Robards v. Wolfe*, *supra*, is the only American case, it is believed, where this has been denied. Nor does the reasoning in the case seem to us at all satisfactory. It is true, there *may be* two persons of the same name; and that the presumption arising from identity of name may be erroneous and illusory. And the same objection could be urged against presumptive or circumstantial evidence in various other cases, where it is undeniably admissible, and *prima facie* sufficient. Where the fact is shown that there is another person of the same name with the party who is alleged to have executed the instrument, further evidence might then be required. But until this appears, it is difficult to see why the presumption adverted to should not stand; at least so far as to allow the point to be passed upon by the jury. (See *Atchinson v. McCulloch*, 5 Watts' Rep. 13; *Jackson, ex dem. Shultz, v. Goes*, 13 John. Rep. 518; *Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140, 149, 150; *Jackson, ex dem. Bogert, v. King*, 5 id. 237.)

In South Carolina, proof of the hand-writing of the party, must be added to that of the subscribing witnesses, and, in general, proof of the hand-writing of all the witnesses is requisite. (*Hopkins v. De Graffenreid*, 2 Bay's Rep. 187. *Oliphant v. Taggart*, 1 id. 255. *Plunket v. Bowman*, 2 McCord's Rep. 138. *Duncan v. Beard*, 2 Nott & McCord, 400. *Young v. Stockdale*, id. 531. *Elwee v. Sutton*, 2 Bail. Rep. 128. *Corneal v. Bickley*, 1 McCord, 166. *Sims v. De Graffenreid*, 4 McCord's Rep. 253. *Townsend v. Covington*, 3 id. 219. *Edgar ads. Brown*, 4 id. 91.) But, where the maker of a promissory note was a marksman, held, that proof of the hand-writing of the subscribing witness was enough. (*Burnly ads. Whitaker*, 2 Nott & McCord, 374.)

In Louisiana also, proof of the hand-writing of the attesting witness is not sufficient; the maker's signature must be authenticated in some way, and this is not done, it is said, by proving the hand-writing of the witness or witnesses. (*Dismukes v. Musgrove*, 7 Mart. Lou. Rep. 58, N. S. *Barfield v. Hewlett*, 4 Mill. Lou. Rep. 118. *Crouse v. Duffield*, 12 Mart. Lou. Rep. 539. *Lynch v. Postlethwaite*, 7 id. 69.) But an exception is allowed where the party is a marksman. (*Tagiaseo v. Molinari's heirs*, 9 Lou. Rep. (Curry) 112.)

It seems that, in all cases, where the hand-writing of the subscribing witnesses is resorted to, for the purpose of establishing an instrument, the opposite party may controvert the presumption arising therefrom, by showing statements made by them inconsistent with their attestation. (See ante, note 520, p. 764; also ante, note 583, p. 771.)

NOTE 893—p. 475.

The American cases on this subject will be found in our next preceding note. The English cases are not agreed that any proof is necessary in the first instance, to identify the party and connect him with the instrument, beyond what arises from the identity of name. Our author's observations are founded upon what is said by Bayley, J., in *Nelson v. Whittall*, 1 Barn. & Ald. 21: Lord Ellenborough, C. J., and Abbott, J., in the same case, obviously inclined to the opinion that nothing more was requisite, in the first instance, than merely to prove the hand-writing of the witness. The case of *Page v. Mann*, 1 Mood. & Malk. 79, is to the same effect; there the opinion of Bayley, J., was cited to show, that something beyond proof of the witness' signature was necessary in order to allow the instrument to be read. Lord Tenterden, C. J., said the practice had been otherwise; that he had frequently admitted evidence of the hand-writing of the witnesses, as sufficient, without other proof. So, where the obligor in a bond signed only by his mark, and though there was some slight evidence given that the defendant had lived at the place where the bond described the party who executed it as living, no stress whatever was placed upon that, his lordship saying, that if there were no evidence beyond the hand-writing of the witness, he would have no doubt of its sufficiency. (*Mitchell v. Johnson*, id. 176.) See also *S. P. Kay v. Brookman*, id. 236; *S. C. 3 Carr. & Payne*, 555; *Doe, ex dem. Wheeldon, v. Paul*, id. 613. *Hill v. Unett*, 3 Madd. Rep. 370, seems to be among those authorities which allow proof of the hand-writing of the witness alone, when

properly resorted to, to be sufficient, without proof of the party's signature. Though Mr. Starkie has set it down as one going to mark a distinction between cases where a witness is dead and where he is living; and as holding, that in the latter instance, the hand-writing of the witness merely, will not do; but in the former it will. (1 Stark. Ev. 328, n. (f.); id. 329, n. (k.)) The witness, however, was there produced, and all that the vice chancellor said, was this—"If a witness is dead, it is only necessary to prove the hand-writing of the witness; but when the witness is alive, *he* must not only prove his own hand-writing as witness, but *he* must prove the hand-writing of the person who executed the deed," clearly referring to a living witness, who is produced, and not to one who, though living, was absent beyond the jurisdiction, so as to dispense with his attendance.

NOTE 899—p. 475.

If the subscribing witness fails to prove the due execution of the instrument, the party may establish the fact by other evidence. (Whitaker v. Salisbury, 15 Pick. 534, 543, 4. Sigfried v. Levan, 6 Ser. & Rawle, 308. Taylor v. Meekly, 4 Yeates' Rep. 79. Patterson v. Tucker, 4 Halst. Rep. 322. Miller's estate, 3 Rawle, 318. Boxer v. Rabeth, 1 Gow's Rep. 175. Boyer v. Norris, 1 Harringt. Rep. 22, 3.) Even should the witness deny his attestation, or give evidence tending to disprove the execution, (which he is competent to do though he confess his signature, ante, notes 75, 6, p. 70, 1,) the party may contradict him. (Whitaker v. Salisbury, 15 Pick. 544. Sigfried v. Levan, 6 Ser. & Rawle, 308. Taylor v. Meekly, 4 Yeates' Rep. 79. Hall v. Phelps, 2 John. Rep. 452. Handy v. The State, 7 Harr. & John. 42, 48, 9. Holloway v. Lawrence, 1 Hawks' Rep. 49, 50. Booker v. Bowles, 2 Blackf. Rep. 90. Vernon v. Hammet, 1 Hill's Rep. 269.) The witness' hand-writing may be proved, notwithstanding his doubt or denial of it; and this has been called the most usual and direct proof; but, in such case, it ought to be very clear and satisfactory. (Pearson v. Wightman, 1 Rep. Const. Ct. So. Car. 336.) And where the hand-writing is distinctly proved, the instrument is to be read to the jury, and if they find the fact of execution, the court will not disturb the verdict. (Id. Patterson v. Tucker, 4 Halst. Rep. 322.)

The party calling the witness, however, will not be allowed to impeach his character for truth. (Whitaker v. Salisbury, 15 Pick. 544. Brown v. Bellows, 4 id. 194.) Though it has been held that he may prove previous contradictory statements of the witness. (Brown v. Bellows, 4 Pick. Rep. 179, 187, 8, 194. Cowden v. Reynolds, 12 Ser. & Rawle, 281. Sigfried v. Levan, 6 id. 308, 314. See Crowell v. Kirk, 3 Dev. 357, per Ruffin, J.) It is difficult, however, to reconcile the latter cases with the general rule which forbids that a party shall be allowed to impeach his own witness. (See on this subject ante, notes 534, 5, 6, pp. 779 to 781, 2; also, Whitaker v. Brown, 15 Pick. 544, 5.)

Sometimes a subscribing witness when called on can recollect nothing of the execution, not even the act of signing by the party, independent of the fact of finding his (the witness') name attached to the attestation. It seems to be well settled that, in such cases, if the witness, in addition to identifying his signature, can say that he never at-

tested a writing, without seeing it executed, this will amount to very cogent evidence of the execution. It furnishes a presumption ranging in principle, along with those which arise from artificial habits, of which there are many. (See ante, note 298, p. 294, 5.) The attestation of the witness, in these and similar instances, has been likened to a memorandum, used to refresh his recollection; and, in ascertaining how far the witness must go in order to allow the point of execution to be submitted to the jury, the reader may be materially aided by several of the cases stated ante, note 528, p. 750, et seq., where the general subject of memoranda was considered, and several *dicta* bearing directly upon the present enquiry, introduced. (See particularly at pp. 751, 2, of that note, and *The State v. Rawles*, and *Collins v. Lemastus*, cited at the latter page; also, *Pearson v. Wightman*, 1 Rep. Const. Ct. So. Car. 336; *Dan v. Brown*, 4 Cowen's Rep. 486, 9.) If the witness recognizes his signature, and says that he has no recollection of the fact of its being executed in his presence, but that seeing his signature to it he has no doubt he saw it executed; this has always been received as sufficient proof of execution. (Per Bayley, J., in *Maugham v. Hubbard*, 1 Mann. & Ryl. 7. See also, *Russell v. Coffin*, 8 Pick. Rep. 143; per Ewing, C. J., in *Den v. Downam*, 1 Green's Rep. 142; *Merrill v. The Ithica & Owego Rail Road Co.* 16 Wend. 598; *Currie v. Donald*, 1 Wash. Rep. 58; *Denn, ex dem. Gaston, v. Mason*, 1 Cox's Rep. 10, and note at p. 11; *Patterson v. Tucker*, 4 Halst. 322, 332, 3; per Sutherland, J., delivering the opinion, in *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277, 282; *Wheeler v. Hatch*, 3 Fairf. 389; *Brown v. Anderson*, 1 Monroe, 198.) Accordingly, in *Hall v. Luther*, 13 Wend. 491, a subscribing witness to a bond, given by an under sheriff with sureties, to the sheriff, swore that he remembered the sheriff was, on the day of its date, taking bonds of his deputies; that he recollected seeing some of the obligors at the time, but could not say he saw A and B, two of them; he, however, recognized his own hand-writing, and presumed he saw all the obligors sign or heard them acknowledge it, or he would not have witnessed it; held, *prima facie* sufficient to entitle the instrument to be read in evidence. (See *Miller's estate*, 3 Rawle, 312, 317, 318.) Where one of two subscribing witnesses to a deed did not recollect witnessing it, but identified his own hand-writing, and said he had no doubt he saw it executed, "as he was not in the habit of signing his name to what he did not see executed;" it appearing also, that the other witness was out of the state, and proof being given of his hand-writing: Held, sufficient to allow the instrument to go to the jury, unless there was reason to suspect or believe the deed to be a forgery. (*Russell v. Coffin*, 8 Pick. Rep. 143.) A subscribing witness to a warrant of attorney swore, that from certain memoranda he found, he was at a given place on a particular day, being the day the warrant bore date; that his name subscribed thereto was his own hand-writing; that the seal appeared to have been taken from an engraving then and still in his possession; and that, from these circumstances, he was convinced he was present and witnessed the execution of the instrument: This was adjudged enough to authorize a jury to pronounce the instrument duly executed, although the witness had not sworn to the person's hand-writing who was alleged to have executed it, nor that the same was executed by such person. It is possible, say the court, that the witness may have quibbled, and that he saw the instrument executed by some other person than the party; but this approaches so near to perjury, that it is not to be presumed in respect to a man of unimpeached character. If his charac-

ter had been proved bad, the jury might have disregarded the evidence. (*Pigott v. Holloway*, 1 Binn. Rep. 436.) In *Collins v. Lemasters*, 2 Bail. Rep. 141, a witness to a deed recognized his own signature, and was induced to believe from that circumstance, that it was executed in his presence; he remembered the parties to it being together at the time of the supposed execution, but had no recollection of having seen them sign, seal, deliver, or of hearing them acknowledge the deed: And held, that this was enough to authorize the deed to go to the jury. The other subscribing witness was then called by the opposite party, who swore that one of the parties had not signed at the time of the attestation, nor had the witness any recollection of such party being present at the attestation. Upon this testimony the case was submitted to the jury, and they having found in favor of the deed, the court refused to disturb the verdict.

NOTE 900—p. 475.

Such persons are not subscribing witnesses within the meaning of the rule on this subject, and therefore need not be produced, nor their hand-writing proved. (See ante, note 876, p. 1262, 3.)

Likewise, where it is shown that the name of the witness was put to the instrument by another, without the witness' knowledge or assent, he is not to be regarded as an attesting witness. (*Handy v. The State*, 7 Harr. & John. 49. See also, *Allen v. Martin*, 1 N. Car. Law Repos. 373.)

NOTE 901—p. 476.

All the cases are agreed that, in the instances enumerated in the text, you may treat the instrument, though attested, precisely as if it were unattested, and prove the execution by any testimony which would be proper were there no subscribing witnesses; i. e. by proving the hand-writing of the maker, his acknowledgments, &c., &c. (See per Walworth, chancellor, *Jackson, ex dem. Varick, v. Waldron*, 13 Wend. 183, 4; and per Tracy, senator, *id.* 196; *Pelletreau v. Jackson*, 11 *id.* 123, per Nelson, C. J.; *McPherson v. Rathbone*, *id.* 99, per Savage, C. J.; *Clark v. Sanderson*, 3 Binn. Rep. 192; *Handy v. The State*, 7 Harr. & John. 42, 48, 9; *Whittemore v. Brooks*, 1 Greenl. Rep. 57; *Duncan v. Beard*, 2 Nott & M'Cord, 400; *Halloway v. Lawrence*, 1 Hawks' Rep. 49, 50; *Gilliam's adm'r. v. Perkinson's adm'r.* 4 Rand. Rep. 525; *Gregory v. Baugh*, 4 *id.* 636, per Green, J.; *Farnsworth v. Briggs*, 5 Peters' Rep. 319; *Miller's estate*, 3 Rawle, 318; *Bayer v. Norris*, 1 Harringt. Rep. 22; *Bennet v. Robinson's adm'r.* 3 Stewart & Porter, 229; *Raines v. Phillips*, 1 Leigh. 433.) So in Virginia, where a mulatto is incompetent as a witness; an instrument to which his name appears as a subscribing witness, may be proved as though it were unattested. (*Gilliam's adm'r. v. Perkinson's adm'r.* 4 Rand. 325.)

But the hand-writing of the subscribing witnesses, where there are such, is, in general, the next best evidence in the absence of their testimony; and before the hand-writing of the maker, or his acknowledgments, can be received as sufficient to estab-

lish the execution, a reason must be furnished for failing to produce this species of evidence. It is proper therefore to notice what circumstances shall let the party in to prove the execution of a deed by the hand-writing or acknowledgment of the maker, when the same is attested.

We have seen that he cannot do this, without first accounting for the absence of the subscribing witnesses. (See ante, note 876, p. 1261; also ante, note 895, p. 1293, 4, et seq.) See also p. 473, of the text.

Even then, according to most cases, it is not of course to allow the deed to be proved by identifying the hand-writing of the party. (See the text, p. 473.) And accordingly, in New-York, where the subscribing witnesses to a deed could not be produced, held, that the next best evidence was proof of their hand-writing, and that proof of the hand-writing of the party was a "third degree of evidence," not sufficient to establish the execution, unless a foundation was first laid by showing a fair, bona fide, and unavailing effort to prove the hand-writing of the witnesses. (*Pelletreau v. Jackson*, 11 Wend. 110. S. C. in error under title of *Jackson, ex dem. Varick, v. Waldron*, 18 id. 178. *McPherson v. Rathbone*, 11 id. 96.) This doctrine has been expressly sanctioned in the supreme court of the United States. (*Clarke v. Courtney*, 5 Peters' Rep. 319. See *Cram v. Morris' lessee*, 6 id. 598, 615, 616.)

So also, in Pennsylvania, though all the judges agreed that proof of the hand-writing of the party was more satisfactory than that of the subscribing witnesses. (*Clark v. Sanderson*, 3 Binn. Rep. 192. See also, *M'Gennis v. Allison*, 10 Ser. & Rawle, 199; *Hamilton v. Marsden*, 6 Binn. 45 et seq.) Likewise in Virginia. (*Gilliam's adm'r. v. Perkinson's adm'r.* 4 Rand. Rep. 325. Per Green, J., in *Gregory v. Baugh*, 4 id. 636. See *Somerville v. Sullivant*, 1 Call's Rep. 560, 561; *Raines v. Phillips*, 1 Leigh, 483.) So too, *semble*, in Maryland; (*The State v. Handy*, 7 Harr. & John. 49, 9;) in Maine; (*Whittemore v. Brooks*, 1 Greenl. Rep. 60;) Delaware; (*Boyer v. Norris*, 1 Harringt. Rep. 22;) North Carolina; (*Jones v. Blount*, 1 Hayw. Rep. 238; *Irving v. Irving*, 2 id. 27; *Halloway v. Lawrence*, 1 Hawks' Rep. 49;) and in the latter state the rule has been carried so far in one case, that where the witness to a bond attested it by making his mark, instead of writing his name, the court held the party bound to show, before he was allowed to prove the obligor's hand-writing, that there was once such a man as the witness, and that he "used to make his mark in the manner that it appeared to have been made to the bond." (*Nelius v. Brickell's adm'r.* 1 Hayw. Rep. 19.) But in *Engles v. Brington*, 4 Yeater Rep. 346, the court said, that to attempt to prove a mark "was idle and ridiculous." (See also *Gilliam's adm'r. v. Perkinson's adm'r.* 4 Rand. Rep. 325; *Gregory v. Baugh*, 4 id. 636, per Green, J.) The general doctrine has been recognized in Massachusetts, as to instruments requiring a subscribing witness in order to render them valid, or those where something more than the mere signature of the party is necessary to be established in order to prove the execution; e. g. instruments under seal. Otherwise, however, as to attested promissory notes. (*Homer v. Wallis*, 11 Mass. Rep. 309. See *Whitaker v. Salisbury*, 15 Pick. Rep. 534.) As to the doctrine in South Carolina, see the cases cited from the reports of that state, ante, note 897, p. 1302. See also, as to the doctrine in Kentucky, *Ford v. Hale*, 1 Monroe, 23; and in Louisiana, *Barfield v. Hewlett*, 4 Miller's Lou. Rep. 118; *Lynch v. Postlethwaite*, 7 Mart. Lou. Rep. 69, 209; *Crouse v. Duffield*, 12 id. 539.

The same degree of diligence and effort to prove the hand-writing of the witness should be shown, before admitting evidence of that of the party, as is required in respect to the endeavor to procure the personal attendance of the witness. (Per Nelson, J., delivering the opinion in *Pelletreau v. Jackson*, 11 Wend. 123. Per Tracy, senator, S. C. in error, under title, *Jackson, ex dem. Varick, v. Waldron*, 13 Wend. 196 et seq. See *Ford v. Hale*, 1 Monroe, 23; *Raines v. Phillips*, 1 Leigh, 434, per Brooke P.) The party's inability to prove the hand-writing will not be inferred from the facts that, the witness' attestation took place 24 years ago, when she was 16 or 20 years of age, and that she soon after moved away and had not been heard from since; especially, if there are persons who were formerly acquainted with her, and might be called to testify, but who are not called. (*Pelletreau v. Jackson*, 11 Wend. 123, 4. S. C. in error, under title *Jackson, ex dem. Varick, v. Waldron*, 13 id. 178. See *Jackson, ex dem. Livingston, v. Burton*, 11 John. Rep. 64; *Clarke's lessee v. Courtney*, 5 Peters' Rep. 319.) Where the brother of the witness was called to prove his hand-writing, who did not recognize it, and said it did not resemble that of his brother, this was held sufficient to allow proof of the party's signature. If his own brother, say the court, could not prove his signature, it is fairly inferrible that it could not be proved. (*M'Pherson v. Rathbone*, 11 Wend. 96, 99.) Search made for proof of the hand-writing of the witness, where she last resided, but without effect, is enough to allow proof of the hand-writing of the party. (*Clark v. Sanderson*, 3 Binn. Rep. 192, 195, et seq.)

If the obligor in a bond fraudulently remove a witness, this appearing will let in proof of the obligor's hand-writing, acknowledgments, &c. (Per Heath, J., in *Gibson v. Minet*, 1 H. Black. 623. Per Haywood, J., in *Ingram v. Hall*, 1 Hayw. Rep. 207.)

Where the hand-writing of the maker of the instrument may be resorted to, it is, in general, *prima facie* evidence of every thing else necessary to complete execution. (*Sigfried v. Levan*, 6 Ser. & Rawle, 311.) This proposition will also be found recognized in most of the cases cited *supra*, p. 1305.

The declarations of the maker may be resorted to, to prove the instrument, wherever you are permitted to resort to his hand-writing. (*Conrad v. Farrow*, 6 Watts' Rep. 536. *Irving v. Irving*, 2 Hayw. Rep. 27, 8. *Taylor v. Meekly*, 4 Yeates' Rep. 79. *Halloway v. Lawrence*, 1 Hawk's Rep. 49, 50. *Miller's estate*, 3 Rawle, 318.) But in Louisiana, proof by the acknowledgment of a party has been called a very weak and most suspicious species of testimony. (*Plique v. Labranche*, 9 Lou. Rep. 562. See *ante*, note 192, p. 210, 211.) The party's acknowledgment may be implied by his acts or his silence under certain circumstances. (*Hill v. Scales*, 7 Yerg. 410.) In *Conrad v. Farrow*, *supra*, the court seem to have assumed that the common law preferred evidence of hand-writing of the maker to that of his confessions. Such, however, does not appear to be the doctrine as laid down by our author; for, he puts the various modes of proof mentioned as proper for such cases in a way which seems to imply, that either the hand-writing of the maker, proof by witnesses present at the execution, or admissions, may be resorted to at the pleasure of the party seeking to establish the instrument (See the text at pp. 475, 6.) So in *Pelletreau v. Jackson*, 11 Wend. 123, Nelson, J., after enumerating the instances in which, according to our author, an attested deed may be proved as if there were no subscribing witnesses, says,

“in all these cases the execution of the deed may be proved by proving the hand-writing of the party or by his admissions. (See also *per* Yates and Brackenridge, Js. in *Clark v. Sanderson*, 8 Binn. Rep. 198, 9; *Kingwood v. Bethlehem*, 1 Green’s Rep. 226.)”

In South Carolina, to prove an unattested instrument a witness was called who was incompetent to testify to hand-writing, and whose only knowledge of the instrument was, that he was present when the party signed a paper, said, at the time, to contain similar contents; but he did not pretend to identify the one in question as being that, by any other circumstance; and the court held, that before such testimony could be received, the inability to prove the hand-writing of the party must be first shown. (*Hunter v. Glenn*, 1 Bail. Rep. 542, 3, 4.)

If, however, none of the modes of proof before spoken of are attainable, then the law allows a resort to collateral circumstances; (*Hunter v. Glenn*, *supra*;) as, the acts of the opposite party recognizing the instrument as valid and subsisting; (see *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 282, 3; *Rex v. The Inhabitants of Longor*, 4 Barn. & Adol. 647;) or other testimony, not intrinsically incompetent, and leading the mind to believe that the instrument is genuine. In all cases, says *Haywood, J.*, speaking on this subject, where it is apparent that positive testimony is unattainable, there must be a recurrence to testimony founded on presumptions; therein requiring, first, the most satisfactory presumptive proof that can be had, and, in default of that, the next best, until we have passed through all the several grades of circumstances that raise presumptions, from that which Lord Coke terms the violent, until we arrive at that which excites the light presumption that moveth not at all. (*Ingram v. Hall*, 1 Hayw. Rep. 207.) See *ante*, note 298, p. 304. The influence of circumstances in authenticating instruments is the most remarkable in the case of ancient writings, of which we shall speak in a subsequent note. The general doctrine, as applicable to recent transactions, was carried to a singular extent, in a case decided in 1824, in South Carolina. The suit was on a note, and the defence set up by the administratrix of the maker, was, that it had been given in consideration of an adulterous intercourse between the plaintiff, who was the payee, and the intestate. On the trial, to establish this defence, the defendant among other things produced certain letters which had been written, as was alleged, by the procurement of the plaintiff; they were not signed, and it appeared the plaintiff could not write; proof was offered of their having been found among the papers of the intestate, that he was in the habit of taking letters out of the post office which had a particular mark upon them, such as appeared on these, and the post office stamp was also identified. The defendant submitted the letters themselves as containing internal evidence of their being the letters of the plaintiff.

The presiding judge, however, refused to allow them to be read; and, on motion for a new trial, *Nott, J.* delivered the opinion of the court on this part of the case as follows: “The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of the hand-writing. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must therefore be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts

which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances, which go to strengthen the presumption. In ordinary cases such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the hand-writing, therefore, is higher evidence. But in the present case, the evidence offered was the best which the nature of the case could afford. Whether it would have been sufficient to establish the fact, is another question, but I think it ought to be submitted to the jury." (*Singleton v. Bremar*, adm'x, &c. 1 Harp. Rep. 201, 210.)

There is another class of cases where you are generally driven in the first instance to collateral circumstances, acknowledgments, &c. in order to connect a party with a paper sought to be proved against him. This happens frequently when the paper is printed throughout, and the printer is unknown, or a party to the suit. Comparison of the types, devices, &c. has been allowed, in Pennsylvania, to connect the defendant, an editor of a newspaper, with the publication sought to be established. (*McCorkle v. Binns*, 5 Binn. Rep. 340.) Printers, it is said, know a newspaper by the type, and can generally ascertain the source of a publication from that circumstance. Accordingly, in an action for a libel against the publisher of the *Ontario Messenger*, a printer was called, who said he had been at the office of the defendant, and had seen a paper called the *Ontario Messenger* printed there; he was not particularly acquainted with the paper, but believed that the one produced was printed with the types used in the defendant's office; and held, that this was *prima facie* sufficient to connect the defendant with the publication. (*Southwick v. Stevens*, 10 John. Rep. 443.) See *McCorkle v. Binns*, 5 Binn. Rep. 340. To prove that the defendant was a broker, a witness produced one of his cards: held, not evidence unless it was received from the defendant himself. And, per Abbott, C. J., the proper way is to give the defendant notice to produce his cards, and then prove one as a copy or give parol evidence of the contents. (*Clark v. Copp*, 1 Carr. & Payne, 199.)

In a previous note, several cases were cited going to show that possession of a deed by a grantee or other person claiming under it, will in general be presumptive evidence of delivery, when connected with proof of the other ingredients of complete execution. (See ante, note 898, p. 1234, 5.) This results from one of the great leading principles of presumptive evidence, viz. that things are held to be legally and properly in their existing state until the contrary be shewn. (See ante, note 298, p. 295.) And it is no less applicable to other writings than to deeds. Thus, the plaintiff sued on an account for monies advanced for the building of a vessel; and, on the trial, the defendant offered a paper purporting to be the plaintiff's account with such vessel; it was proved to be in the plaintiff's hand-writing, but was not signed by him; and he objected to it for the want of such signature, and because there was no proof of delivery of it to the defendant; but held, that the paper was sufficiently authenticated to render it competent, and that the possession of it by the defendant was enough to raise the presumption, (which must prevail unless repelled,) that the account was rendered by the plaintiff to the defendant, and came properly to the defendant's hands. (*Nichols v. Alsop*, 10 Conn. Rep. 263.) See ante, note 191, p. 194, 5.

If there be no evidence of authenticity the instrument cannot be read to the jury; but if there be any fact or circumstance tending to prove the authenticity, from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision. (Per Duncan, J. delivering the opinion of the court in *Sigfried v. Levan*, 6 Ser. & Rawle, 308, 312. *Dodge v. Bank of Kentucky*, 2 Marsh. Ken. Rep. 613. *Curtis v. Hall*, 1 South. Rep. 148. *Stahl v. Berger*, 10 Ser. & Rawle, 170. *Piggott v. Halloway*, 1 Binn. Rep. 442, 3. *The President, Managers and Co. of the Berks & Dauphin Turnp. Road v. Myers*, 6 Ser. & Rawle, 12.

And when a prima facie case of execution has once been made, the court is not to allow the other party to adduce counter proof before the instrument is read, and thus assume to take the question from the jury. (*Fisher v. Kean*, 1 Watts' Rep. 278. See *Childerston v. Hammon*, 9 Ser. & Rawle, 68; *McCorkle v. Binns*, 5 Binn. Rep. 340, 352; *Commissioners of Berks County v. Ross*, 3 id. 539.)

NOTE 902—p. 466.

It has been said, that if the witness was incompetent from interest at the time of attestation and at the trial, his attestation is a nullity. *Swire v. Bell*, cited in the text, n. (2), seems to favor this notion, and nothing is said as to the party's knowledge of the fact at the time of attestation, though the latter is doubtless a reasonable qualification. (See 1 Stark. Ev. 325, 330, 6th Am. ed.)

In *Nelius v. Brickell's adm'r*, 1 Hayw. Rep. 19, the bond sued upon was attested by the obligor's wife, and the obligee on the trial would have established it by proof of her hand-writing; *sed non allocatur*; and by the court—"the witness was incompetent from the beginning, and if she could not be admitted as a witness, much less ought her hand-writing to be received as evidence." See also per Yeates, J. in *Hamilton v. Marsden*, 6 Binn. Rep. 50; *Lantermilch v. Kneagy*, 3 Ser. & Rawle, 202.

NOTE 903—p. 477.

English writers have not spoken on this subject with much clearness. Buller's *Nisi Prius*, p. 555, lays it down that, in addition to the age of the deed, there ought to be "some account" of it, "where found, &c." C. B. Gilbert says, that though the deed be of the required age, "yet, if possession hath not gone along with it" there should be "some account of the deed; because the presumption fails where there is no possession; for, it is no more than old parchment, if no account be given of its execution." (Gilb. on Ev. 103, 4.) Mr. Starkie says, "some account ought to be given of the place where it has been kept, or evidence should be given that the party has been in possession under the deed." (1 Stark. Ev. 332, 6th Am. ed. citing Bull. N. P. 254, 255, 648, Bac. Abr. F. 644.) Peake advances the doctrine thus—"that a deed of above thirty years standing, requires no further proof of its execution than the bare production, provided the possession has been according to the provisions of the deed, and there is no apparent erasure, &c." He adds, "in like manner, if a bond of that date be found among the papers of an intestate, or public company, the same pre-

sumption arises from the place where it was found. But as this rule is founded on presumption, it does not apply where there are circumstances to raise a contrary presumption, as if the possession has been contrary to the deed," or if the deed appear on its face razed or interlined, or a man convey a reversion, first to one, and then by a subsequent deed to another, and the second purchaser prove his title; "in all these cases it will be incumbent on the party to give the ordinary evidence of the execution of his deed; for the presumption, from the antiquity of the deed, is destroyed by the opposite presumption; in the one case, that some unfair alteration has been made in the deed; in the other, that the person having the possession had also the legal right; for the law will not raise a presumption that a man would be guilty of so manifest a fraud, as to convey the same estate to two different people." (Norris' Peake, 163, 4.) Mr. Roscoe lays down the rule in nearly the same terms as Mr. Starkie. (Roscoe. Ev. 70.) And so does Mr. Gresley. (Gresley. Eq. Ev. 124.) Mr. Matthews goes more fully into what he considers the reason of the rule. "It is manifest," he observes, "that the general probability of the due execution of instruments which are meant to have a legal operation, is by many degrees increased by lapse of time; which, as it affords opportunity to those whose interest it was, to dispute their efficiency, shows at once the acquiescence of such persons, and also a conviction, on their part, that all proper steps were taken to render the assurance valid. On this principle, supported by a consideration of the difficulty, if not impossibility of obtaining living testimony, deeds of thirty years standing, by a very ancient rule of law, are admitted in evidence without proof of execution; and where the witnesses are dead, deeds of even a less age, provided the enjoyment of the property to which they relate has corresponded with the limitations, are received as genuine and authentic." (Matth. Pres. Ev. 271, 2, citing our author, and Selw. N. P. 535, 5th ed. Co. Litt. 6, b. Wood's Instit. 596.)

Strictly speaking, we apprehend, no instrument, however ancient, can be said to "prove itself." All that we understand from the rule on this subject is, that when an instrument appearing on its face to be thirty years old, is produced, its authenticity may, in certain cases, be presumed; not from any thing belonging solely to the instrument itself, but mainly from circumstances out of it, the existence of which, like all other facts, must be shown on the trial.

A deed or instrument thirty years old or upwards, purporting to be a conveyance of property real or personal, is sufficiently corroborated to be read without further assurance of authenticity, by showing that possession of the thing it assumes to convey has gone along and been held in accordance with its provisions. So far the cases, both English and American, seem entirely agreed. (See Jackson, ex dem. Lewis, v. Laroway, 3 John. Cas. 283, 236, 7, 289 et seq.; Jackson, ex dem. Burhans, v. Blanshaw, 3 John. Rep. 292, 297, 8; Roberts' widow v. Stanton, 2 Munf. 129, 135; Thompson v. Bullock, 1 Bay's Rep. 364; Knox v. Silloway, 1 Fairf. Rep. 217; Jackson, ex dem. Van Schaick, v. Davis, 5 Cowen's Rep. 123; Hewlett v. Cock, 7 Wend. 371; Jackson, ex dem. Bradt, v. Brooks, 8 id. 426, 431; Carroll v. Norwood, 1 Harr. & John. 174; Gittings v. Hall, id. 14; Owings v. Norwood, 2 id. 96, 106; Hall v. Gittings, 2 Harr. & John. 389, 392; Joce's lessee v. Harris, 1 Harr. & McHen. 196; Hoddy's lessee v. Harryman, 3 id. 581, 583; Middleton v. Mass, 2 Nott & McCord, 55; Duncan v. Beard, id. 400; Doe, ex dem. Clinton, v. Phelps, 9 Johns. Rep. 169, 171; Doe, ex dem. Clinton, v. Campbell, 10 id. 475; Waldron v. Tuttle, 4 New

Hamp. Rep. 371; McGennis v. Allison, 10 Ser. & Rawle, 199; Healy v. Moul, 5 id. 181; Tolman v. Emerson, 4 Pick. Rep. 162; Everley v. Stoner, 2 Yeates' Rep. 122.) The possession need not extend to every part of the premises covered by the deed. A possession of part under the deed affords evidence of authenticity, it has been said, of as high character as though that possession extended to the whole; and it renders the deed evidence even as against one in possession of the other part. (Jackson, ex dem. Van Schaick, v. Davis, 5 Cowen's Rep. 123, 127, 8. See also Jackson, ex dem. Hunt, v. Luquere, id. 22; Jackson, ex dem. Wilkins, v. Lamb, 7 id. 431.) If the possession is conformable to the limitations in the deed, it shall be presumed to be under it. (*Seemle*, Carhampton's lessee v. Carhampton, 1 Irish T. Rep. 578.)

The length of possession which must be shown, when that circumstance solely is relied on, has not been much discussed. In Jackson, ex dem. Burhans, v. Blanshaw, 3 John. Rep. 292, the doctrine was distinctly held, that no possession short of thirty years would answer; in other words, that the age of the deed must be calculated from the commencement of the possession; for it is the accompanying possession which raises the presumption in favor of its authenticity. (Id. 297, 8. See also S. P., Jackson, ex dem. Hunt, v. Luquere, 5 Cowen's Rep. 221, 227, 8.) This doctrine has been recognized in New-Hampshire; (Waldron v. Tuttle, 4 N. Hamp. Rep. 377;) and South Carolina; (*seemle*, per Harper, J. in Robinson v. Craig, 1 Hill's Rep. 391, 2, O'Neill, J. dissenting.) Indeed most of the American cases, cited *supra*, will be found to proceed upon the same general principle. It was doubted at one period in Pennsylvania, whether a shorter possession might not answer, e. g. 25 years, (Everley v. Stoner, 2 Yeates' Rep. 122,) and subsequently 21 years, that corresponding with the period of limitation. (McGennis v. Allison, 10 Ser. & Rawle, 199.) But thirty years seems the shortest period which has ever been judicially acted upon in that state, unless in connection with other circumstances. (See Healy v. Moule, 5 Ser. & Rawle, 185; Arnold v. Gorr, 1 Rawle, 223.)

The above remarks with respect to the length of possession required as *indispensable*, must be understood with the qualification, that possession is the only circumstance relied on by way of showing the authenticity of the instrument. A full corresponding possession is not the only corroboration which will allow the instrument to be read without proof of execution, though there are several *dicta* which look that way. See Jackson, ex dem. Burhans, v. Blanshaw, 3 John. Rep. 292, 297, 8, per Kent, C. J., who, in delivering the prevailing opinion, reiterated what was said by him, dissenting, in Jackson, ex dem. Lewis, v. Laroway, 3 John. Cas. 289, et seq. See also per Savage, C. J., in Jackson, ex dem. Bradt, v. Brooks, 8 Wend. 426, 431; Middleton v. Mass, 2 Nott & McCord, 55, per Johnson, J.; Waldron v. Tuttle, 4 N. Hamp. Rep. 377; McGennis v. Allison, 10 Ser. & Rawle, 199; Arnold v. Gorr, 1 Rawle, 223; Healy v. Moul, 5 Ser. & Rawle, 181. Our author, at p. 477, seems to have laid down the rule in the true spirit of the English adjudications; and it obviously admits of this alternative, viz. that if possession has not gone along with the deed, so as to furnish a presumption of its authenticity from that source alone, other circumstances may be resorted to. In Carhampton's lessee v. Carhampton, 1 Irish T. R. 567, the plaintiff produced a deed dated 14th January, 1735, purporting to have been made on the marriage of the *late* Lord Carhampton with the plaintiff; and proved that possession had accompanied it 52 years, and until the death of the late lord; he also produced a clerk

from the registry office, who proved that he found in the registry office the memorial of a deed agreeing in parties, witnesses, description, &c. &c. with the deed produced; held, that the memorial might be read, and also the deed, as an ancient deed, leaving the question of authenticity to the jury. "A reasonable presumption of the authenticity of the instrument," said Carlton, C. J. delivering the opinion in this case, "was sufficient to admit it to be read." (Id. p. 577.) The permitting it to be read, however, does not decide on the final influence of the evidence, as to its reality; that is for the jury. (Id. 577.) Such unquestionably is the well settled doctrine in New-York. In *Jackson, ex dem. Lewis, v. Laroway*, 3 John. Cas. 283, the point was fairly and fully considered, and Radcliffe, J. who delivered the prevailing opinion, laid down the general rule to be, "that a deed appearing to be of the age of thirty years, may be given in evidence without proof of its execution, if the possession be shown to have accompanied it; or, where no possession has accompanied it, if such account be given of the deed, as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. This rule," he adds, "is founded on the necessity of admitting other proof, as a substitute for the production of witnesses, who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed; but where no such possession appears, other circumstances are admitted to account for it, and raise a legal presumption in its favor." (Id. 286, 7.) This case has never been overruled, but on the contrary has received the sanction of several subsequent adjudications. (*Hewlett v. Cock*, 7 Wend. 371. *Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221, 225, 6, 7, 8. *Jackson, ex dem. Wilkins, v. Lamb*, 7 id. 431. *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277.) It is the doctrine in South Carolina also; (*Robinson v. Craig*, 1 Hill's Rep. 389, 391, 2;) and Indiana; (*semble, Henthorn v. Doe*, 1 Blackf. Rep. 156, 162, and note (8) at p. 165.) And it has been both recognized and acted upon by the supreme court of the United States. (*Barr v. Gratz*, 4 Wheat. Rep. 213. *Winn v. Patterson*, 9 Peters' Rep. 674, 5, per Story, J. See *Coulson v. Walton*, id. 62, 72; *Clarke's lessee v. Courtney*, 5 id. 344.) Proof of such circumstances as could not well have happened, without the existence of the deed, affords a presumption that the deed is fair. (*Thompson v. Bullock*, 1 Bay's Rep. 364.) Indeed, almost any evidence intrinsically unobjectionable, and tending to raise a presumption of the genuineness of the instrument, is admissible. The sufficiency of it will depend so much upon the nature of each particular case, that no general rule can be laid down with regard to it. (See *Jackson, ex dem. Lewis, v. Laroway*, and *Hewlett v. Cock*, supra.)

The antiquity of the deed or instrument, viz, its having existed thirty years, must be made out. This is many times shown by direct evidence, but oftener, perhaps, by circumstances. The party must not rely solely upon the date of the instrument, or its appearance. (*Forbes v. Wale*, 1 Black. Rep. 532. *Robinson v. Craig*, 1 Hill's Rep. 389.) In the case of a conveyance, possession in accordance with it, for thirty years, is presumptive evidence of its actual existence for that length of time, if there is nothing in the date to rebut that presumption. (Per Harper, J. in *Robinson v. Craig*, 1 Hill's Rep. 390, 1. And see the cases supra, as to possession; also, *Blair v. Miller*, 2 Dev. Rep. 407, 410.) If a full and complete possession cannot be shown, then the fact may be made out by other circumstances. (Id.) The hand-writing to certificates of acknowledgment, or probate, endorsed upon the instrument, though not according to law,

and therefore unofficial, may be resorted to in order to show its antiquity; proof of the hand-writing will, in such case, be *prima facie* sufficient, it seems, to show the existence of the instrument at the date of the certificates. (Jackson, *ex dem. Lewis, v. Laroway*, 3 Johns. Cas. 287, 289.)

Much stress is always placed upon the circumstance of the instrument having been found in the custody of those who had an interest in the subject matter to which it purports to relate. In *accounting* for it, this should always be looked to; and if it has been preserved by them with care, we are entitled to infer their opinion to have been in favor of its genuineness. In the case of ancient deeds of conveyance, for example, we should expect to find them, if genuine, in the possession of some one claiming under the grantee, and preserved among the muniments of title. When so found, the fact is favorable to their authenticity and reality *as deeds*. But, on the other hand, if found in the custody of strangers, entirely unconnected with the estate; or, even though found in the proper custody, if they appear to have been thrown aside, among papers of little or no comparative value, this raises a presumption against them, which must be overcome before the mind can assent to their genuineness. (See post, 479 et seq. of the text, and the cases there cited; also, per Washington, J. in *Barger v. Miller*, 4 Wash. C. C. Rep. 283, 4; *Duncan v. Beard*, 2 Nott & McCord, 400, 406, 7; *Middleton v. Mass*, *id.* 55.)

The cases are not clear, it would seem, whether the mere fact of the deed or instrument having existed thirty years, in the proper custody, unaided by any other circumstance, is enough to allow it to be read. According to the English adjudications, this would furnish the requisite presumption of its authenticity. (See the cases cited in the text at p. 477, notes (1), (2), (3), (4), (5); also ante, p. 252, 3, of the text; *Carhampton's lessee v. Carhampton*, 1 Irish T. Rep. 577, 8.) So, also, in South Carolina; (*semble*, per cur., Harper, J. delivering the opinion, in *Robinson v. Craig*, 1 Hill's Rep. 389;) but, in this case, beside the antiquity of the deed, possession had been held of a part of the property, in accordance with its provisions, for six or eight years, and there had been no possession prior to that inconsistent with it. The deed, moreover, purported to have been recorded soon after its date. In a previous case, in the same state, the deed was dated over one hundred years ago; it had been proved and recorded a few days after its execution, and the party offering it proposed to show, that it had been in his custody, and those under whom he claimed, for more than thirty years: yet, as possession had not gone along with it, and no act of ownership was shown to have been exercised in accordance with it, held, that it could not be read without proof of execution. Mr. Justice Johnson, who delivered the opinion, after quoting from Buller's N. P. that "there ought to be some account of the deed, where found, &c." said, that this was applicable to a peculiar species of writing, regarded as in the nature of public property, and partaking in some degree of the character of records; that, in respect to these, it was enough to show, that they had come from the place where, according to their nature, they would probably be deposited. But he denied that such was the case with mere private writings, as deeds, &c. however ancient. (*Middleton v. Mass*, 2 Nott & McCord, 55.) In *Barr v. Gratz*, 4 Wheat. 213, it was held that the deed having existed for thirty years, and it being proved to have been in possession of the lessors of the plaintiff, together with the fact of their having some years before asserted it in a chancery suit, as the foundation of their title, was enough to entitle it to be read with-

out proof of execution. (Id. 217.) See *Coulson v. Walton*, 9 Peters' Rep. 62, 73; *Winn v. Patterson*, id. 674, 5; *Clark's lessee v. Courtney*, 5 id. 344. See also *Henthorn v. Doe*, 1 Blackf. Rep. 157, 162, and note (3) at p. 165. In *Jackson, ex dem. Lewis, v. Laroway*, 3 John. Cas. 283, the question arose upon an ancient will; it bore date in 1723; the premises remained in their natural state till 1753, when possession was taken by those claiming in opposition to the will; several unauthorized certificates of probate, &c. were endorsed on it, ranging in respect to date from 1735 to 1744, the hand-writing to which was offered to be proved. The court, on motion for a new trial, held, that the presumption against the will, arising from the absence of corresponding possession up to 1753, was explained away by the character and situation of the property previous to that time; and the like presumption from the adverse possession, was neutralized by the circumstance that those who had an interest in the will, did not appear to have known of such possession having been taken, until long afterward. In short, the case turned mainly upon the question, whether, showing the existence of the will as early as 1735, (the date of one of the certificates, which were offered on the trial for that purpose,) would, in the absence of any counter presumption, be sufficient to entitle it to be read as an ancient deed. The court decided in the affirmative, (Kent, J. dissenting,) and granted a new trial, because the judge at the circuit refused to admit the will. This case was reviewed and directly approved in *Hewlett v. Cock*, 7 Wend. 374; and in the latter, Nelson, J., who delivered the opinion, placed strong emphasis upon the fact of the lease having been found in the appropriate custody; but there, this circumstance stood connected with others of a no less imposing character. *Jackson, ex dem. Lewis, v. Laroway*, supra, has, perhaps, gone farther than any other direct adjudication in New-York, in giving effect to the presumption arising from the mere existence of the instrument for thirty years, unaided by other circumstances. It is difficult, if not impossible, to reconcile the opinion of the court, in that case, with certain *dicta* in *Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221. The question in both cases was, as to the admissibility of an ancient will. Both recognize and act upon the doctrine of the English courts, that where possession is not shown, you may resort to circumstances. In the latter, the circumstantial evidence consisted of proof of the hand-writing of one of the witnesses, possession of one of the devisees for nearly (though not quite) thirty years, &c. These were held sufficient to allow the will to be read, on the footing of an ancient deed; but Woodworth, J., who delivered the opinion, at p. 224 denies that the mere existence of an instrument for more than thirty years, is, in any case, enough to authorize it to be read without further corroboration. He denies, moreover, that such a doctrine has ever been judicially recognized in New-York; "and if introduced," he says, "would be an experiment of very dangerous tendency." It is to be noted that the learned judge was speaking in a case where the custody of the instrument had been indisputably regular; and assuming that the presence of this circumstance is not to qualify his observations, in any degree, we are at a loss to perceive the distinction between the doctrine which he says has "*not* been recognized," and that which *was* recognized in *Jackson, ex dem. Lewis, v. Laroway*. Indeed at p. 225, 6, he substantially concedes, with respect to that case, that the view we have taken of it is correct.

Thus far we have spoken mainly with regard to cases, where the authenticity of the instrument stands independent of any thing except presumptions derived from circum-

stances, collateral to it, and consistent with its provisions. It is hardly necessary to mention that testimony identifying the hand-writing of the witnesses, or parties, or some of them, though it may be of a very inferior character, and such as would not be admissible in regard to more recent transactions, is also frequently resorted to. This, perhaps, should be called direct evidence of the *execution* of the instrument, 'as contradistinguished from that arising from the circumstances of which we have spoken. But the cases where such, or the like evidence, has been *required*, constitute a distinct class, not included in our previous observations, but which may properly be here noticed.

Where an ancient instrument stands uncorroborated by possession, and is not otherwise sufficiently "accounted for," as it is called, some proof of execution is to be adduced. (*McGennis v. Allison*, 10 Serg. & Rawle, 199. *Coulson v. Walton*, 9 Peters' Rep. 71, 72.) But the law is indulgent in such cases, and does not require that complete measure of proof which it demands in respect to more recent transactions. (*Per McLean, J. in Coulson v. Walton*, 9 Peters' R. 62, 70.) See *Bennett v. Runyon*, 4 Dana, 422, 424. If the subscribing witnesses are living, and not absent or incompetent, they should be called. (See *McGennis v. Allison*, 10 Serg. & Rawle, 197, 199; *Jackson, ex dem. Burhans, v. Blanshaw*, 3 John. Rep. 292, 297, 8. *Clarke's lessee v. Courtney*, 5 Peters' Rep. 319, 344; *Tolman v. Emmerson*, 4 Pick. Rep. 160, 162.) But it is not unusual for the court to presume their death or absence, after the lapse of thirty years or upwards, and so save the necessity of search, enquiry, &c. (See *McGinnis v. Allison*, 10 Serg. & Rawle, 199; *Winn v. Patterson*, 9 Peters' Rep. 674, 5, per Story, J.; *Jackson, ex dem. Livingston, v. Burton*, 11 John. Rep. 64; *Duncan v. Beard*, 2 Nott & McCord, 400, 408; *Knox v. Silloway*, 1 Fairf. Rep. 217; *Bennet v. Robinson's adm'r*, 3 Stewart & Porter, 229. But see *Clarke's lessee v. Courtney*, 5 Peters' Rep. 319, 344.) And, in Pennsylvania, where a writing was dated 28 years and 5 months before the trial, and possession had gone along with it, held that it was sufficiently proved by a person who was present at the execution, though no inquiry had been made for the attesting witness. (*Everley v. Stoner*, 2 Yeates' Rep. 122.) In *Thomas' lessee v. Horlocker*, 1 Dall. Rep. 14, a deed was produced, bearing date sixty-three years ago. One of the witnesses was proved to be dead, and the other not known. Possession had not accompanied it, and no proof was adduced respecting it or its custody previous to the trial, save that a witness testified, he had well known one of the attesting witnesses, had seen many deeds and papers signed by him, and thence believed his name to the deed in question to be in his hand-writing, but had never seen him write. Considering its *antiquity* the court thought this was sufficient proof, and so allowed it to be read in evidence. Where hand-writing is resorted to, in these cases, very inferior testimony on the point is admissible. (See post, p. 491, 2 of the text.)

NOTE 904—p. 477.

A copy of a faculty, granted in 1613, was admitted in evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository which had been destroyed by the great fire of London. (*Isham v. Wallace*, 4 Simons, 25.)

NOTE 905—p. 477.

See *Denn, ex dem. Gaston, v. Mason*, 1 Cox's Rep. 10.

NOTE 906—p. 477.

Mr. Starkie lays down the rule as follows: "Where the deed labors under any suspicion, arising from any rasure or interlineation, it is matter of prudence and discretion to prove it in the usual way, by means of an attesting witness, if any be still living, or by proof of the hand-writing of an attesting witness, where they are all dead, in order to rebut the unfavorable presumption arising from an inspection of the deed." (1 Stark. Ev. 330, 1, 6th Am. ed.) Gilbert and Buller substantially agree that, under such circumstances, the deed should be proved; by the witnesses, if living, and if they are dead, by proving the hand-writing of the witnesses or one of them, and also the hand-writing of the party. (Bull. N. P. 255. Gilb. Ev. (Lofft's ed.) 104.) Our author seems to require that, in addition to proving the deed in one of these modes, "the blemish should be satisfactorily explained." (See p. 477 of the text.) But Buller and Gilbert, the authorities cited by him, do not go so far: they merely require proof of the deed, and in case the subscribing witnesses are unattainable, they agree, that the deed may be proved by identifying their hand-writing and that of the party. This, as has been well said, cannot mean that an account must be given of the blemishes; for, proving the hand-writing of the witnesses could not do that. (Per Williams, C. J. in *Bailey v. Taylor*, 11 Conn. Rep. 535.)

We apprehend there will be found little or no distinction between ancient instruments and others, in this particular. Ordinarily, where there are rasures or interlineations appearing on a deed, it becomes a question of fact for the jury, whether they were made before or after execution; and the decision of that question will in a great measure depend upon the circumstances of each individual case. (2 Ev. Poth. 181.) The general doctrine as to the *onus*, in these cases, was somewhat fully considered ante, note 298, p. 299 et seq.; and we shall here set down some few additional observations.

The decisions, as we saw in that note, are not entirely consistent respecting the presumption arising from the mere face of the instrument. The nature of the alteration, however, must always have great weight in determining questions of this sort. If, for instance, the alteration tends to *diminish*, instead of *increase*, the rights of the person to whom the instrument was given, the law will not impose upon him the burthen of accounting for it. (*Bailey v. Taylor*, 11 Conn. Rep. 531.) This was the case of a note, altered from 600 to 500 dollars; the court declined determining whether such an alteration would avoid it; but assuming that it would, if made after execution, through the procurement of the holder, they held, that the question whether it had been so made, was properly submitted to the jury, and that the judge who tried the cause did right in refusing to charge them to presume against the legality of the alteration. Where an auctioneer's memorandum-book of sales had been altered, by adding a date, the court said, "it is not to be presumed that the alteration was made by the plaintiff, (the owner of the property sold,) as there are no facts disclosed from which such presumption can arise." (*Nichols v. Johnson*, 10 Conn. Rep. 192, 198.)

In the case of a deed, where the alteration is against the interest of the grantee, it will be presumed, in the absence of testimony, to have been done at the time of execution. (*Hesslinger v. Shutz*, 16 Serg. & Rawle, 44, 46, per Duncan, J.) In *Coulson v. Walton*, 9 Peters' Rep. 78, 9, the question was upon the authenticity of an ancient bond for a deed, in which some blemishes or alterations appeared. It was not doubted but that they were made since the execution; and the point was, whether those claiming under, or those claiming adversely to it, had made them. The alteration was not calculated to advance the interest of those claiming under the bond; and the proof showed that it had been possessed by those claiming adversely to it. They having an interest in destroying it, the court said it was fair to presume that, if the alteration was made by design, it was made by some of those whose interest lay in destroying it. But, where a bond has been altered since its delivery, and in a material part, the *onus* will be upon the obligee to show that it was done legally. (*Barrington v. The Bank of Washington*, 14 Serg. & Rawle, 405.) The presumption in such cases usually is, that the alteration was made by the obligee, or with his assent at all events. So as to a deed of lands. (*Chelsey v. Frost*, 1 N. Hamp. Rep. 145.)

The same principle applies in respect to a note, altered after execution, and apparently for the benefit of the promisee. (*Bowers v. Jewell*, 2 N. Hamp. Rep. 543. See *Martindale v. Follet*, 1 id. 95.) The case of *Henman v. Dickinson*, 5 Bing. 183, cited ante, note 298, p. 299, went a great way in presuming against the legality of an alteration, appearing upon the face of commercial paper. Indeed, the position established by that case seems to make no distinction between different species of written instruments, but was probably designed as applicable to all. This decision has been repudiated in Connecticut, and it is said that no other adjudication in the English courts has gone to the same extent, or recognized its doctrines. (See *Bailey v. Taylor*, 11 Conn. Rep. 538, 9, 540, per Williams, C. J., delivering the opinion of the court.) In the latter, the court review *Taylor v. Moseley*, 6 Carr. & Payne, 273, (a case since that of *Henman v. Dickinson*,) and infer from it that the opinion of *Lyndhurst, C. B.*; who tried the cause, was against the law as laid down in *Henman v. Dickinson*.

NOTE 907—p. 477.

The cases are by no means agreed, on all points, as to the effect of an alteration in a sealed instrument, made after execution. We shall follow our author, in leaving this subject to be discussed under a subsequent head. (See post, vol. 2, p. 147, 8.) The following references, however, to such authorities as have incidentally occurred, in our researches for other purposes, are set down as exhibiting some of the views which have been entertained in regard to the general doctrine. 2 Ev. Poth. 179, et seq. *Bayley on Bills*, 173, Lond. ed. of 1829. No. 48 Law Lib. Philad. *Pigot's case*, 11 Co. 27. *Markham v. Gonaston*, Cro. Eliz. 626. *Shep. Touch.* 69. *Cutts v. United States*, 1 Gall. 69, 71. *Barrett v. Thorndike*, 1 Greenl. Rep. 73, 77. *Chesley v. Frost*, 1 N. Hamp. Rep. 145. *Tomson v. Ward*, 1 id. 9. *Smith v. Crooker*, 5 Mass. Rep. 538. *Hatch v. Hatch*, 9 id. 307. *Hunt v. Adams*, 6 id. 521. *Stahl v. Berger*, 10 Serg. & Rawle, 170. *Speake v. United States*, [9 Cranch, 28. *Moore v. Bickham's lessee*, 1 Binn. 1, 4. *Whiting v. Daniel*, 1 Hen. & Munf. 390. *Bowers v. Jewell*, 2 N. Hamp.

Rep. 544. Bayley v. Taylor, 11 Conn. Rep. 533, et seq. Nichols v. Johnson, 10 id. 196, 7, et seq. Jackson, ex dem. Malin, v. Malin, 15 John. Rep. 293. Rees v. Overbaugh, 6 Cowen's Rep. 746. Williams v. Crary, 5 id. 368. Barrington v. The Bank of Washington, 14 Serg. & Rawle, 405. Hale v. Russ, 1 Greenl. R. 334. Ingram v. Hall, 1 Hayw. 212, 213. Owings v. Norwood's lessee, 2 Harr. & John. 96. Penny v. Corwithe, 18 John. Rep. 499. Jackson, ex dem. Stewart, v. Kingsley, 17 id. 158. See also the cases relating to deeds, ante, note 298, p. 299, et seq.

NOTE 908—p. 478.

S. P., Penny v. Corwithe, 18 John. R. 499, 501. See Connell v. Brown, Litt. Sel. Cas. 459, 462, 3.

NOTE 909—p. 478.

S. P., Penny v. Corwithe, 18 John. Rep. 499, 501. So, *semble*, any person may be allowed to testify that he saw the rasure before the execution of the deed. (Id.)

NOTE 910—p. 478.

In Massachusetts, this doctrine has been disapproved. (Tolman v. Emerson, 4 Pick. Rep. 162.) The case proceeds upon the assumption that the like disapproval was contained in Jackson, ex dem. Burhans, v. Blanshaw, 3 John. R. 292. Spencer J. there, however, expressly says that, in the case of an ancient deed, it is not necessary to call the subscribing witnesses; for the rule is general. (Id. 295.) And Kent. C. J., who delivered the prevailing opinion, held merely that the subscribing witness, being alive, &c. must be called, *unless the admission of the will in question could be supported on the footing of an ancient deed, which proves itself*; thus, by strong implication at least, conceding that, in the latter case, the subscribing witness, though living, and in a situation to be produced, need not be called. (Id. 297, 8.) This doctrine was directly recognized in Jackson, ex dem. Bowman, v. Christman, 4 Wend. 277, 8; and incidentally, in Knox v. Silloway, 1 Fairf. Rep. 217. See also S. P., M'Gennis v. Allison, 10 Serg. & Rawle, 199; Doe, ex dem. Oldham, v. Wolley, 8 Barn. & Cress. 25; Henthorn v. Doe, 1 Blackf. Rep. 162.

We have seen, that where the deed is not so corroborated as to allow it to be read as an ancient deed, the subscribing witnesses, if shown to be alive and in a situation to be produced, must be called. (Ante, note 903, p. 1316.)

NOTE 911—p. 483.

Upon a question as to the settlement of E., a document was produced, purporting to be W.'s letter of orders, signed in 1799 by the then archbishop of Tuam, which was

proved to have been among W.'s papers at the time of his death, in July, 1839; held, that the certificate of the ordination of W. was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that, the certificate not being the act of any court, and not having any relation to the corporate character of the archbishop, the seal was to be considered the seal of the natural person, and not of the corporation. (*The King v. The Inhabitants of Bathwick*, 2 Barn. & Adol. 639.) If it had been signed only, there could have been no question as to its admissibility. (Id.) A parish certificate, dated 7th Sept. 1758, purported in the body of it to have been granted to a pauper and his family, by two churchwardens and two overseers. It was signed and sealed by two overseers, and by one churchwarden only. The churchwardens for the year 1758 were nominated at Easter, and were proved to have been sworn into office on the 15th of September, at the visitation; but there was no direct evidence of their having been sworn into office before that time. The certifying parish, after the date of the certificate, had frequently relieved the pauper, and different members of the family, while they were residing in other parishes. Held, that in favor of such an ancient certificate, which had been treated by the certifying parish as valid, the court would presume that the churchwarden, who executed the certificate, was sworn before he executed it, and therefore that it was duly executed by him as churchwarden. (*Rex v. Inhabitants of Whitchurch*, 7 Barn. & Cress. 575. See *Rex v. Catesby*, 2 id. 814.)

NOTE 912—p. 483.

In various cases, a party may have so acted himself, or induced others to act, in respect to a written instrument, as to dispense with the necessity of proving its execution as against him. The case of *Barnes v. Lucas*, Ry. & Mood. N. P. Rep. 264, cited in the text, was an action against the sheriff, for taking insufficient sureties in a replevin bond, which he had assigned to the plaintiff; and Abbott, C. J. held, that the assignment dispensed with proof of the execution of the bond. See this case and some others proceeding upon a kindred principle, ante, note 431, p. 557. In *Gardner v. Grove*, 10 Serg. & Rawle, 137, it appeared that G. and C. had sold land to M., by an article of agreement. M. had assigned to H., and the latter to the defendant, and he to I., who sold to the plaintiff. The action was brought on an agreement, entered into by the defendant, "to keep the plaintiff clear of back interest on that piece of ground that he (the defendant) purchased of M., till the day she (the plaintiff) purchased of H." All the assignments were endorsed on the article; and it was argued that the defendant's assignment to I. recognized the preceding writings, so as to save the necessity of proving them. The court said there might be plausibility in the argument, but gave no decided opinion upon the point. It was held, however, that the agreement sued upon did not amount to such a recognition of the assignment of H. to the defendant as to supersede proof of the latter—it referred to the defendant's purchase, say the court, but contained nothing which could identify the paper; and, as the assignment was attested, the subscribing witnesses should have been called. (Id.) In *Biddis v. James*, 6 Binn. Rep. 321, the action was to recover the amount of a prize drawn by the plaintiff in the defendant's lottery. By the act under which the lottery was established, the

defendant was bound to give security, and to present to the governor for his approval, and lodge with him, a plan or scheme of the lottery. A scheme and bond were found on file in the secretary's office, and had been copied by a clerk into the book of executive minutes; the scheme purported to have been signed by the defendant, and was the only one to be found on file, relating to the lottery in question; and the bond, (a sworn copy of which was produced,) purported to have been signed by the defendant and others, in the presence of two witnesses. Neither the signature to the scheme, nor the execution of the bond, were proved; but the court held them sufficiently authenticated, under the circumstances, to be admitted in evidence. "As to the scheme," said Tilghman, C. J., delivering the opinion, "it was not essential that the name of B. (the defendant) should be signed at all, and therefore this paper being found in the office, and no other paper of the kind being there, the presumption was very strong that it was the scheme submitted to the governor in compliance with the act of assembly. With respect to the bond, the presumption was equally strong of its having been deposited by B., and if deposited by him, I take it to be immaterial, in the present action, whether he executed it or not. For, if he had deposited a forged bond, and thus imposed on the governor, he would not be permitted to avail himself of this plea, in bar of actions for the recovery of prizes in the lottery which he had proceeded to draw." (Id. 328, 9.) In an action upon the bond it would have been necessary to prove its execution; (*said id.* 328;) but this, doubtless, means as against the sureties; B. who deposited the bond, could not be allowed to gainsay its genuineness.

The recital of one instrument in another will frequently constitute an exception to the general rule requiring proof of the execution by witnesses. That this is so, according to the American decisions, will be seen by the cases ante, note 163, p. 160, 1, and ante, note 869, p. 1235 et seq.

An additional exception is where the instrument is admitted by the pleadings. Thus, in Kentucky, a plea of covenants performed, to a declaration on a covenant, does not put in issue either the existence or genuineness of the instrument declared on. And held, that the plaintiff might avail himself either of the recital of the covenant in his declaration, or he might read the covenant itself, so far as it conformed to the recital, without proving its execution. (*Helm's ex'rs v. Jones' adm'r*, 3 Dana, 86, 7.)

Several of the states have statutes providing that, in certain cases, the execution of certain instruments need not be proved, unless their execution shall have been specially denied in some specified mode. Such a statute exists in Louisiana; (*Hughes v. Harrison*, 8 Mart. Lou. Rep. N. S. 297; *Bennett v. Allison*, 2 Mill. Lou. Rep. 419; *Miller v. Cohea*, 1 id. 586;) in Ohio; (*Martin v. Butler*, 1 Wright's Rep. 553;) and Kentucky. (See the cases ante, note 860, p. 1209.)

Another obvious exception is, where a statute makes a certified copy of the instrument evidence, instead of the original. (*M'Coy v. Lightner*, 2 Watts' Rep. 349.)

NOTE 913—p. 485.

In general, to prove the hand-writing of a person, any witness may be called, who has, in either of the modes which the law recognizes as legitimate, acquired such a knowledge of the general character of the party's hand-writing, as will enable him to

swear to his *belief* that the hand-writing in question is the hand-writing of that person. (2 Stark. Ev. 372, 6th Am. ed. See as to the general doctrine, *Plieque v. Labranche*, 9 Lou. Rep. (Curry) 562; *Dorsey v. Dorsey*, 3 Harr. & John. 410; *Commissioners, &c. v. Hanion*, 1 Nott & McCord, 554; *Slaymaker v. Boyd*, 1 Pennsylv. Rep. 216.) It has been laid down in Pennsylvania that to enquire of a witness what is his *impression*, is descending to a test too vague to form a judgment upon. It is, say the court, like asking what was his understanding of a conversation, instead of enquiring what the parties said. The witness should be asked as to his belief. (*Carter v. Connell*, 1 Whart. Rep. 392, 393, 9.) But see ante, note 526, p. 748; also ante, note 164, p. 153, 154. The usual enquiry, after the witness' competency to speak has been settled, by showing his means of knowledge, is whether he believes the paper in question to be of the party's hand-writing. (*Salmon v. Feinour*, 6 Gill & John. 60.) In *Carter v. Connell*, supra, the witness' means of knowledge were very limited; he said, he thought he knew the hand-writing of the party, whose signature was in question, "but would not be willing to be qualified to it;" he thought he had seen him write; had received promissory notes from him; and if he were to see some of the notes, could say if the hand-writing in question was that of the party. The question was then put—"Are you able to say whether to the best of your impression, this paper is in the hand-writing of J. C. [the party] or not?" Perhaps, under the circumstances, particularly as an objection was raised in due time and the question not modified, the enquiry was to be understood as calling for the *mere conjecture* of the witness, without reference to any recollection of his in respect to the character of the party's hand-writing. If the usual enquiry as to belief was purposely avoided with this view, the court were doubtless right in overruling the question put. But, it is difficult to maintain, consistent with the cases, that a witness shall not testify unless he will express a decided belief in respect to the hand-writing. If the witness' knowledge appears to have been derived from proper sources, its degree respects the credence to be awarded to what he says, rather than its competency. In *Garrells v. Alexander*, 4 Esp. Rep. 37, the witness had seen the party execute a bail bond, but had never seen him write at any other time; being asked as to his belief whether the signature in question was the hand-writing of the party, he answered, that he could form no belief on the subject, but the hand-writing in question was like that to the bail bond. This was held evidence to go to the jury. Though that case was doubted by Lord Eldon, in *Eagleton and Coventry v. Kingston*, 8 Ves. jun. 475, yet it seems never to have been overruled, and we find it cited as authority not only by our author, but by other modern English writers on evidence. (*Roscoe's Cr. Ev.* 162. *Roscoe's Ev.* 68. 2 Stark. Ev. 372, 3, n. (h.) 6th Am. ed. 2 Russ. on Cr. 682, 3d Am. ed.) And see *Sharp v. Sharp*, 2 Leigh, 254, 5, per Coalter, J.; *Redford's adm'r v. Peggy*, 6 Rand. 316.

A witness who speaks of hand-writing from having seen the person write, is competent, though he never saw him write but once. (See the text, p. 484, 5. *Garrells v. Alexander*, supra. *The Commonwealth v. Levy*, 2 Wheel. Cr. Cas. 246, 7. See *Utica Ins. Co. v. Badger*, 3 Wend. 102.) But he should have seen the person write in the ordinary course of business, or, at least, when he had no motive for disguising his hand. Where the witness stated that he had seen the party write, and, on being enquired of as to the circumstances, said, that it was previous to the trial, for the purpose of shewing the witness his true manner of writing so as to enable him to testify accu-

ately; held, that the witness was incompetent. (*Stranger v. Searle*, 1 Esp. Rep. 14. See this case commented on by Denman, C. J. in *Doe, ex dem. Mudd, v. Suckermore*, 1 Nev. & P. 32, 56. S. C. 5 Adol. & Ellis, 703.) Proof of the hand-writing of the endorser of a note, going no farther than that the witness believed it to be the hand-writing of the endorser, which belief was founded on the fact of having seen him write his name two months before the trial, and also five years before the trial, the witness stating at the same time, that he would not have been able to have testified from having seen him write five years ago, and expressing some doubts as to a part of the signature, is hardly sufficient to uphold a verdict in favor of the signature. (*Utica Ins. Co. v. Badger*, 3 Wend. 102.) And, where the witness stated, that he had only seen the party upon one occasion sign his name to an instrument, to which he was an attesting witness, and that he was unable to form an opinion as to the hand-writing, without inspecting that other instrument, his evidence was held inadmissible. (*Filliter v. Minchin*, cor. Holroyd, J. *Dorchester Spring Assizes*, 1819, cited 2 Stark. Ev. 362, 3, n. (h.) S. C. cited *Rosc. Cr. Ev.* 162, from *Mann. Index*, 131.) It has been held, however, that a witness who has seen a party write, but has forgotten the character of his hand, may refer to that writing to retouch and strengthen his recollection; but not merely for the purpose of comparison. (See post, p. 491 of the text; *Redford's adm'r v. Peggy*, 6 Rand. Rep. 316; *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144, stated *infra*.)

It was held by Lord Ellenborough, that the full signature of an acceptor was not sufficiently proved, by a witness who had seen him write his name but once before, when he used only the initials of his christian name. (*Powell v. Ford*, 2 Stark. Rep. 164.) But, in a later case, *Abbott, C. J.* said he would not abide by that decision; and ruled, that a witness who had seen the defendant write his name "Mr. Sapio," was competent to prove the signature to a bill signed "L. B. Sapio." (*Lewis v. Sapio*, 1 Mood. & Malk. 39.) In *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144, a witness who had once seen a person, (S. Wheeler,) put the initials of his name to a paper, now in the witness' possession, was held competent to testify as to the signature of such person made in the same way, in attesting a will. He testified from a peculiarity in the character and structure of the letters, particularly in the S, which was inverted; and stated, among other things, that he judged from a comparison of the two signatures. "This," it was said by the court, "is the usual manner of proving a man's hand-writing, and differs wholly from that species of evidence to which the objection applies." (*Id.* 155.) Where the signature to be proved was by a mark, held, that it might be proved from inspection, by a witness who spoke to having seen the party make her mark, and to some peculiarity in it. (*George v. Surrey*, 1 Mood. & Malk. 516.)

It has been held, that a witness who swears to his belief of hand-writing must form his judgment from his recollection of the general character of the hand-writing, and not from any extrinsic or collateral circumstances. Accordingly, where a witness said the hand-writing was like the plaintiff's, but he did not think it was his, because the plaintiff was *too much of a man of the world to sign such a paper*, Lord Kenyon held the answer improper, and that the witness ought to found his opinion upon the character of the hand-writing only. (*Da Costa v. Pym*, Peake's add. Cas. 144.) A Mr. Caldicott was allowed to state his belief that certain hand-writing was not that of Mr.

Mickle, the author of the *Lusiad*, because he was a very correct man in making capital and small letters where such were required, and, in the writing produced, that correctness was not observed. That, however, was not going beyond the hand-writing itself. (See the case stated by Mr. Erskine in *Da Costa v. Pym*, Peake's add. Cas. 144.) See also *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144, *supra*; also *Freelove v. Fenner*, 2 Gall. Rep. 170.

NOTE 914—p. 486.

The following cases recognize the doctrine of the text, respecting knowledge of hand-writing derived from a written correspondence with the person whose hand-writing is sought to be established. *Titford v. Knott*, 2 John. Cas. 211. *The State v. Allen*, 1 Hawks' Rep. 6. *Lyon v. Lyman*, 9 Conn. Rep. 55, 59, 60. *Carey v. Pitt*, Peake's add. Cas. 130. *Russel v. Coffin*, 8 Pick. Rep. 143. *Hammond's case*, 2 Greenl. Rep. 53. *Redford's adm'r v. Peggy*, 6 Rand. 316. *Turnipseed v. Hawkins*, 1 McCord, 278, 9. *Faber v. Hilliard*, 2 N. Hamp. Rep. 480, 1, 2. *Clark v. Wallace*, 3 Pennsylv. Rep. 441. *Thatcher v. Goff*, 11 Lou. Rep. (Curry,) 94.

It is essential that the *identity* of the correspondent, whose letters have been received, with the party whose hand writing is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence. (2 Stark. Ev. 372, 3, 6th Amer. ed.) It is not always necessary, however, to call the person to whom the letters were addressed; other persons through whose hands the letters passed, in the course of business, as clerks, &c. are competent to testify. (*Rex v. Slaney*, 5 Carr. & Payne, 213. *Titford v. Knott*, 2 John. Cas. 211, 214.) A witness, to prove the hand-writing of the defendant S. F., said, he had never seen S. F., but had corresponded with one S. F., of Plymouth Dock; that he had so addressed his letters, and received answers from him, and had, from that correspondence, acquired such a knowledge of his hand-writing as enabled him to say that the paper produced was in the same hand-writing: evidence was given that the defendant lived at Plymouth Dock, and that no other person of the same name resided there: and held, that the proof was sufficient. (*Harrington v. Fry*, 1 Ry. & Mood. 90.) In *Tharpe v. Gisburne*, 2 Carr. & Payne, 21, the witness said, he had never seen the party, but believed the instrument to be in his hand-writing, from having received letters from him upon which he had acted; Best, C. J. ruled that this was quite sufficient for the witness to ground a belief upon, which he said was all that was required. The reporter in a note to this case adds, that "now, the universal practice of the lord chief justices at the sittings, is, if the witness states he has received letters, purporting to come from a party, and has acted on those letters, to ask him whether he believes the paper he is called to prove is of that party's hand-writing." (Id. See per Williams, J. in *Doe v. Suckermore*, 1 Nev. & P. 43; S. C. 5 Adol. & Ellis, 703.)

Hand-writing is well proved by a witness who has received letters from the party, in answer to letters written to him by the witness, though the witness has never done any thing in consequence of the receipt of such letters. (*Doe v. Wallinger, cor. Holroyd*, J. Dorchester Spring Assizes, 1819, 2 Stark. Ev. 273, n. (h.) 6th Am. ed.) If letters are sent, directed to a person on particular business, and an answer is received

in due course, a fair inference arises that the answer was sent by the person in whose hand-writing it purports to be. (Per Lord Kenyon in *Carey v. Pitt*, Peake's add. Cas. 130.)

The like general doctrine prevails where the witness, though he has seen no written correspondence of the party, is able to testify from other authentic papers, received or examined by him in the course of business; (per Kent, J. in *Titford v. Knott*, 2 John. Cas. 214; *Turnipseed v. Hawkins*, 1 McCord, 278; *Faber v. Hilliard*, 2 N. Hamp. Rep. 481, 2; *Thatcher v. Goff*, 11 Lou. Rep. (Curry,) 94;) e. g., notes, purporting to have been signed by the alleged writer, and afterward paid by him; the payment of them being a full admission that he had made and signed them. (*Johnson v. Davenport*, 19 John. Rep. 134, 136.) So, where the witness, an officer of a bank, stated that he knew the person's hand-writing, from the circumstance of having his bank-book, and having seen his checks, which were received and paid in the ordinary course of business. (*Coffee's case*, 4 City Hall Rec. 52; S. C., Judic. Repos. 293.) In Virginia, a witness who had acquired a knowledge of the hand-writing of a person, from an examination of his papers after his death, (the witness being his administrator,) was held competent to testify to his hand-writing, in the court of probate, though the witness professed to have no knowledge save that so derived. (*Sharp v. Sharp*, 2 Leigh, 249.) In *Smith v. Sainsbury*, 5 Carr. & Payne, 196, it became necessary for the defendant to prove the hand-writing of Mary Smith, an attesting witness to an agreement, purporting to be signed by the plaintiff. The defendant's attorney for this purpose testified, that he believed he was acquainted with her hand-writing; that he had never seen her write, but had observed the name of Mary Smith signed to an affidavit, which had been used by the plaintiff's counsel, in answer to an application to postpone the cause, and which was filed. In the affidavit it was sworn, that Mary Smith was the plaintiff's wife. This evidence being objected to, Park, J. held it sufficient; for, the plaintiff was precluded from alleging that the signature to the affidavit was not genuine. He distinguished it from the case of mere comparison of hand-writing, inasmuch as the witness took notice of the signature, and, in his mind, formed an opinion, which enabled him to swear to his belief. But mere comparison of hand-writing is not, in general, allowable. (See *id.*; also post, note 915, p. 1326 et seq.) And where the plaintiff's counsel, to prove a letter to be of the defendant's hand-writing, testified, that he knew the defendant's hand-writing from having seen other papers in the master's office, which were admitted to be of his hand-writing by the defendant's attorney, and that he (the witness) had frequently acted on those papers, but had never seen the party write nor corresponded with him: held, that this amounted to knowledge derived from mere comparison of hands, and was therefore incompetent. (*Greaves v. Hunter*, 2 Carr. & Payne, 477.) A witness who could not undertake to say he had ever seen the person actually write, but from such person having been a notary public, he had seen much of his acknowledged hand-writing, was held competent to testify. (*Duncan v. Beard*, 2 Nott & McCord, 400.) This, however, was the case of an old will, and the antiquity of the transaction may have caused some relaxation in the rule. See *Strother v. Lucas*, 7 Peters' Rep. 766, 7; *Turnipseed v. Hawkins*, 1 McCord, 272, 278; also post, note 917.

Where there is a reasonable possibility that the specimens on which the witness grounds his belief were not genuine, his testimony will be rejected; as, where the

inspector of franks at the post office, called to prove the signature of a member of parliament, could only speak from the superscription of letters *purporting* to have been signed by him. (Gresley's Eq. Ev. 190. Carey v. Pitt, Peake's add. Cas. 130. Batchelor v. Sir John Honeywood, 2 Esp. Rep. 714.) Where a witness has no other knowledge of the party's hand-writing, than from having seen writings which were said, by other persons, to be his, he cannot be allowed to testify. (Goldsmith v. Bane, 3 Halst. 87. Thatcher v. Goff, 11 Lou. Rep. (Curry) 94, 98.) See further on this subject, State v. Allen, 1 Hawke's Rep. 6, and other cases relating to disproving the genuineness of bank bills, post, note 918.

NOTE 915—p. 490.

Mr. Starkie, speaking as to the rule excluding mere comparison of hands, says, that perhaps after all, the most satisfactory reason for it is, that if such comparison were allowed, it would open the door to the admission of a great deal of collateral evidence, which might go to a very inconvenient length. For, in every case, it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen, (if the present rule were to be broken through,) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent. (2 Stark. Ev. 375, 6th Am. ed.)

By comparison, is now meant, an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person; though formerly, even comparing the standard formed in the witness' mind with the writing in dispute, was called evidence by comparison; and hence, was deemed inadmissible, at least in criminal cases. (2 Stark. Ev. 373, 4, 6th Am. ed.)

The English courts have consistently followed the rule, excluding evidence founded upon a mere comparison of hands by witnesses. (See several cases cited in the next preceding note p. 1325; also, an elaborate note, exhibiting most of the earlier English cases, 4 Esp. Rep. 273, *a*, Day's ed.) A witness cannot have two writings placed in his hands, and then be asked, whether, in his belief, both were not written by the same person. (Clermont v. Tullidge, 4 Carr. & Payne, 1. See also Mutchinson, v. Allcock, 1 Dowl. & Ryl. 165; Greaves v. Hunter, 2 Carr. & Payne, 477, stated in the next preceding note p. 1325.) On information for a riot, a letter from the prosecutor was offered by the defendant, and admitted to be genuine. Then a lost letter was proposed to be proved by a witness, who never saw the prosecutor write, but would swear it was in the same hand with the letter produced; this was rejected, because he had never seen the party write. (The King v. Sir T. Culpepper, Skin. 673.)

But though *witnesses* cannot be permitted to compare two papers, and give their opinion to the jury, as the result of such comparison merely, yet the *jury*, under certain limitations, have been allowed to assist their judgment in this way. In Allesbrook v. Roach, 1 Esp. Rep. 351, before Lord Kenyon, there was contradictory evidence respecting the defendant's hand-writing, and the jury were allowed to compare bills, admitted to have been written by him, with the disputed signature. The bills, in this case, were introduced, as it seems, for the mere purpose of comparison. The

same learned judge is reported to have held directly the contrary in *Da Costa v. Pyme*, Peake's add. Cas. 144, and *Macferson v. Thoytes*, Peake's Rep. 20. See also *Brookbard v. Woodley*, id. Cor. Yates, J. In more recent English cases, the doctrine is laid down thus—that the court or jury may compare two documents together, when properly in evidence, and from that comparison form a judgment upon the genuineness of the hand writing. (*Griffiths v. Williams*, 1 Crom. & Jerv. 47. *Solita v. Yarrow*, 1 Moo. & Rob. 133. *Doe v. Newton*, 1 Nev. & P. 4; S. C. 5 Adol. & Ellis, 514. See the observations of the judges in *Doe*, ex dem. *Mudd*, v. *Suckermore*, 1 Nev. & P. 32; S. C. 5 Adol. & Ellis, 703.) But, the document with which the comparison is made, must be one already in evidence in the case, and not produced merely for the purpose of the comparison. Accordingly where, upon an indictment for sending a threatening letter, in order to prove the hand writing to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, *Bolland B.*, after considering *Griffiths v. Williams*, supra, rejected the evidence, observing that, to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document, put in for another purpose, and, therefore, free from the suspicion of having been so selected. (*Morgan's case*, 1 Moo. & Rob. 134 n. See 2 Stark. Ev. 374, n. (h.) 6th Am. ed. *Rosc. Cr. Ev.* 163; *Bromage v. Rice*, 7 Carr. & Payne, 548; *Waddington v. Cousins*, id. 596; *Doe v. Newton*, 1 Nev. & P. 4; S. C. 5 Adol. & Ellis, 514. See the observations of the judges in *Doe*, ex dem. *Mudd*, v. *Suckermore*, 5 Adol. & Ellis, 703; S. C. 1 Nev. & P. 32.) *Gurney, B.*, it is said, after consultation with *Alderson, J.*, allowed signatures, indisputably genuine, and spelled differently, to be submitted to the jury for the purpose of comparison with the signature in question. (*Anon.* 1833, cited 2 Stark. Ev. 374, n. (h) 6th Am. ed.; also *Gresl. Eq. Ev.* 191.) The standards were probably competent evidence for other purposes. But mere unaided comparison, will not authorize a jury to find in favor of the genuineness of a writing. Accordingly, in *Allport v. Meek*, 4 Carr. & Payne, 267, the action was by the indorsee against the acceptor of a bill of exchange; the witness called to prove the hand-writing of the drawer, said, that neither the drawing nor the indorsement were in the hand-writing of the person whose they purported to be. But it was proved, that the defendant had acknowledged the acceptance to be his, and it was contended, that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought upon inspection that the drawing and indorsement were of the same hand-writing. But held, that some evidence was necessary for the jury to act upon.

The doctrine excluding comparison of hands by witnesses, was recognized by the supreme court of the United States, in *Strother v. Lucas*, 7 Peters' Rep. 763. "It is a general rule," said *Thompson, C. J.*, delivering the opinion in that case, "that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the hand-writing, but is called upon to testify merely from a comparison of hands." (*Id.* 767.)

In New-York, the like has been recognized, in several instances. In *Titford v. Knott*, 2 John. Rep. 211, 214, *Kent, J.*, advanced the doctrine thus—"It is usual for witnesses to prove hand-writing from previous knowledge of the hand, derived from

having seen the person write, or from authentic papers received in the course of business. If the witness has no previous knowledge, he then cannot be permitted to decide in court from a comparison of hands." The same rule was admitted in *Jackson, ex dem. Van Duzen, v. Van Duzen*, 5 John. Rep. 155; but there, the comparison was made by a witness who had seen the party write, and probably only for the purpose of refreshing his recollection. See S. C. stated ante note 913, p. 1323. In *Jackson, ex dem. Woodruff, v. Cody*, 9 Cowen's Rep. 140, there was a dispute as to the identity of a witness to a deed, there being several persons of the same name; and a witness at the circuit was allowed to compare the hand-writing to the attestation, with another writing long in his possession, and reputed to be the hand-writing of his grandfather, though he had never seen him write. The evidence was received without objection; but the supreme court inclined to think it would have been admissible for the purpose of identity even had it been objected to. The deed was dated in 1792, and the trial took place in 1827. The case, therefore, would in some respects, seem to fall nearly within the principle of the rule stated post, p. 491 of the text, allowing comparison of hands to be resorted to, in proving ancient writings. See also post, note 917. The general rule, excluding comparison of hands, was fully admitted in *Jackson, ex dem. Parker, v. Phillips*, 9 Cowen's Rep. 94, 112. There, for the purpose of showing that a deed purporting to have been signed by one Abraham Barnes, was not genuine plaintiff offered to prove that a certain account book was in the hand-writing of Barnes, and that his name, written therein by himself, was wrote differently from the signature to the deed, his christian name being spelled *Abraham* in the book, and *Abraham* to the deed. The circuit judge rejected the evidence, as amounting to no more than a mere comparison of hands. On a motion subsequently made for a new trial, the decision at the circuit was affirmed; and *Savage, C. J.*, who delivered the opinion, said, "the rule is settled in England, and I believe in this state, that comparison of hands, by juxtaposition of two writings in order to ascertain whether both were written by the same person, is inadmissible." The learned chief justice assigned as one reason for the rule, that the specimens produced might be selected for the purpose; and another, he added, was, that if permitted, these specimens might "be contested and examined by others, and thus collateral evidence might be introduced to an inconvenient length, and, in the end, might not be conducive to justice." (Id. 112.)

The point as to comparison by the jury, was also raised and considered in *Jackson, ex dem. Parker, v. Phillips*, supra. It was proposed to authenticate the book mentioned, and then to submit both the book and the deed for inspection by the jury. The circuit judge overruled the proposition, and the supreme court held that his decision was correct. *Savage, C. J.* said, that where a practice of allowing comparison of hands, either by the witnesses or the jury, has obtained, he presumed it would be found that the comparison had been made by consent. (Id. 100, 112.) The decision itself, whatever may be thought of some *dicta* in the case, is not at all in conflict with the English doctrine, relative to submitting papers for inspection and comparison by the jury; for, the book was brought forward for the single purpose of comparison. See further on the same subject, *Olmstead v. Stewart*, 13 John. Rep. 238, 9, per curiam.

Some early *nisi prius* decisions, in New-York, deserve notice. In *Haskins v. Stuyvesant*, Anth. N. P. 97, comparison of hands was held inadmissible, by *Van Ness, J.*,

even as subsidiary testimony, in a case where the proof was conflicting. But, in *Rogers' adm'r v. Shaler*, id. 109, *Spencer, J.* held, that where the intestate's hand-writing to shipping articles had already been proved by the plaintiff, the defendant might call a witness to compare such hand-writing with papers alleged by the defendant to be in the intestate's hand-writing, and state his inference to the jury, with a view of establishing the genuineness of the latter; "the jury," he added, "not being competent to make such comparison." *Quere*; for this, according to the doctrine as recently held in England, was precisely the case where the jury would be allowed to take both papers, and aid their judgment by comparison. The rule excluding comparison of hands by the jury, was acted upon in *Hutchins' case*, 4 City Hall. Rec. 119, where, though both the prosecutor and prisoner consented, yet the mayor interposed, and refused to allow it. (See *Coffey's case*, *Judic. Repos.* 293, 295, 6.)

In Virginia, opinions of witnesses derived from a mere comparison of hands, are inadmissible. Nor can other papers be given in evidence, with a view of laying them before the jury to aid them in forming their judgment by comparison. (*Rowt's adm'r v. Kile's adm'r*, 1 Leigh, 216. See *Gardner's adm'r v. Vidal*, 6 Rand. Rep. 106; *Redford's adm'r v. Peggy*, id. 316; *Sharp v. Sharp*, 2 Leigh, 249.) But, a witness who has seen a person write, may, when called on to testify to his hand-writing, refer to other papers in his own possession, known to have been written by such person, to refresh his memory. Nor will the weight of the witness' testimony be impaired, it seems, by reason of his having done so before the trial. (*Redford's adm'r v. Peggy*, 6 Rand. 316.) See on this point post, p. 491 of the text, and the cases cited post, note 916.

In New-Jersey, it seems, evidence by comparison of hands is inadmissible. (*Goldsmith v. Bane*, 3 Halst. 87.)

So in Kentucky; though the court concede an exception in the case of ancient writings. They add, also, that comparison of hands "has been sometimes admitted in aid and corroboration of other proof. But alone, and without other proof, the general rule is not to admit it. (*Woodward v. Spiller*, 1 Dana's Rep. 179, 181.)

In Maine, the doctrine, it has been said, (per *Dagget, J.*, 9 Conn. Rep. 61,) allows of testimony derived from a mere comparison of hands; and *Hammond's case*, 2 Greenl. Rep. 33, was cited as showing this. The prisoner there was indicted for forging a check on the Portland Bank, in the name of *Atwood & Quincy*. The prosecutor proved, that a sheet of paper was found in the prisoner's chest, on which were written six or seven other and similar checks; and that the prisoner acknowledged the latter to have been written by him. This paper was lost, or unintentionally destroyed, before the trial. He then introduced one of the directors of the bank as a witness, to prove that he had seen and critically examined the lost paper, that the signature to the checks written thereon resembled the signature to the forged one, and the witness believed that the forged check was signed by the prisoner. The decision was not put upon the ground that a comparison of hands, in the technical sense, was allowable; but the court went on the principle that a witness, who has become acquainted with the hand-writing of a party, by having seen writing acknowledged to be his, is competent to testify in respect to it. The comparison allowed in the case was not made by bringing the two writings in juxtaposition, but, as it seems, by comparing a standard formed in the witness' mind from having critically examined an acknowledged specimen of the prisoner's hand-writing, (and that too previous to

the trial,) with the signature in question. If the witness' knowledge had been gained in the course of business, and with no reference to the trial, the case would probably have fallen within the principle of several decisions stated ante, note 914, p. 1325. The court, however, said, that the rule excluding comparison of hands is not in force in Maine, or in Massachusetts, *with the same strictness and to the same extent as in England*. But how far the relaxation may go was not defined.

In Massachusetts, it was held in an early case, that where a signature is contested, other papers may be proved and submitted to the jury, for the purpose of enabling them to judge by comparison. The decision went no farther than to allow a comparison by the jury, where there were conflicting proofs, and in aid of other testimony: and Parker, C. J., who delivered the opinion, put it mainly upon local usage, apparently conceding that the English doctrine was against it. (*Homer v. Wallis*, 11 Mass Rep. 309, 312. See *Hall v. Huse*, 10 id. 39, S. P.) In a recent case the court went beyond this and allowed other signatures, not otherwise competent evidence, to be introduced for the purpose of enabling the court and jury to compare, and thus form an opinion upon the genuineness of the controverted signature. So persons of skill may be called to give their opinion as witnesses from a comparison merely, as to the identity or difference of admitted or proved specimens, with the signature in question. But, it seems, the signatures thus introduced as standards must be shown to be genuine, either by being admitted to be so, or by direct evidence of a witness who saw the party write them. (*Moody v. Rowell*, 17 Pick. 490, 494, 5, 6.)

In South Carolina, comparison of hands by the jury is allowable in aid of doubtful proof; and papers may be proved with the express view of submitting them for the inspection of the jury. So also, it seems, as to comparison by witnesses. But in no case is such evidence admissible, except as a circumstance in corroboration of other evidence. *Per se*, say the court, it is so feeble as to be unsafe to act upon. (*Boman v. Plunkett*, 2 McCord, 518, 520.)

In Pennsylvania, it appears to have been decided by the circuit court of the U. States, sitting in that state, that hand-writing could not be proved by a comparison of hands. (*Martin v. Taylor*, and *United States v. Johns*, Wharton's Dig. 300, 2d ed. pl. 353.) But see *Murati v. Luciani*, 1 Bald. Rep. 49, 50, 1, 2. Such was held to be the established rule in criminal cases. (*United States v. Craig*, 4 Wash. C. C. Rep. 729, 731.) But, in the state court, after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with other writing concerning which there is no doubt. (Said, in *McCorkle v. Binns*, 5 Binn. Rep. 340, 349, per Tilghman, C. J.) On the same principle, from a comparison of the types, devices, &c. of two newspapers, one of which was clearly proved, (and that too for the very purpose of comparison,) and the other imperfectly, held, that the jury might infer that both were printed by the same person. (Id.) This doctrine, as to hand-writing, was fully sanctioned and adopted in *The Farmer's Bank v. Whitehall*, 10 Serg. & Rawle, 110. Though the court seemed to confine the rule to civil cases, and to instances where the comparison is instituted in corroboration of other evidence. *S. P. Bank of Pennsylvania v. Haldeman*, 1 Pennsylv. Rep. 161. See, as to criminal cases, *Pennsylvania v. McKee*, Addis. Rep. 33; per Duncan, J. in *The Commonwealth v. Smith*, 6 Serg. & Rawle, 571. Indeed, no distinction is now recognized between civil and criminal cases in this respect. (See *Callan v. Gaylord*, 3

Watts' Rep. 321, 323, 4.) Mere unaided comparison of hands, without other proof, is not in general admissible. (*Vickroy v. Skelley*, 14 Serg. & Rawle, 372. *Callan v. Gaylord*, 3 Watts' Rep. 321, 323. *Lodge v. Phipper*, 11 Serg. & Rawle, 333.)

In New-Hampshire, the rule is substantially the same as in Pennsylvania. "We take it to be well settled," say the court, "that it cannot be left to a jury, to determine whether a signature is genuine or not, by comparing it with other signatures proved to be genuine. But, when witnesses acquainted with the hand-writing in question have been called and examined, other signatures, proved to be genuine, may be submitted to the jury, to corroborate or weaken the testimony of such witnesses." (*Myers v. Tuscan*, 3 N. Hamp. Rep. 47.)

In the circuit court of the United States, sitting in Rhode Island, a question arose whether an altered word in a will was in the hand-writing of the scribe who drafted it; after witnesses acquainted with his hand-writing had testified to their opinion that the word was not written by him, and predicated their statement mainly on the mode of forming a particular letter, and the use of double hyphens—other witnesses, who were also acquainted with his hand-writing, were allowed to state that certain deeds, which they produced to the jury, were the hand-writing of the scribe, and contained the peculiarity as to the particular letter and the hyphens observable in the will, and that they had frequently known him write in this way. "Nothing is clearer," said the court, "than that this is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of hand-writing, and produce the best possible proof of their own accuracy." (*Freelove v. Fenner*, 2 Gall. Rep. 170, 175.)

In Connecticut, the English doctrine has been distinctly repudiated; and not only may specimens be introduced for the purpose of inspection by the jury, but witnesses, it seems, are allowed to give opinions, derived from a mere comparison of hands on the trial. (*Lyon v. Lyman*, 9 Conn. Rep. 55.) And no distinction is made between criminal and civil cases, in this respect. (*Id.* 61. *State v. Brunson*, 1 Root's Rep. 307.) But see *State v. King*, stated by Mr. Day in a note to *Macferson v. Thoytes*, Peake's Rep. 21; *Swift's Ev.* 29, 30.

In Louisiana, the doctrine on this subject rests upon their code of practice. Proof by comparison is there allowed. (See *Plieque v. Labranche*, 9 Lou. Rep. (Curry) 559, 562; *Bell v. Norwood*, 7 id. 95, 6; *Barfield v. Hewlet*, 6 Mart. Lou. Rep. 78, N. S.; *City Bank of New-Orleans v. Foucher*, 9 Lou. Rep. (Curry) 405; *Bissell v. Irvin's heirs*, 10 id. 524.)

NOTE 916—p. 491.

See *S. P., Redford's adm'r v. Peggy*, 6 Rand. 316; *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144. See the observations of Paterson, J. in *Doe, ex dem. Mudd, v. Suckermore*, 1 Nev. & P. 51.

NOTE 917—p. 492.

Rosc. Cr. Ev. 133. 2 *Stark. Ev.* 375, 6th Am. ed. See per *Williams, J.* in *Doe, ex dem. Mudd, v. Suckermore*, 1 Nev. & P. 41; *S. C.* 5 *Adol. & Ellis*, 708.

The doctrine of the text has been recognized in several American cases. In Virginia, where evidence by comparison of hands is disallowed, Carr, J. speaking to that point, said, that the decisions "go no further than, that where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write, comparison with the documents known to be in his hand-writing, has been admitted." (Rowt's adm'r. v. Kile's adm'r. 1 Leigh, 222.) But held, in that case, that a paper dated in 1807, the suit having been brought in 1815, did not fall within the principle of the exception.

The general doctrine was directly held in Jackson, ex dem. Bradt, v. Brooks, 8 Wend. 426. There, the witness' only knowledge of the hand-writing to a very old deed, was derived from an inspection of other ancient deeds, having the same signature, which had been treated and preserved as muniments of title; and, inasmuch as, from the lapse of time, no one could be presumed alive who had seen the party write, the witness was allowed to testify, and his testimony deemed sufficient. (See id. 431, 2. S. C. affirmed on error, 15 Wend. 111.) In Jackson v. Kip, Anth. N. P. 105, to prove that an ancient survey was made by a former surveyor-general, the plaintiff offered a witness who had been in the habit of inspecting ancient surveys, and had thus become acquainted with surveys avowedly made by such surveyor. The defendant's counsel objected, and called for the papers from which the witness had formed his opinion, so that the jury might compare for themselves. But Spencer, J., who presided at the trial, overruled the objection, and admitted the evidence. See also S. P., Cantev v. Platt, 2 McCord, 260; Jones v. Huggins, 1 Dev. R. 223; Duncan v. Beard, 2 Nott & McCord, 400; Turnipseed v. Hawkins, 1 McCord, 272, 278; Thomas v. Horlocker, 1 Dall. 14; Vickroy v. Skelley, 14 Serg. & Rawle, 372, 3; also ante, note 903, p. 1316.

In Strother v. Lucas, 6 Peters' Rep. 767, the doctrine was recognized by Thompson J., delivering the opinion of the court, thus: "There may be cases, where, from the antiquity of the writing it is impossible for any living witness to swear he ever saw the party write, comparison of hand-writing with documents, known to be in his hand-writing, has been admitted. But these are extraordinary instances, arising from the necessity of the case, and which do not apply to the one before the court." The deed (which was the instrument sought to be proved in that case) bore date in 1781; but it appeared there were living witnesses who had seen the party write, one of whom was examined as a witness in the cause.

NOTE 918—p. 494.

Our author seems to make some distinction between *proving* and *disproving* hand-writing. In the former case, the testimony of the supposed writer need not be called in the first instance; but, in the latter, he appears to doubt whether in criminal cases especially, it is not to be regarded as the best evidence, and therefore indispensable. (See in the text, p. 492, 3; also ante, pp. 223, 4, 5.) Mr. Starkie denies that there is any difference. He says, "the objection that secondary evidence is substituted for the best, does not apply in either instance, since there is not such a distinction between one man's knowledge of his own hand-writing, and the knowledge of another,

on the same subject, as constitutes the former evidence of a superior degree to the latter." (2 Stark. Ev. 339, 340, 6th Am. ed.) Mr. Roscoe is of the same opinion. (Rosc. Cr. Ev. 5, 6.) And Mr. Gresley also. (Gresley's Eq. Ev. 189.) The English cases are slightly conflicting on this subject. See Hughes' case, 2 East's P. C. 1002. M'Guire's case, id. Case of Bank prosecutions, Russ. & Ryan, 378. Smith's case, 2 East's P. C. 1000.

In North Carolina, a justice's proceedings were allowed to be proved by persons acquainted with his hand-writing, without calling him or accounting for his absence. The court, in giving their opinion, deny that this is an invasion of the rule requiring the best evidence. For, whether a signature is proved by the person who made it, or by one acquainted with his hand-writing, the *kind* of proof is exactly the same. They are both primary—since the knowledge of both is acquired by the same means; although it may be, that the evidence of the supposed writer is in degree stronger than the other. (Ainsworth v. Greenlee, 1 Hawk's Rep. 190. See ante, note 414, p. 541; ante, note 418, p. 546; also ante, note 423, p. 553.) Indeed, we believe there is no material discrepancy among either the American or English cases on this point. In the first instance, and in order to prove hand-writing merely, it is not necessary to call the supposed writer; but other persons, acquainted with his hand-writing, are allowed to testify, without excusing the absence of the writer himself. This may be collected from several cases cited ante, notes 912, 913. An early case, in Pennsylvania, seems to have proceeded upon a different principle. (M'Kee v. Executors of Myers, Addis. Rep. 31; stated ante, note 423, p. 553.) In Brewster v. Countryman, 12 Wend. 446, the defendant wished to avail himself of a written contract between him and the plaintiff, which the defendant had destroyed. He offered what he alleged was a copy; and proved that the plaintiff had requested one J. H. to make a copy, and that the paper produced was in J. H.'s hand-writing. A witness testified that he had seen the original and that the copy was substantially the same, but he could not say it was a copy, not having compared it with the original. The court held, that J. H.'s testimony should have been obtained, saying that though that produced was pretty strong, it was secondary to what was withheld. (Id. 449.) There, however, the question was upon the authentication of the copy, generally, and not whether J. H. should be called to prove or disprove his hand-writing.

The doctrine as to *disproving* hand-writing, without calling the supposed writer, came under consideration in Faber v. Hilliard, 2 N. Hamp. Rep. 430. The defendant in that case, proved he had paid the plaintiff a ten dollar bill, purporting to have been issued by a bank of another state; and the plaintiff offered to prove that the bill was counterfeit; but the persons called for that purpose, not being officers of the bank, and not having seen counterfeit bills on it of the denomination of the one in question, though they had of other denominations, and were much accustomed to the inspection of money, were objected to by the defendant. Their testimony, however, was held admissible. The court laid down the rule as a general one, that persons who have formed an acquaintance with the hand-writing in question, are equally competent either to prove or disprove it, as the supposed writer. (Id. 481.) Nor is it necessary in order to disprove the signatures of the bank officers, in such case, to call persons who have actually seen them write. (Id.)

The subject of disproving the genuineness of papers has most frequently been considered in criminal prosecutions, for passing counterfeit bills, for forgery &c. We have seen that the party whose name is forged is competent to testify in these cases. (See ante, note 236, p. 253; also *Hess v. State of Ohio*, 5 Hamm Rep. 7; *Simmons v. The State*, 7 id. 116. Contra, *State v. Whitten*, 1 Hill's Rep. 100.) And this, where the instrument purports to have been attested by witnesses, who are neither produced nor accounted for. (*Simmons v. The State*, supra.) And the question has several times arisen whether the testimony of such person was not indispensable. *Faber v. Hilliard*, supra, makes no distinction between civil and criminal cases, but regards the rule acted upon as applicable to both. Nor was any distinction suggested, on the ground that the bank officers were out of the state, but the evidence there allowed was treated as primary in its character. The same doctrine was directly applied on an indictment for passing a counterfeit bank bill, in *State v. Carr*, 5 N. Hamp. Rep. 367; where it was held, that witnesses who had become acquainted with the signatures of the president and cashier, by having seen many of the bills in circulation, were competent to disprove the genuineness of the bill in question. There too the bank was out of the state, but the court in their opinion make no mention of the circumstance.

In Ohio, it has been held that the prosecutor need not call the president and cashier, though in the particular case they resided in an adjoining county. (*Hess v. The State of Ohio*, 5 Hamm. 5, 7.) The court adopt the doctrine of Mr. Starkie, that the testimony of the president and cashier is not superior in degree to that of other persons acquainted with their hand-writing. The witness introduced in this case, was a teller of another bank; he had never seen the officers mentioned write, but had frequently seen notes, letters, &c., (received at the bank of which he was teller as genuine) with their signatures; and held, that his opinion of the counterfeit character of the bill in question was proper evidence for the jury. The court also seem to favor the notion that persons "skilled in examining signatures and notes" might be allowed to testify. (Id. 6, 7.) In *Simmons v. The State*, (7 Hamm. Rep. 116,) the indictment was for forging a note; and the testimony of the alleged maker was incidentally spoken of as the best evidence of which the nature of the case would admit.

The Massachusetts doctrine on this subject was considered in *Commonwealth v. Carey*, 2 Pick. 47. The indictment was for uttering a counterfeit bill, on the bank of another state. To disprove the signatures of the president and cashier, the prosecutor offered two witnesses, both officers of another bank, who testified to their having received and paid out, very frequently, notes of the bank in question, and in that way had become acquainted with the signatures of the president and cashier; they had never seen either of those officers write, but one of them had once carried a large number of the bills to the bank which he had taken as genuine, and they were received and paid for by the bank. This testimony was held admissible; but the court evidently regarded it as secondary, and inferior to that of the president and cashier whose signatures were sought to be disproved, and they justify its admission solely on the ground that the court had no power to compel the attendance of those officers. (Id. 50.) It seems that the legislature of that state have passed a statute, which allows the same evidence where the bill in question is upon a local bank, situated forty miles or over from the place of trial. (Id.)

In Vermont, on a similar indictment, a person who had frequently dealt with the bank, and who said he had by that means become acquainted with the hand-writing of the president and cashier, was held competent to disprove their signatures, though he had never seen them write. And after such proof, it was said, the prosecutor might examine as to any mark, character, or appearance of the bill, by which it could be distinguished from those which were genuine. (*State v. Ravelin*, 1 D. Chip. Rep. 295.) In this case the bank was out of the state. No special notice, however, was taken of the circumstance, and the court seem to have treated the testimony allowed as primary.

Such also appears to be the doctrine in Connecticut. (Per. Daggett, J. in *Barnum v. Barnum*, 9 Conn. Rep. 249.) See *Lyon v. Lyman*, id. 55.

In South Carolina, where the prisoner was indicted for forging a bank note on a bank of that state, one ground taken in moving for a new trial was, that a proper officer of the bank should have been called to testify to the forgery. Three of the judges were of opinion, that one of the officers, who was conversant with the hand-writing of all the officers, and who knew the various devices, and private marks, affixed to the bills of the bank, should have been produced:—The other two judges gave no opinion upon the point. The case was determined, however, upon other grounds, in respect to which the court were unanimous. (*The State v. Petty*, 1 Harp. Rep. 59.) It obviously furnishes no warrant for holding, that the president and cashier must be produced in order to disprove their own hand-writing. In a more recent decision, the doctrine of the above case, so far as it goes to show that a bank officer *must* be called, was overruled; and the rule was laid down thus—that in all cases, the opinion of any person familiar with the notes of the bank, is admissible in the first instance, and the weight and value of the opinion is for the jury. The court, however, directly approved of the practice of calling an officer of the bank, and said, that they would rarely be satisfied with a conviction on less certain testimony than that which the officers might be supposed able to give. The cases in which the attendance of an officer would be properly dispensed with, are said to be, where the forgery is so gross and palpable that other persons, familiar with bills of the bank, can readily detect it by some unequivocal indication, without reference to the private marks of the bank. (*State v. Hooper*, 2 Bail. 37.) In another case, decided about the same time, a witness was allowed to give his opinion that certain bills were counterfeit, though he was not a bank officer, and had only seen a part of the persons write whose names were to the bills, he professing an acquaintance with the hand-writing of the rest from a general familiarity with the bills on those banks. (*State v. Tutt*, id. 44, 5.)

In Virginia, persons who have become well acquainted with notes of the bank in the way of business are competent; an officer of the bank need not be called by the prosecutor for any purpose. (*Martin v. Commonwealth*, 2 Leigh, 745, 749. *Moore v. Commonwealth*, id. 701, 706.)

In North Carolina, where a witness could only speak as to the genuineness of the signatures of the president and cashier of a bank, from having received bank notes in the course of business, purporting to have been signed by them, which passed current and were reputed genuine; held, that he was incompetent to prove their hand-writing, or to testify that a bank note, with their names appearing upon it, was counterfeit; at least, unless the ordinary occupation of the witness was such as to render it probable

that he had received and paid away large sums, so as to be a skilful judge, and that the notes had been actually passed by him so long ago as to allow time for the return of them, if spurious. (*The State v. Allen*, 1 Hawks' Rep. 6.) It seems that a banker, who, in that character, had habitually, for several years, paid away large sums in such notes, which he believed to be genuine, and were so reputed, would be competent. (*Id.*) The court in this case said, (see *id.* p. 10, per Henderson, J.) that they intentionally avoided expressing any opinion upon the doctrines laid down in *The United States v. Holtsclaw*, 2 Hayw. Rep. 379. That was decided in the circuit court of the U. States, sitting in North Carolina, A. D. 1805. It was there objected that no one could speak as to the signatures of the president and cashier, save such as had seen them write, or corresponded with them. The court held otherwise, saying—"These signatures are known to the public, and persons who have been in the habit of distinguishing the genuine from the counterfeit signature, and are conversant in dealings for bank bills, are as well qualified to determine of their genuineness, as persons who, in private correspondence, have received letters from the person whose hand-writing is in question. Moreover, it is determined by the skilful whether a bill be genuine, not only by the signature, but also by the face of the bill, and by the exact conformity of the devices which are used for the detection of counterfeits, to those in true bills. We are of opinion that the judgment of persons well acquainted with bank paper, is sufficient evidence to determine whether the one in question be genuine or not." This opinion, it seems by what fell from the attorney general, 3 Hawks' Rep. 395, was delivered by Marshall, C. J. In *State v. Candler*, 3 Hawks' Rep. 393, a merchant, who had been much in the habit of receiving and paying away notes of a particular bank for ten years previous to the trial, was held competent to disprove the genuineness of a bill purporting to have been issued by such bank, though he had never seen the president or cashier write, nor corresponded with either.

In Pennsylvania, it is not necessary, in order to disprove the signature of the officers of a bank to a bill purporting to have been issued by the bank, that those officers should be produced: the proof may be by any one acquainted with their signatures from having seen them write, or having corresponded with them. (*The Commonwealth v. Smith*, 6 Serg. & Rawle, 568.) The bank was out of the state. That circumstance was adverted to, in the opinion of the court, by way of illustrating the inconveniences of the opposite doctrine, but not as excusing inferior evidence; for they appear to have treated the testimony adjudged allowable as primary in its character.

In the court of sessions of the city of New-York, the prosecutor, in order to disprove the genuineness of a bill purporting to have been issued by the Bank of Chenango, introduced witnesses who were well acquainted, as they stated, with the bills of that bank, &c. but had never seen the president or cashier write, nor ever corresponded with them. On an objection being taken, the court said that, "if the district attorney had witnesses who could testify that they had seen the parties write, whose names had been forged, or had corresponded with them, they must be produced to the court; and in the absence of such testimony, the court thought the evidence of brokers and others well acquainted with bank notes, particularly of the bank whose notes had been forged, would be sufficient." Witnesses who had seen the president and cashier write, or who had corresponded with them, were subsequently produced; and the prisoner convicted. (*The People v. Badger*, 1 Wheel. Cr. Cas. 543, 4, 5.) In another

case, the witness, who was a broker, said he was acquainted with the bills of the bank in question, and pronounced the one produced a counterfeit. On being questioned as to how he formed his judgment, he answered, "from the engraving, and general appearance of the bill." It turned out, on further enquiry, that he did not know the names even of the president and cashier. The mayor said this testimony would not answer; that, "to prove a bank note to be counterfeit, it was incumbent on the prosecutor to introduce some person who knew the hand-writing of the president and cashier, or had been in the habit of corresponding with them, or of receiving and returning their notes." (Silkworth's case, 5 City Hall Rec. 176, 7.)

We have seen in the text that the English cases are not agreed upon the point, whether persons practised in the examination of hand-writing, and in the detection of forgeries, usually called *experts*, can be allowed to give their opinion as to the hand-writing in question being of a genuine or an imitated character. See on this subject, *Gres. Eq. Ev.* 190; 1 *Chitty's Cr. Law*, 581, 2, Am. ed. of 1836; *Rosc. Cr. Ev.* 163, 4; 2 *Stark. Ev.* 375, 6, 6th Amer. ed.; 2 *Russ. on Cr.* 363, 4, Phil. ed. 1836. In *Goodtitle, dem. Revett v. Braham*, cited in the text at p. 493, note (2), where this species of evidence was admitted, Lord Kenyon mentioned a case where a decipherer had given evidence of the meaning of letters, without explaining the grounds of his art, and where the prisoner was convicted and executed. Buller, J. said it was like the Wells Harbor case, where persons of skill were allowed to give evidence of opinion. In *Carey v. Pitt*, Peake's add. Cas. 130, a case not noticed by our author, Lord Kenyon expressly rejected the opinion of an inspector of franks, saying, that though such evidence was received in *Goodtitle, dem. Revett, v. Braham*, he had in his charge to the jury laid no stress upon it. See also *Bachelor v. Sir John Honeywood*, 2 *Esp. Rep.* 714; per Denman, C. J. in *Doe, ex dem. Mudd, v. Suckermore*, 1 *Nev. & P.* 63; *Gurney v. Langlands*, 5 *Barn. & Ald.* 330; *Kemp v. Mackvill, Sayer*, 132; *Stranger v. Searle*, 1 *Esp. R.* 14.

This species of evidence, if admissible at all, must obviously stand upon the general principle allowing persons skilled in a particular science or art, to give their opinions upon questions relating to it, and in respect to which they are supposed to possess peculiar knowledge. On the point how far such testimony has been allowed, in general, see ante, p. 290, 1, of the text; also ante, note 529, p. 759, et seq. See likewise *Norman v. Wells*, 17 *Wend.* 136, 161, 2, 3; *Cotterill v. Myrick*, 3 *Fairf. Rep.* 230, 1; *Boies v. M'Allister*, id. 308. As to hand-writing, some of the American cases, cited supra, in their *dicta* at least, lean toward sanctioning the admissibility of experts, or persons skilled in detecting forgeries. See particularly *Hess v. The State of Ohio*, 5 *Hamm. Rep.* 7; *United States v. Holtsclaw*, 2 *Hayw.* 379. But most of them require that the witness, in order to be able to speak as to the hand-writing of a person, should have had a *previous knowledge* of the general character of his hand, gained in some legitimate way. (See the American cases, supra, in respect to disproving the genuineness of bank bills; also see the cases ante, notes 913, 914.) In Pennsylvania, it was held that a witness, though a man of business, and much conversant with writings, but who had never been employed in the detection of forgeries, could not be asked whether, in his opinion, from comparing a genuine signature with the one in dispute, they were in the same hand-writing. The evidence was offered with a view of disproving the latter, and was not proposed in aid of other evidence, but as mere naked unassisted comparison of

hands. The court inclined to think that such testimony could not be received from an acknowledged expert, though *semble*, that he might be asked whether, in his opinion, the signature in question was in an *imitated* or a *natural* hand. (*Lodge v. Phipper*, 11 Serg. & Rawle, 333, 335, 6.) This decision stands supported by *Rex v. Cator*, 4 Esp. Rep. 117. But in a case subsequent to *Lodge v. Phipper*, it was held, that the testimony of *experts*, speaking from their knowledge and skill merely, is not competent to prove a forgery. (*Bank of Pennsylvania v. Haldeman*, 1 Pennsylv. Rep. 161, 180, 1, 2.)

On the other hand, in Connecticut, experts are allowed to testify whether a disputed signature is in a *disguised*, or a *natural* hand. The experts were cashiers of banks, and the court, in vindication of the rule adopted, observe, that the question was one of art, which might be answered by a person of skill and experience. "Cashiers of banks are employed in the inspection and examination of writings. It is at this day, especially, when forgeries are so common, almost an habitual practice to view signatures and writings of all kinds with a scrutinizing eye; and thus they acquire a degree of skill which enables them to speak with confidence, and which entitles their testimony to weight. Artizans of all kinds are to be credited, when they speak of the productions of others of the same occupation; and their skill and dexterity is sometimes surprising to those not conversant with such subjects. (*Lyon v. Lyman*, 9 Conn. Rep. 55, 60.) The same doctrine seems to have been held in Massachusetts by Parsons, C. J. in a case before him in 1811. (*Abbee v. Daniels*, cited 2 Stark. Ev. 376, n. (1) 6th Am. ed.) And in a recent case in that state, it was deliberately sanctioned; though the court say that such evidence is generally very slight, and often wholly immaterial. (*Moody v. Rowell*, 17 Pick. 490, 497, 8.) We have seen, ante, note 915, that, in several of the states, where genuineness of hand-writing is contested, witnesses are allowed to compare the hand-writing in dispute with other undisputed specimens, and state the result to the jury; jurors also, as appears by the same note, are allowed by some courts to institute a similar comparison; and this doctrine, wherever it has been acted upon, seems the same, whether the object of the comparison be to sustain or impeach the instrument.

We have seen too that those courts, which disallow comparison of hands, have recognized a clear and well defined exception in respect to ancient writings. (See ante, note, 917.) It is proper to remark here, in connection with the subject of disproving hand-writing, considered above, that conclusions drawn merely from *dissimilitude* between the disputed writing and authentic specimens are not always entitled to much consideration. In *Young v. Brown*, 1 Hagg. Eccl. Rep. 556, this species of evidence was regarded as very weak and deceptive, and of slight weight only when opposed by evidence of *similitude*; and as scarcely deserving notice when encountered by positive testimony of persons who saw the writing signed. See also *Bell v. Norwood*, 7 Lou. Rep. (Curry,) 96. The reason given why evidence of dissimilitude is inferior to that of similitude, is, that it requires great skill so to imitate hand-writing, especially for several lines, as to deceive persons well acquainted with the original character, and who are not very likely to form an erroneous opinion, if, on carefully inspecting such a paper, they are satisfied it is genuine. On the other hand, dissimilitude may be occasioned by a variety of circumstances—by the state of the health, and spirits of the writer—by his materials—by his position—

by his hurry, or care—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters. (*Constable v. Steibel*, 1 Hagg. Eccl. Rep. 56.) See *Murphy v. Hagerman*, 1 Wright's Rep. 292, 298. So, dissimilitude may be occasioned by the presence of a hair in the nib of the pen, or its more or less free discharge of ink, which frequently varies the turn of the letters. (*Id.*) Some witnesses, from their occupation, are liable to magnify slight discrepancies; engravers, for instance, who from their habit of attending to the exact form of every letter, when engaged to make fac similes, are so alive to the least dissimilitude, that any little difference would strike them as of importance. (*Constable v. Steibel*, supra.) Witnesses who come forward under prepossessions against the hand-writing in question, will many times be found to run into the same error. And, in all such cases, the reasons which they give for their opinions must be narrowly watched; if the latter are trivial, or if the witnesses, concurring in the result, clash in their reasons, this will take from the general force of their testimony, however confident they may seem. (*Id.*) In *Young v. Brown*, supra, one reason given by the witnesses who disbelieved the genuineness of the hand-writing, was because in the disputed signature the entire name was written out at length, whereas the alleged writer used, as they said, to sign the initials of his christian name, writing his surname only at length. This circumstance, however, may or may not be important. Sir John Nicholl remarked in respect to it in that case, that a person signing his name at public meetings, or to printed cards, or the like, usually signs in a hurry and in the shortest way;—a surrogate probably signs a jurat differently from what he would subscribe a bond, or a deed, or his own will, &c. See further, *Crisp v. Walpole*, 2 Hagg. Eccl. Rep. 201.

A question has sometimes arisen as to the mode of authenticating a post mark. In *Abbey v. Lill*, 5 Bing. 299, the post-mark on a letter was sought to be used, with a view of showing the true time of the defendant's acknowledgment contained in the letter, which was in evidence. The defendant said it must be proved by calling a person from the post office. Best, C. J. remarked, that if there were doubt about it he would send for a clerk from the post office. The jury however entertained no doubt, and acted upon the post-mark as genuine. On this ground a rule nisi was obtained to set aside the verdict; and on cause being shewn against it, it was discharged; principally, however, because the chief justice offered to send for a witness and the defendant did not afterward insist upon strict proof. The post-master of another office has been called to prove the mark, (*Fletcher v. Braddyl*, Cor. Holroyd, J. cited 2 Stark. Ev. 455, note (q) 6th Am. ed.,) but this is not necessary; any one in the habit of receiving letters by the post, and seeing the mark frequently may, testify on the subject. (*Semble Abbey v. Lill*, supra.) As to the mode of proving printed papers, see ante, note 901, p. 1309.

NOTE 919—p. 494.

The scrivener or *penn*er of the will, who by being named executor, therefore writes his name in the clause appointing him such, though actually a witness to all the solemnities of execution by the testator, cannot be deemed a subscribing witness, nor can this act be received as equivalent to subscribing so as to make him one of three attesting wit-

nesses. (*Snelgrove v. Snelgrove*, 4 Dessaus. Eq. Rep. 274, 283.) At the latter page are some sensible rules for distinguishing who shall be received as a subscribing witness.

NOTE 920—p. 494.

The statutes of New-York were always the same, in substance, till recently. See act of 3d March, 1787, 1 Greenl. 386, 7, § 2; act of 20th Feb. 1801, 1 R. L. of 1801, 178, § 2; and act of March 5th, 1813, 1 R. L. of 1813, 364, § 2. These statutes continued to 1830, when the number of attesting witnesses was reduced to two or more, which are made necessary, both to wills of real and personal estate, with several modifications in the manner of execution and attestation. 2 R. S. p. 63 and 4 of 1st, and p. 7 and 8 of 2d ed. As to the right of devising and bequeathing, see 2 R. S. p. 56 and 60 of 1st, and p. 2 and 4 of 2d ed. For the Virginia statutes see Cabell, J. in *Dudleys v. Dudleys*, 3 Leigh, 442. These and the like matters depend on the statutes of the several states, which, it is presumed, are far from being uniform. In Pennsylvania, the books of reports and other books, down to quite a recent period, show that it was not essential for the testator to sign, or for any witness to attest a will even of lands, nor that it should be formally published. (3 U. S. Law Reg. by Griffith, 254. *Rossiter v. Simmons*, 6 Serg. & Rawle, 452. *Hight v. Wilson*, 1 Dall. 94.) And several cases, therefore, which seem peculiar to that state, arose and were decided, as to what should constitute a valid testamentary disposition, or work a revocation. (*Weigel v. Weigel*, 5 Watts, 486. *Walmsley v. Read*, 1 Yeates, 87. *Boudinot v. Bradford*, 2 id. 170. *Arndt v. Arndt*, 1 Serg. & Rawle, 256. *Plumstead's appeal*, 4 id. 545. *Barnet's appeal*, 3 Rawle, 15. *Mullen v. McKelvy*, 5 Watts, 399. *Stein v. North*, 3 Yeates, 324. *Shield v. Irwin*, id. 389. *Toner v. Daggart*, 5 Binn. 490.) Like peculiarities are also exhibited in Kentucky, (*Baker v. Dobins*, 4 Dana, 220, 221.) and Tennessee, (*Suggett v. Kitchell*, 6 Yerg. 425.) In South Carolina, three witnesses were necessary. (*Snelgrove v. Snelgrove*, 4 Dessaus. 274.) So in Alabama. (*Apperson v. Cottrell*, 3 Porter, 51.) So in Massachusetts. (*Avery v. Pixley*, 4 Mass. Rep. 460.) While Kentucky required only two, and not always any witness. (*Baker v. Dobins*, 4 Dana, 221. *Davis v. Mason*, 1 Peters' S. C. Rep. 503.) So Indiana. (*Doe, ex dem. Knapp, v. Pattison*, 2 Blackf. 355.) For a sufficient execution to emancipate slaves in Virginia, see *Dunn v. Amey*, 1 Leigh, 465. But this would not be the proper place to pursue the subject, were it practicable, farther than what might respect the mode of attestation, or proof where no attestation is required. Mr. Griffith's U. S. Law Register, in the answer to his query 61, under the head of each state, gives a probable clew to the local law on this subject, in most of the states, as it stood about the year 1821. We have no means of tracing its changes since that time, which, if the spirit of innovation recently displayed in our own legislation has generally prevailed, must have been very considerable. Nor would such information, could it be obtained, serve as a safe guide perhaps for a longer term than the next annual session of the state legislatures. Under this head of wills, therefore, we shall confine ourselves, hereafter, to such cases as apparently furnish a general rule within what we believe to be the existing and probably continuing features of local statutes, occasionally noticing the legislative provisions of New-York.

The revised statutes of this state, which took effect in 1830, Jan. 1, (2 R. S. p. 63 of 1st, and p. 7 of the 2d ed, § 40,) provide as follows:

Every last will and testament of real or personal property shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator.

§ 41 requires each attesting witness to write opposite the name, his place of residence, under a penalty, though the omission shall not vitiate the will. And the person who signs the testator's name by his direction must be a subscribing witness. These and many other of our new regulations in respect to the framing, revoking and construction of wills, have doubtless thrown open a vast field of dispute and consequent litigation. Uncertain as these heads of the law were reputed to be, previous to our present statutes, the state may deem itself fortunate if it reach the same degree of certainty under the new provisions, in a century from their enactment. Under the multitude of new directions, especially in regard to the manner of testamentary limitations, it has already, in less than ten years, come to be thought a lucky hit, with the ablest and most careful lawyer, if he can draw a will distributing a valuable estate in a useful manner, without working destruction to the entire instrument which he sets himself about.

It is proper to say, that very few of the rules which follow either in the text or notes have any application to proving wills of *personalty* in courts of law. With them, as indeed with every other court, wherein the will comes collaterally in question, a shape in which it generally must come after it has been proved according to the ecclesiastical law, the mere production of the probate duly authenticated by a court of competent jurisdiction, is conclusive. This may be seen at large in the past text and notes, with the extent, qualifications and exceptions to the rule, both as it relates to domestic courts of probate, and those of neighboring countries. (P. 343 & 4 of the text, and notes 613, p. 857, to the end of note 627 inclusive, p. 877.)

NOTE 921—p. 494.

Snelgrove v. Snelgrove, 4 Dessaus. Eq. Rep. 274. Per Wilde, J. in *Hawes v. Humphrey*, 9 Pick. 356. And in the last case the converse was held, that in all cases where a witness is *competent*, he shall be held credible within the statute of wills. Therefore, though he may be remotely or contingently interested, so as to influence his credibility, this shall not be an objection. See post, notes 924 and 927. So of any other objection merely to his credibility. *Amory v. Fellowes*, 5 Mass. Rep. 219, 228, 9. And it belongs to the judge to decide on the competency, and the jury on the credibility of the evidence, as in ordinary cases. See ante, note 326, p. 423; *Amory v. Fellowes*, 5 Mass. Rep. 219, 229, Parsons, C. J.

NOTE 922—p. 494.

Allison's ex'rs v. Allison, 4 Hawks, 141. **Daniel, J.** in **Old v. Old**, 4 Dev. Rep. 501. **Hawes v. Humphrey**, 9 Pick. 350, 356. **Amory v. Fellowes**, 5 Mass. Rep. 219, 229, **Parsons, C. J.** **Snelgrove v. Snelgrove**, 4 Dessaus. Eq. Rep. 283. In the last case a devisee was held interested and incompetent, there being then, 1812, it seems, no statute in South Carolina declaring such interest void. In **Curtiss v. Strong**, 4 Day, 51, one of the three attesting witnesses being incompetent on account of his religious belief, the will was therefore held void. See **Farnandis v. Henderson**, South Car. Law Jour. 202, S. P. agreed. A witness interested at the time of examination is not competent to prove that he was not so at the time when he attested. (**Gill's will**, 2 Dana, 448.) But the witness becoming incompetent afterwards, shall not vitiate the will. Thus an executor who takes no interest under the will, being competent when he subscribes, the will shall be proved by the other attesting witnesses, or by showing his hand-writing, or other secondary evidence, if he be afterwards placed in such a position as to be incompetent, (**Daniel, J.** in **Old v. Old**, 4 Dev. Rep. 501, 2,) e. g. where he has accepted the trust, or is a party, for that or any other cause. (**Sears v. Dillingham**, 12 Mass. Rep. 358. **Crowell v. Kirk**, 3 Dev. Rep. 355, 6. **Old v. Old**, 4 id. 500, 501, 2. See post, note 924.) Or the party may, by his own and mutual consent, be sworn as a witness. (**Old v. Old**, 4 Dev. Rep. 501, per **Daniel, J.**)

It was held at an early day in Maryland, that a witness being incompetent at the time, did not vitiate the will, as where the husband of a devisee was a witness, and he was received to prove the will on conveying his interest. (**Shaffer's lessee v. Corbett**, 3 Har. & M'Henry, 513, 535, May, 1797, and on appeal, 1799. And see post, note 927.) This too was under the words of the English statute of attestation. And see **Deakins v. Hollis**, 7 Gill and John. 311, 315. The wife of a legatee, who released his interest, was received there to prove a nuncupative will. (**Brayfield v. Brayfield**, 3 Har. & John. 203.) A like decision was made in Pennsylvania, A. D. 1827, but on the ground that the statute there was not the English statute. (**Kerns v. Soxman**, 17 Serg. & Rawle, 315.)

Where the attesting witness has become incompetent, the party may resort directly to other proof. He is not bound first to offer the witness, in order that the other party may waive the objection, and so be enabled to take the benefit of objecting to his credibility, and shake his credit by a cross-examination. (**Crowell v. Kirk**, 3 Dev. Rep. 355.)

NOTE 923—p. 495.

So held under the South Carolina statute, which, at the time, contained no provision avoiding the interest of the subscribing witness. (**Snelgrove v. Snelgrove**, 4 Dessaus. Eq. Rep. 274.) And so of a legatee, though it was intimated that, by releasing his interest, he might be received to support the will in favor of the devisee. (**Dickson v. Bates**, 2 Bay, 448.) Quere. The North Carolina statute expressly declares that a devise shall not be valid, if any one of the witnesses be interested in the devise. Held, that an attestation by a devisee in trust, with a provision for compensation in executing the trust, avoided the will within the statute. (**Allison's ex'rs v.**

Allison, 4 Hawks, 141, 175, 6, et seq.) Otherwise of a witness who is merely presumptive heir. (Old v. Old, 4 Dev. Rep. 500, 501.)

NOTE 924—p. 495.

Denn, ex dem. Snedeker, v. Allen, 1 Penningt. Rep. 35. Comstock v. Hadlyme Ecclesiastical Society, 8 Conn. Rep. 254, S. P., even though he have accepted the trust as executor, and acted under the will. This too was held where the executor was substantially a party to the suit contesting the validity of the will; for it was agreed that he was not liable to costs. The case of Hayden v. Loomis, 2 Root. 350, contra, was disregarded. (See 8 Conn. Rep. 263.) *A fortiori*, where the executor declines the trust. (Hawley v. Brown, 1 Root, 494.) Otherwise where he is a party and liable for costs. (Durant v. Starr, 11 Mass. Rep. 527. Sears v. Dillingham, 12 id. 358, 360. Vansant v. Boileau, 1 Binn. 444.) Yet the will is good and may be proved by others. (Sears v. Dillingham, supra. And see ante, note 921, p. 1341.) A judge of probate in the district is a competent attesting witness. (M'Lean v. Barnard, 1 Root, 462. Ford, son and heir, &c. 2 Root, 232.) So the inhabitant of an incorporated society to which property is devised for the support of a school. (Cornwell v. Isham, 1 Day, 35.) So a witness whose interest under the will is neutralized or overborne by an interest against it, as if he will gain more as an heir, &c. by its defeat, than as devisee by upholding it. (Garland v. Crow's ex'rs, 2 Bail. 24. Allen v. Allen, 2 Tenn. Rep. 172.) And see post, note 927, and ante, note 921. Per Dessausure, Ch. in Snelgrove v. Snelgrove, 4 Desauss. Eq. Rep. 282, to the same effect as Garland v. Crow's ex'rs, supra. Thus an attesting witness who was objected to by the heir, because the witness held a covenant of warranty against the testator, was held competent; for the land was equally liable to make him good, whether it went to the heir or devisee. (Thompson v. Shoeman, 1 Bibb, 401.) See also Bacon v. Bacon, 17 Pick. 134.

NOTE 925—p. 495.

The old statute of New-York of 1797, (1 Greenl. 388, § 7,) expressly provided a mode for restoring the competency of an attesting legatee of any will, made at or previous to the 1st March, 1753.

NOTE 926—p. 495.

New-York has had a similar statute ever since March 3, 1797, and before. Greenl. 388, § 6. 1 R. L. of 1801, § 12. 1 R. L. of 1813, 367, § 12. 2 R. S. 65 of 1st & 9 of 2nd ed. § 50. Though now by the last statute, § 51, where the witness would take any thing without the will, so much of that is saved to him under the will as in value shall amount to what the will gives him. A like statute of Kentucky is noticed, 2 Dana, 454, Gill's will. Where the devise, &c. is void by the will, no title can be derived from the devisee. (Jackson, ex dem. Denniston, v. Denniston, 4 John. Rep.

311.) The statute 25 Geo. 2, ch. 6, from which the older New-York statutes on the same subject appear to have been substantially transcribed, does not avoid a legacy given to a subscribing witness of a will or codicil which relates exclusively to *personal estate*. It extends to such wills only as are required to be attested by witnesses in order to their validity. *Brett v. Brett*, 3 Ad. Eccl. Rep. 210, affirmed by the delegates 1 Hag. Eccl. Rep. 58, note (a). 3 Russ. 436, note (a). *Emanuel v. Constable*, 3 Russ. 436. *Foster v. Banbury*, 3 Sim. 40. The case of *Lees v. Summersgill*, 17 Ves. 508 contra, is, therefore, overruled. Since the present statute of New-York, (see ante, note 920, p. 1340,) which requires both wills of real and personal estate to be attested in the same way, the law as declared in *Lees v. Summersgill*, would probably be deemed applicable in that state.

NOTE 927—p. 496.

But by several cases in New-York, the contrary is holden; viz. that a devise, &c. to the husband or wife of the attesting witness is void; and so the witness competent to attest. (*Jackson, ex dem. Cooder, v. Woods*, 1 John. Cas. 163. *Jackson, ex dem. Beach, v. Durland*, 2 id. 314.) In South Carolina, it was held by Chancellors Mathews and Rutledge, that a bequest to the wife was valid within the Stat. 25 Geo. 2; and yet the husband competent. (*Woodberry v. Collins*, 1 Desauss. Rep. 424.) This is agreeable to what Lewis, C. J. held of the attestation by a wife whose husband was a devisee in *Jackson, ex dem. Cooder, v. Woods*. In the latter case, he held it sufficient that the attesting witness, though interested at the time of attestation in consequence of the connubial relation, became competent, if he were without interest at the time of the examination. (See ante, 494 of the text, and note 922, p. 1342.) But in *Woodberry v. Collins*, the competency of the husband seems from the reasoning in the book, to be referable rather to the remote and contingent character of the interest to which he became entitled. And it has been held on much consideration, with good reason, and on very satisfactory authority, that one deriving a remote and contingent interest, e. g. a possible relief from taxation, by a devise to a corporate society, is not incompetent. And so where it may tend to his advantage by providing for schools in his neighborhood, and the like. (*Hawes v. Humphrey*, 9 Pick. 350, 356.) The case is sustained by one of still stronger contingent interest in Connecticut. (*Cornwell v. Isham*, 1 Day, 35, wrongly cited as 4 Day, ante, note 126, and vid. ante, note 924, p. 1343, and note 921, p. 1341. See also *Nason v. Thatcher*, 7 Mass. Rep. 398.) The same thing was held in *Eustis v. Parker*, 1 N. H. Rep. 273. Indeed, these and like cases are but additional illustrations of the exceptions considered ante, note 88, p. 92, and note 93, p. 99, and other notes and the text, that interests remote, contingent or uncertain, do not disqualify a witness; and that a corporator especially, who, as such, may be benefitted, is yet frequently admitted. (Ante, note 116, p. 125, also note 126, p. 139, and note 240, p. 254.) In *Eustis v. Parker*, the case is expressly put on the ground that, by the law of New-Hampshire, a public or municipal corporator is always a witness, though, the corporation itself be interested in the event of the suit; and such is the decided balance of the cases, noticed in various parts of these notes. Yet a witness taking a contingent remainder under the will, was held incompetent to

testify in support of it, on an issue of *devisavit vel non*. This witness had not attested the will. (*Harrison v. Rowan*, 3 Wash. C. C. Rep. 581.) The heir or devisee of a deceased devisee is not competent to prove the original will, if the witness' share would be increased by establishing it. (*Gill's will*, 2 Dana, 449.) The interest, however, must be legal as in other cases; and not merely ideal or honorary. (*Ante*, notes 91 & 92, pp. 98 & 99.) And accordingly where a witness was offered to support a will, the bequest in which he had said was to the witness' father for his the witness' own benefit, he was received notwithstanding, as no agreement of the father was proved to take the bequest in trust for him. At most, the witness' declaration went to his credibility, merely. (*Rogers v. Briley*, 1 Hayw. 256.) But there was also clearly another answer; viz. that a declaration of the witness as to his interest is mere hearsay. (*Ante*, note 249, p. 258 & 497, p. 707.)

The question of interest is of course the same, so far as it respects competency at the time of examination, whether the witness attested the will or not. One taking an interest under it, therefore, though he did not attest, cannot be received to prove sanity, or any other fact in support of the will. (*Harrison v. Rowan*, *supra*. *Tucker v. Sanger*, 1 McClelland, 435. See *Hall v. Hall*, 17 Pick. 373.)

But the interest of such a witness may be restored as in other cases; e. g. if he be a legatee, he may assign his legacy without warranty. It is not necessary that he should release it. (*Cates v. Wacter*, 2 Hill, 442.)

A widow dissenting from her husband's will and taking out of the estate her dower and personal estate as in case of intestacy, is not interested so as to preclude her testifying against the will. Nor is she incompetent to state declarations of her husband adverse to the fact, that he intended the will to be a complete one, and the like, on the ground that they were confidential between husband and wife. (*Hester v. Hester*, 4 Dev. 228, 230, 1.) Quere of this last position.

NOTE 928—p. 496.

When the original will is accidentally lost or destroyed, whether before or after the testator's death, the rule admitting secondary evidence of its execution and contents comes in; (*Keeling v. Ball*, 2 East, 103; *Trevelyan v. Trevelyan*, 1 Phillim. Rep. 153; *Bowen v. Idley*, 1 Edw. Ch. Rep. 148; 11 Wend. 227, S. C. on appeal; *Dan v. Brown*, 4 Cowen, 433; *Jackson, ex dem. Schuyler, v. Russell*, 4 Wend. 543; *Jackson, ex dem. Bush, v. Hasbrouck*, 12 John. Rep. 192, and other cases *infra*; *Payne's will*, 4 Monroe, 422; *Beauchamp's will*, *id.* 361; *Apperson v. Cottrell*, 3 Porter, 51; *Lane's will*, 2 Dana, 106; *Cates v. Wacter*, 2 Hill, 442;) and as in other like cases, it resorts to such expedients for proof as good fortune may have preserved and placed within its reach. A very common one, of course, would be the register of some court of probate, where it has been proved by the executor, and copied with a view to an administration of the personal estate. (*Jackson, ex dem. Donaldson, v. Lucett*, 2 Cain. 363. *Jackson, ex dem. Schuyler, v. Russell*, 4 Wend. 543. *Franklin v. Creyon*, 1 Harp. Eq. Rep. 243.) And, under circumstances, a copy attached to the letters of probate. (*Smith's lessee v. Steele*, 1 Har. & McHenry, 419. *Hall v. Gittings*, 2 Harr. & John. 112.) Sometimes a resort to parol evidence is necessary. (*Wilnot's lessee v. Talbot*, 3

Harr. & McHen. 2. Thomas v. Thomas, 2 Mill. Lou. Rep. 166. Smith v. Carter, 3 Rand. 167. Fetherly v. Waggoner, 11 Wend. 599. Clarke v. Wright, 3 Pick. 67.) The effect of this is very different in the case of a will not found at the death, and where it is found. In the former case, the presumption is, that the testator destroyed it *animo revocandi*; (Beauchamp's will, 4 Monroe, 361; Betts v. Jackson, ex dem. Brown, 6 Wend. 173, on error; S. C. 9 Cowen, 208, contra;) which may be repelled or strengthened by the testator's declarations, &c. (id.) but not circumstances *aliunde*. (Id.) The requisites to establish a lost or destroyed will are now specially declared, in New-York, by statute. (2 R. S. p. 12, § 74, 2d ed.) By this, among other things, the contents must be shown by two witnesses. Independent of statute regulation, a single witness is sufficient. (Lewis v. Lewis, 6 Serg. & Rawle, 497, per Duncan, J.) A copy of a will executed proved and recorded in a neighboring state, was received in evidence. (Elmendorff v. Carmichael, 3 Litt. Rep. 479. And see Hood v. Mathers, 2 A. K. Marsh. 555.)

For the purpose of establishing the loss, destruction, detention by the opposite party, notice to produce, and other preliminary circumstances addressed to the court, with a view to the introduction of secondary evidence, a party or other interested witness, is, by some states, received to testify in favor of his own interest; by others not. (See ante, note 122, p. 138, and the cases there cited. Also ante, note 861, p. 1218.) In New-York he is received. (Dan v. Brown, 4 Cowen, 483. Jackson, ex dem. Brown, v. Betts, 9 id. 208; 6 Wend. 173, S. C. on error, and S. P.)

If the detention, loss or destruction, should appear to have been by the wilful act of the party seeking to introduce the will, and especially if for the fraudulent purpose of letting in the secondary evidence, of course it will be precluded. But the accidental loss, or a detention, loss or destruction over which he has no control, should be shown. (See ante, note 861, p. 1216, 17.) The destruction of the will and of the probate book in which it was recorded by the public enemy, lets in parol evidence. (Smith v. Carter, 3 Rand. 167.) And due search in a proper place, and inability to find it, is a very common ground for secondary evidence. (Dan v. Brown, and other cases, *infra*. See also ante, note 861, p. 1214, et seq.; also note 867, p. 1224, et seq.) In searching, resort should be had to places where the paper, in common presumption, founded on prudence, the ordinary course of business, or the requirements of law, &c. would probably be. Ordinarily this is the place where the most valuable private papers of the testator were kept by him, when the will has not been discovered since his death, and it is sought to infer that a party interested who was about the person of the testator, has suppressed it. (Dan v. Brown, 4 Cowen, 483. Jackson, ex dem. Brown, v. Betts, 9 Cowen, 208. 6 Cowen, 377, S. C. and S. P. 6 Wend. 173, S. C. but not S. P.) To this it is always prudent to add a search in the probate office, where, by law, the original is sometimes to be deposited. (Dan v. Brown, 4 Cowen, 483. Jackson, ex dem. Schuyler, v. Russell, 4 Wend. 543. Smith's lessee v. Steele, 1 Har. & McHen. 419.) And if the will has been known to exist after the testator's death, and its destruction is not plainly shown, the office of the executors and probate office should both be searched, and resort be shown to any other person who appeared in fact to have had it. (Jackson, ex dem. Bush, v. Hasbrouck, 12 John. Rep. 192. Jackson, ex dem. Schuyler, v. Russell, *supra*.) The declaration of the opposite party, generally, that the will had been searched for and not found, is not enough. The admission should show search

by the proper person and in the proper place. (*Dan v. Brown*, 4 Cowen, 492.) The search need not be made by the officer who is presumed to have the custody, but may be by another under his direction. (*Jackson, ex dem. Schuyler, v. Russell*, supra.) And confessions of third persons, deceased, who may be supposed probably to have had the will, or at least a knowledge of it, have been received to show its existence and loss. Thus where one derived title under the will of his grandfather, he was allowed to show such admissions made by his father and mother, both of them being dead. (*Fetherly v. Waggoner*, 11 Wend. 599.) The declarations of the testator, even though made *in articulo mortis*, as to the existence and place of his will, were held not to be admissible, in *Jackson, ex dem. Brown, v. Betts*, 4 Cowen, 490; 6 id. 377, S. C. and S. P.; *Collins v. Elliott*, 1 Har. & John. 1. But of this *quere*; for both parties claimed under him. Many cases are stated and considered on this ground, ante, note 481, p. 646 et seq. And see *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. But it seems to be quite contrary to the spirit of the statute that the existence of the will should be shown by such declarations alone. At most they can be received as auxiliary to evidence of witnesses who have seen it. (*Clark v. Morton*, 5 Rawle, 235.) The declarations of the witnesses or draftsman, unsworn, are clearly inadmissible. (*Collins v. Elliott*, 1 Har. & John. 1.)

In several of the states, as we saw ante, note 620, p. 861, the probate and registry of a will is made primary evidence of its due execution and contents, as well in respect to the realty as to the personalty; sometimes conclusive, and at others only presumptive in its effect. We do not propose to extend our quotations much farther in respect to this mode of proof, the form and effect of which differ with different states, as well as the tribunal before which the probate is to be taken; the power sometimes being conferred on common law courts, and at others on courts specially devoted to the cognizance of last wills and testaments, and the rights growing out of them. Some few cases, additional to those in the note above cited, must finish all we can here do towards sketching the features of this probate system. Its principle seems to have come from the English chancery bill filed to establish a devise. It is of the nature of that to bring in the heir, and all others interested to oppose or sustain the will, and thereby to conclude them in respect to real estate, as effectually as a probate before the ecclesiastical court, *per testes* and in solemn form, concludes interests in the personalty. The frame and object, with the peculiar mode of proof in this chancery suit, may all be collected from *Bootle v. Blundell*, 19 Ves. 494 to 534. The summary proceeding, &c. in New-York, before the surrogate, is detailed, 2 R. S. 2d ed. p. 2, § 7 to 19 inclusive; in North Carolina, in the county court, by *Ruffin, C. J.* in *Redmond v. Collins*, 4 Dev. Rep. 436, et seq.

In Massachusetts a will of real estate cannot be received in evidence on a trial at law till it has passed the probate court and been allowed there; (*Shumway v. Holbrook*, 1 Pick. 114;) and when so allowed, the probate is conclusive on the trial at law. (*Id.*) So in North Carolina. (*Den, ex dem. Saffer, v. Herring*, 3 Dev. Rep. 341.) And such appears to be the law of Kentucky. (*Carmichael v. Elmendorf*, 4 Bibb, 484. *Morgan's devisees v. Gaines*, 3 A. K. Marsh. 613. *Davis v. Mason*, 1 Peters, 508.) As to receiving wills of land there on probate of a neighboring state, see *Hood v. Mathers*, 2 A. K. Marsh. 555; *Bowman v. Bartlett*, 3 id. 89; *Elmendorf v. Carmichael*, 3 Litt. Rep. 479. See also *Slack v. Walcott*, 3 Mason, 508. As

to Ohio, see *Wilson's ex'rs v. Tappan*, 6 Ham. 174. In Pennsylvania, while it is conclusive as to the personalty, it is no more than prima facie evidence as to the realty, either for or against the will. (*Miller v. Carothers*, 6 Serg. & Rawle, 223. *Dornick v. Reichenback*, 10 id. 84. *Smith v. Bonsall*, 5 Rawle, 80.) And whether this be not so as to Rhode Island, quere. (*Smith v. Fenner*, 1 Gall. 170, 174.) In North Carolina, the probate is conclusive except as to fraud or irregularity. (*Stanley et ux. v. —*, 2 Hayw. 75.) But the certificate of probate must, to make it admissible, state certain facts, as that all the witnesses were sworn, &c. (*Blount v. Patton*, 2 Hawks, 237.) The law of Tennessee appears to be the same. (*Howell v. Whitchurch*, 4 Hayw. 49.) But probate of a will of lands in another state is not evidence in respect to land in Tennessee. (*Darby's lessee v. Mayer*, 10 Wheat. 465.) In Virginia, the probate is one mode of proof, but not essential. (*Bagsell v. Elliott*, 2 Rand. 190.) In Maryland, as in England, probate is no proof of a will of real estate. (*Smith's lessee v. Steele*, 1 Harr. & McHen. 419. *Darby's lessee v. Mayer*, 10 Wheat. 470.) So, it seems, of South Carolina. (*Howell v. House*, 2 Rep. Const. Court, 80.) As to Connecticut, quere. (*Avery v. Chappel*, 6 Conn. Rep. 270, 276.) In Maine, *semble*, the probate concludes. (*Mellen, C. J. in Small v. Small*, 4 Greenl. 225.) So in Alabama. (*Tarver v. Tarver*, 9 Peters, 174, 180. *Darrington v. Borland*, 3 Porter, 11, 38.) The jurisdiction of the orphan's court being complete, it may allow probate of a lost will, and thus bind the courts of law. The correction of error can be by a direct proceeding only. (*Apperson v. Cottrell*, 3 Porter, 51.) To what extent the probate of a will of real estate shall conclude in North Carolina, see the case of *Den, ex dem. Sasser, v. Herring*, 3 Dev. Rep. 341, and especially *Redmond v. Collins*, 4 id. 430 to 449, which contains much learning on the practice and effect of propounding and proving wills in general; and the distinction as to the effect of probate, or denial of probate between cases of personal and real estate.

A will of lands was admitted to probate in Virginia, on a simple proof of a probate in Louisiana, which shewed affirmatively that it was proved there in the same manner as it must have been to entitle it to be received and registered in the probate court of Virginia. (*Ex parte Povall*, 3 Leigh, 816.) But the proceeding was sanctioned as within the meaning of the statute of Virginia regulating the probate of wills there. (See the statute, 3 Leigh, 817, *note*.) But independent of the statute, quere; (*Darby's lessee v. Mayer*, 10 Wheat. 470, 474;) for the foreign court can hardly be said to have jurisdiction of domestic lands, the disposition of which is governed by the *lex loci rei sitæ*. (Id. 469.) Though a probate be essential to give effect to a will of land, it need not be made previous to a suit by the devisee to recover the land. Probate pending the suit, relates back to the death of the testator. (*Poole v. Fleeger*, 11 Pet. Rep. 185, 211.)

The statutes of New-York on the subject of proving and recording wills of real estate and certifying the proof, which till lately confined the power to the courts of common law, will be mostly found by the following references to different editions. 1 Greenl. 236; 2 id. 235. 1 R. L. of 1801, p. 173, act of April 5, 1803, sess. 26, ch. 99. 1 R. L. of 1813, p. 364. 2 R. S. of 1830, 2d ed. p. 2, et seq. See also *Jackson, ex dem. Colden, v. Walsh*, 14 John. Rep. 407, in which several old statutes are collated and applied. None of these statutes make the probate more than prima facie evidence; and to this see *Jackson, ex dem. Woodhull, v. Rumsey*, 3 John. Cas. 234. For the method of proceeding to

probate under the old statute, see case of Lawrence's will, 2 Wend. 297. Common law proof is always admissible.

NOTE 929—p. 496.

Post, 501 of the text, S. P. with additional cases, and see post, note 931 and the cases there cited from the Kentucky Reports. Proof of all the circumstances necessary to the execution of a valid will, by one of the subscribing witnesses, is sufficient in a court of common law, without calling the rest. If the adverse party would impeach the will, he may examine the others. (Howell et. al. v. Houee, 2 Rep. Const. Ct. 80. Turnipseed v. Hawkins, 1 M'Cord, 272. Lindsay's heirs v. McCormack, 2 A. K. Marsh. Rep. 229, 230. Turner v. Turner, 1 Litt. 103, 104. Hight v. Wilson, 1 Dallas, 94. Trustees v. Blount, 2 Tayl. 13. Denn v. Allen, 1 Penningt. Rep. 35. Allen v. Allen, 2 Tenn. Rep. 172. Jackson, ex dem. Le Grange, v. Le Grange, 19 John. Rep. 386. Hock v. Hock, 6 Serg. & Rawle, 47. Jackson, ex dem. Kellogg, v. Vickory, 1 Wend. 406. Dan v. Brown, 4 Cowen's Rep. 493. Davis v. Mason, 1 Peters' Rep. 503. Blount v. Patton, 2 Hawks, 237. Elmendorff v. Carmichael, 3 Litt. 479. Den, ex dem. Compton, v. Mitton, 7 Halst. 70. Wright v. Doe, ex dem. Tatham, 1 Adolph. & El. 3.) And where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness, this was holden sufficient. (Dan v. Brown, 4 Cowen's Rep. 493. Jackson, ex dem. Brown, v. Betts, 6 Cowen's Rep. 377.) Proof by a subscribing witness that he, with two others, saw executed, and witnessed a will of land which he had seen in the surrogate's office, and which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial, was held sufficient proof of execution on a trial at law. (Jackson, ex dem. Henry, v. Thompson, 6 Cowen's Rep. 178.)

Where one witness was called and proved the signature of himself and the two other subscribing witnesses, and stated that he could not remember particularly whether the other witness subscribed in the presence of the testator; but presumed they all did so, as he would not have subscribed his name as a witness unless the requisites of the statute had been complied with, it appearing that the other witnesses were living and within the jurisdiction of the court; held, that though such evidence would have been sufficient, if the other witnesses had been dead, to authorize a jury to believe that all the formalities had been observed, yet, in this case, it was not sufficient. (Jackson, ex dem. Kellogg, v. Vickory, 1 Wend. 406; and see Doe, ex dem. Harborne, v. Lewis, 7 Carr. & Payne, 574.) That the case might have gone to the jury, had the other witnesses been dead, see Fetherly v. Waggoner, 11 Wend. 599.

In New-Jersey, a will purporting to be signed by three witnesses, but proved by two only, who said nothing with regard to the third, was ruled to be sufficiently proved to go to the jury. (Jackson, ex dem. Tenbroke, v. Van Dyke, 1 Cox, 28.) The act of the legislature of N. J. requires the testator to execute his will in the presence of three witnesses. (Patterson's Laws of N. J. 5.) And the principle of the last case is directly at variance with every adjudication on this subject. See Note (b). to the above case; and post 501 of the text.

The attesting witness could not remember in the particular case, that the testator acknowledged his signature; but said his invariable practice was not to attest a paper without the party's acknowledging the signature to be his. Held sufficient, as to him. (*Quinn v. Radford*, 2 Litt. Rep. 137.) So as to the fact of signing, or acknowledging, or both. (*Cabell, J. in Dudleys v. Dudleys*, 3 Leigh, 443.) But the due attestation by all three of the witnesses, must be shown, directly or circumstantially, by one or all of them. (*Jackson, ex dem. Le Grange, v. Le Grange*, 19 John. 386.) One witness only being produced, he should be credible, and his testimony direct and positive. His "impressions" and statements "according to the best of his recollection," were, standing alone, held not to be sufficient. (*Carrico v. Neal*, 1 Dana, 162, 3.) And where the deposition stated generally, that the testator *executed* the will in his and the other witnesses' presence (who were dead and their hands proved) Lord Chancellor Hart refused to allow it, because nothing was said of *attesting in the testator's* presence. (*Holton v. Lloyd*, 1 Moll. 31, 2.)

NOTE 930—p. 497.

Witnesses are called upon not merely to attest the fact of signing; but to determine whether the testator is *sane* at the time of executing the will. (*Chase v. Lincoln*, 3 Mass. Rep. 236. *Poole v. Richardson*, 3 Mass. Rep. 330. *Heyward v. Hazard*, 1 Bay, 335.) And they were received to be inquired of generally as to their opinion on this point, though that was denied to those who were neither subscribing witnesses nor physicians. (*Poole v. Richardson*, 3 Mass. Rep. 530, and see *Hamblett v. Hamblett*, 6 N. H. Rep. 333, 349.) *Quere*, see ante, note 529, p. 759, and the books and cases there cited; and see per Washington, J. in *Harrison v. Rowan*, 3 Wash. C. C. Rep. 587; per Daniel, J. in *Crowell v. Kirk*, 3 Dev. 355; *Spence v. Spence*, 4 Watts, 165. No person should attest, till he is satisfied the testator is of sound and disposing mind, and acts understandingly, and with a full knowledge of the contents of the will. (*Scribner v. Crane*, 2 Paige, 147.)

The duty of attesting witnesses, who are admissible to testify as to facts which tend for or against the will, (*Hampton v. Garland*, 2 Hayw. 147,) may be collected from the various cases in respect to the requisite sanity and fairness, the whole of which we can not pretend to give. The following contain the general rules; and, with the books to which they refer, will furnish a good many illustrations. *Dew v. Clarke*, 5 Russ. 163. *Dornick v. Reichenback*, 10 Serg. and Rawle, 84. *Rambler v. Tryon*, 7 id. 92, 3, 95. *Starrett v. Douglass*, 2 Yeates, 48. *Ware v. Ware*, 8 Greenl. 42. *Small v. Small*, 4 id. 220. *Williams, J. in Kinne v. Kinne*, 9 Conn. Rep. 102. *Harrison v. Rowan*, 3 Wash. C. C. Rep. 585, 6, &c. *Stevens v. Van Cleave*, 4 id. 265. *McDaniel's will*, 2 J. J. Marsh. 337. *Cochran's will*, 1 Monroe, 263. *Howard's will*, 5 Monroe, 202, 3, 4. *Hathorn v. King*, 8 Mass. Rep. 371. *Chandler v. Ferris*, 1 Harringt. Rep. 454. *Stone v. Damon*, 12 Mass. Rep. 488. *Buckminster v. Perry*, 4 id. 593. *Brooks v. Barrett*, 7 Pick. 94, 99. *Clarke v. Fisher*, 1 Paige, 171. *Tomkins v. Tomkins*, 1 Bail. 92. *Kindleside v. Harrison*, 2 Phillim. Rep. 461. *Mackenzie v. Handasyde*, 2 Hagg. Eccl. Rep. 211. *Van Alst v. Hunter*, 5 John. Ch. Rep. 158. *Carrico v. Neal*, 1 Dana, 163, 4. *Seeman v. Seeman*, 1 Phillim. Rep. Judgm. Sir Geo. Lee, 180. *Grif-*

fin v. Griffin, R. M. Charl. Rep. 217. But this matter is treated of by our author in volume 2nd, 292, under the head of ejectment between the heir and devisee; and which is the proper place to notice the later cases more at large.

NOTE 931—p. 497.

On proving a will in chancery, all the subscribing witnesses must be produced in the first instance, (*Burwell v. Corbin*, 1 Rand. 131, 141;) and every important requisite of the statute must be proved by each witness; (*id.* 141, per Coalter, J.) but their absence may be accounted for as in other cases, which lets in secondary proof. (*James v. Parnell*, Turn. & Russ. 417, and see *Bomford v. Wilme*, 1 Beat. 252. *Concannon v. Cruise*, 2 Moll. 332.) And this rule has been extended, sometimes, to proof in a court of probate. (*Apperson v. Cottrell*, 3 Porter, 51. *Chase v. Lincoln*, 3 Mass. Rep. 236.) Yet on the probate coming in question collaterally, though on its face it shows no notice, and two witnesses only appear to have been examined, the court will intend that all parties had notice, and that there was a legal excuse for not examining the third witness. (*Brown v. Wood*, 17 Mass. Rep. 68.) Some rules of proof peculiar to Pennsylvania, arise out of the statute of wills there. (*Hight v. Wilson*, 1 Dall. 94. *Lewis v. Mairs*, 1 Dall. 278. *Havard v. Davis*, 2 Binn. 414. *Hock v. Hock*, 6 Serg. and Rawle, 47. *Miller v. Carothers*, *id.* 215. *Ester v. Young*, 3 Yeates, 511. *Rohrer v. Stehman*, 1 Watts, 442. *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. *Hoylton v. Brown*, 1 Wash. C. C. Rep. 298. *Musser v. Curry*, 3 Wash. C. C. Rep. 481. *Lewis v. Lewis*, 6 Serg. & Rawle, 489.) So in Virginia. (*Burwell v. Corbin*, 1 Rand. 131.)

In Kentucky, the will, though of land, is admitted to probate on proof by one witness, as on a trial at common law, (*ante*, note 929, p. 1349,) provided he is able to speak to all the requisite solemnities. (*Overall v. Overall*, Litt. Sel. Cas. 503. *Hall v. Sims*, 2 J. J. Marsh. 511. See *Turner v. Turner*, 1 Litt. Rep. 101. *Harper v. Wilson*, 2 A. K. Marsh. 467.) In Virginia, *semble*, all are required *prima facie*, though secondary proof may come in, as in all courts, where the witnesses are abroad, &c. (*Nalle's representatives v. Fenwick*, 4 Rand. 585.) In Maryland, as to a will of real estate, *Quere*. (*Deaking v. Hollis*, 7 Gill & John. 311, 316.) The common law rule as to the number of witnesses required on a probate, *per testes*, of a will of personal property, was examined in *Worsham's adm'r v. Worsham's ex'r*, 5 Leigh, 589; and the conclusion was, that though two are necessary in England, only one was requisite in Virginia, till a late statute there.

And the rule which, *prima facie*, requires all three of the witnesses in chancery, applies, even in that court, only on a bill filed with the direct object of establishing (or making probate of) the will. But for other purposes, as where the will comes in question in a chancery suit not instituted with that object, and in all cases where the proof does not look to a decree and establishing the will generally, but is introduced merely for the purpose of reading it in evidence as a legal instrument, it may always be proved by a single witness, the same as in a court of law. (*Concannon v. Cruise*, 2 Moll. Rep. 332.)

NOTE 932—p. 499.

The statute of New-Jersey directs that all wills shall be in writing, "*signed and published by the testator.*" Where the testator's hand was, by his own consent, guided by another in executing his will, and the will was afterwards acknowledged by him, it was held to be a strictly legal signing by the testator, within the sense of the statute. (Den, ex dem. Stevens, v. Vancleve, 4 Wash. C. C. R. 262.) See 2 R. S. of New-York, 2d ed. p. 7, § 41. In New-York, the name must be subscribed *at the end* of the will. (Id. § 40. Watts v. The Public Administrator of the city of New-York, 4 Wend. 168.) The testator need not seal the will or a revocation. (Doe, ex dem. Knapp, v. Pattison, 2 Blackf. 355. Avery v. Pixley, 4 Mass. Rep. 460, 462. Williams' lessee v. Burnet, 1 Wright, 53.) A neighbor wrote the testator's will thus: "I, S. M. &c. do make this my will," &c. and ending "in ratification, &c. I have, &c. set my hand and seal," which she published and had witnessed, but could not sign, nor was her name fixed at the bottom. Held a good will. (Sarah Miles' will, 2 Dana, 1, 3.) It is sufficient if the testator write his name in the body of the will, or elsewhere upon the paper, if that be intended as a signature, and the signing, wherever it be, may be done by the testator or another. And publication and attestation, where there was no intention to subscribe, is sufficient. (Sarah Miles' will, 1 Dana, 1 to 4. Dudleys v. Dudleys, 3 Leigh, 436. And see Vidal's heirs v. Duplantier, 7 Lou. Rep. (Curry) 37, 45.) Otherwise if there be an intention to subscribe, whether it be defeated by sudden disability, (id.) or the signing be omitted, though the will be acknowledged to the first witness, and signed when the other attests. (Burwell v. Corbin, 1 Rand. 131.) But this last case was questioned in some of its features by Dudleys v. Dudleys, 3 Leigh, 436. Where a will is written on several sheets of paper, it has never been determined that the testator must sign them all. (Pearson v. Wightman, 1 Rep. Const. Court, 345.) See Cheeves', J. remarks in this case, on Right, dem. Cater, v. Price, cited in the text.

NOTE 933—p. 502.

The will need not be read, even to a blind or illiterate testator, in the presence of the witnesses, though it be drawn by one who takes under it, and executed *in extremis*. Upon proving the other formalities of execution, the law presumes he had knowledge of its contents; though, that it was not read to such a testator, may go to the jury as a circumstance in proof of incapacity, undue influence, or fraud. (Hemphill v. Hemphill, 2 Dev. 291. Boyd v. Cook, 3 Leigh. 32. Shanks v. Christopher, 3 A. K. Marsh. 145. Lewis v. Lewis, 6 Serg. & Rawle, 489, 494, 5, 6. Harrison v. Rowan, 3 Wash. C. C. Rep. 580. Tucker v. Calvert, 6 Call, 90. Downey v. Murphey, 1 Dev. and Batt. 82. Carr v. McCamm, id. 276.) Nor need the witness be privy to the contents; (Lewis v. Lewis, 6 Serg. & Rawle, 489, 495; Roane, J. in Burwell v. Corbin, 1 Rand. 157;) though under the peculiar statute of Pennsylvania, if the will be neither signed by the testator, nor in his proper hand, it is essential to prove by two witnesses that he knew the contents. (Lewis v. Lewis, 6 Serg. & Rawle, 496.) So in any case, if the testator's instructions for the draft have been departed from, it must

appear that the departure was in some way explained to him. (Chandler v. Ferris, 1 Harringt. 454.) It is well settled that the witnesses may subscribe at several times, and not in presence of each other. (Roane, J. in Burwell v. Corbin, 1 Rand. 156. Wright v. Wright, 5 Mo. & Payne, 316; 7 Bing. 457, S. C. The British Museum v. White, 3 Mo. & Payne, 689; 6 Bing. 310, S. C. Dudleys v. Dudleys, 3 Leigh, 436.) The testator need not expressly acknowledge it to be his will, if he do what is equivalent; (Small v. Small, 4 Greenl. 220;) nor need the witnesses see his signature nor understand the nature of the instrument. (Id.) But see 2 R. S. of N. Y., 2d ed. p. 7, sub. 3. The testator may acknowledge merely, (Roane, J. in Burwell v. Corbin, 1 Rand. 163,) though the paper lie at a distance. (Eelbeck v. Granberry, 2 Hayw. 232.) And it is perfectly well settled that he need not subscribe in presence of the witnesses. His acknowledgment is enough. (Dudleys v. Dudleys, 3 Leigh, 436. Shanks v. Christopher, supra Reynolds' lessees v. Shirley, 7 Ham. pt. 2, 48. Hall v. Hall, 17 Pick. 373.) And a will or codicil imperfectly attested, may become operative by a distinct codicil referring to and adopting it, though the attesting witnesses did not see the former. But the reference must be explicit. (Utterton v. Robins, 1 Adol. & Ellis, 423; 2 Nev. & Mann. 319, S. C.) A will executed in presence of two subscribing witnesses, and a codicil executed in presence of two subscribing witnesses, one of the latter being different from the former two, although the codicil refer to the will, and affirm it, will not give effect to a devise. (Dunlap v. Dunlap, 4 Dessaus. Eq. Rep. 305.) But a codicil with three competent witnesses, may operate as a republication, or rather an execution of an original will, which was void. And where a devisee attested an original will, which avoided the devise as to him, a codicil afterwards endorsed and attested by indifferent witnesses, was held to give effect to the first will in respect to the void legacy. (Mooers v. White, 6 John. Ch. Rep. 360, 374, 5.) And see Haven v. Foster, 14 Pick. 534, and the cases there cited.

A clause of attestation being annexed to a paper not attested; held that, *prima facie*, it was not intended to operate even as to personal property; but the presumption was not conclusive. (Jones v. Kea, 3 Dev. 301.)

Acknowledgment alone is not enough in New-Jersey, on the words of the statute there, which requires the will to be signed in presence of the witnesses. (Den, ex dem. Compton, v. Mitton, 7 Halst. 70.)

The witnesses must attest in the presence of the testator. (Holton v. Lloyd, 1 Moll. 31, 2.) The attestation clause need not say expressly "in presence of the testator." (Jackson, ex dem. Bowman, v. Christman, 4 Wend. 277. Croft v. Paulet, 2 Str. 1109; 8 Vin. Abr. 123, pl. 4, S. C. Hands v. James, Com. Rep. 531. Bull. N. Pt. 264.) The witness may attest by merely signing his initials, (Adams v. Chaplin, 1 Hill's [South Car. Eq. Rep. 266,) or making his mark, if he cannot write his name. (Den, ex dem. Compton, v. Mitton, 7 Halst. 70. Jackson, ex dem. Van Dusen, v. Van Dusen, 5 John. Rep. 144. And see Vidal's heirs v. Duplantier, 7 Lou. Rep. (Curry) 37, 45.) A formal publication in fact is not necessary. Writing, signing and attesting are, of themselves, a sufficient publication. (Ray v. Walton, 2 A. K. Marsh. 73.) If it be apparent that the testator intended to execute a will, that is a sufficient publication of it. (Swift v. Boardman, 1 Mass. Rep. 258. Roane, J. in Burwell v. Corbin, 1 Rand. 159, et seq.) And per Gibbs, C. J., in Modie v. Reid, 7 Taunt. 361, 2, "If the act of the testatrix in calling on the witnesses to attest her

"will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it. I called on the bar to say what publication was; I do not wonder that I had no answer; for though the parties use the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as for instance of a libel. I know what an uttering is; if a man puts forth base money in certain cases, it is an uttering; but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." And see Coalter, J. in *Burwell v. Corbin*, 1 Rand. 142.

For various circumstances which bring the case within or without the rule as to the presence of the testator, and that it is sufficient if he may, though he do not, in fact, see the witnesses attest, the following cases are valuable. *Todd v. Winchelsea*, 1 Mood. & Malk. 12; 2 Carr. & Payne, 488, S. C. *Neil v. Neil*, 1 Leigh, 6. *Russell v. Falls*, 5 Har. & McHenry, 457, 465, 6, 7, et seq. *Mason v. Harrison*, 5 Har. & John. 480. *Edelen v. Hardy's lessee*, 7 id. 61. *Howard's will*, 5 Monroe, 202.

The testator's presence may be proved by others, as well as the subscribing witnesses. (*Gwinn v. Radford*, 2 Litt. Rep. 137.)

The law does not require that the witnesses' names should appear in any particular part of the will. It is sufficient that they sign. (*Chardon's heirs v. Bongue*, 9 Lou. Rep. (Curry), 458.)

NOTE 934—p. 502.

The text speaks of various grounds for dispensing with the personal examination of witnesses, such as death, insanity, absence from the kingdom, &c. (See p. 501, 2, 3.) These are but illustrations of the general rule, that whenever the subscribing witnesses, the primary testimony, are placed beyond the reach of the party, he becomes entitled to the secondary. (*Chase v. Lincoln*, 3 Mass. Rep. 236.) Other instances are, the attesting witness becoming interested or infamous. (*Sears v. Dillingham*, 12 Mass. Rep. 358.) A witness interested must be excluded, though he acquired his interest after the will was published. (*Gill's will*, 2 Dana, 449.) In these cases their hand-writing may be proved, or the hand-writing of the testator or both. But all the witnesses must be first accounted for. (*Miller v. Miller*, 2 Bing. N. C. 76.) If any one is within the party's power, the hand of others alone cannot be relied upon; for as yet the party has higher evidence, because *direct* to the regular execution; whereas the hand-writing is but *circumstantial*. Per Tindal, C. J. in *Wright v. Doe, ex dem. Tatham*, 1 Adol. & El. 3, a distinction in the degrees of evidence, which we before adverted to more at large, ante, note 322, p. 385, note 325, p. 423, and note 417, p. 544.

It will be perceived by the text that the English cases incline strongly that, in such a case, both the hand-writing of the witnesses and the testator should be shown, (*Hopkins v. Graffenreid*, 2 Bay, 187, *Collins v. Elliott*, 1 Har. & John. 1, *Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221, 223, 4, S. P.) if such evidence be attainable; though if the party fail in either, as must often be the case where the will is ancient, either the one or the other must, of course, give way to still inferior proof according to the circumstances. (See *Miller v. Caruthers*, 6 Serg. & Rawle, 215; *Hall v.*

Gittings, 2 Harr. & John. 112.) Where the witnesses were all dead, and no proof of their hand-writing could be found, proof of the testator's hand-writing was received as sufficient. (*Duncan v. Beard*, 2 Nott & McCord, 400.) In respect to similar proof of deeds, see ante, note 897, p. 1299 et seq., note 901, p. 1305 et seq. It is material in the United States, where courts of record have generally the power of examining witnesses abroad, by commission or otherwise, that this does not vary the rule which lets in the inferior testimony. (Text, 502.) It is in the option of the party, to take his commission, &c. or resort to the secondary proof, on the ground that the primary is beyond the jurisdiction of the court. (*Turner v. Turner*, 1 Litt. Rep. 101; 104.)

The mode of proving death, absence, insanity or other disqualification, is the same as in other cases.

The fact of absence lying at a distance, and being, too, a kind of negative, usually presents the greatest difficulty, as we saw in the proof of other instruments, ante, note 895, p. 1294 et seq. Diligent inquiry at the proper places is usually sufficient, as at the place where the witness was engaged as a clerk, though even that must be dispensed with, if the proper place be not known to the party. This was so in *Miller v. Miller*, 2 Bing. N. C. 76; and proof of hand-writing was received, on showing that the witness had been advertised for a week before the trial in three London newspapers. (Id.) An inquiry of the witness' nephew was proved, who replied that nothing had been heard of him for a number of years; and though no inquiry had been made of the absent witness' family, the reason given was that it was not known who his relations were, where-upon proof of his hand was received even in chancery on a bill filed to establish the will. (*James v. Parnell*, Turn. & Russ. 417.) In Tennessee, a statute provides that the return of absence by the officer holding a subpoena for the witness, shall let in secondary evidence. The statute was acted on for the purpose of proving a will, in *M'Donald v. M'Donald*, 5 Yerg. 307.

The fact being once established which lets in the proof of hand-writing, a single witness may prove the hand-writing of all. (*Hopkins v. Graffenreid*, 2 Bay, 187. And see *Sampson v. White*, 1 McCord, 74.) All the cases agree that hand-writing may be proved. (*Sampson v. White*, 1 McCord, 74.) Absence from the state is the same, for this purpose, as death. (*Engles v. Bruington*, 4 Yeates, 345. *Bowman v. Bartlett*, 3 A. K. Marsh. 90.) The hand-writing of all the witnesses must be proved, unless such proof be shown to be beyond reach of the party. (*Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221, 223, 4. *Hopkins v. Albertson*, 2 Bay, 434.) All the witnesses being dead, and the hand-writing of two proved, the other having signed his initials, and the testator's mark being signed; on very slight proof of the witness' initials and that he had affixed the testator's mark, with possession under the will, and the declaration of an attesting witness in his life time that the will had been properly executed, it was received as evidence to the jury. Note, this declaration came out incidentally, on examining a witness for the defendant, who resisted the will. (*Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144, 154.) The testimony of a deceased attesting witness, sworn on a former trial, was received under an order of chancery, on trying an ejectment; and held, it being full, sufficient proof of the will, though another attesting witness was alive and in court. (*Wright v. Doe, ex dem. Tatham*, 1 Adol. & Ellis, 3.) The court expressed an opinion that the testimony of the deceased witness thus given was equal in degree with that of the living witness,

In one case, a mere exemplification from a court of probate, though the certificate as to the proof of execution was imperfect, the will appearing to be ancient, was received as proof both of the execution and contents. (*Hall v. Gittings*, 2 Har. & John. 112, 121, 2.) Not one of the witnesses appears to have been sworn, or their absence otherwise accounted for than by inference from the great lapse of time since the apparent date of the will, which might lead to the presumption of their death.

NOTE 935—p. 502.

In *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277, 283, Sutherland, J. delivering the opinion of the court, says, "If the subscribing witnesses all swear that the will was not duly executed, the devisee may notwithstanding go into circumstantial evidence to prove its due execution." "And what circumstances would justify a stronger presumption in favor of the validity of a will than the fact that the devisees, who had all the means of knowledge in their power, treated it as a valid will, entered upon and divided the estate according to its provisions, and continued so to hold and enjoy their respective portions for more than forty years?" (*Pearson v. Wightman*, 1 Const. Rep. 336, S. P.) But where the witnesses either so deny or fail to prove their attestation, the counter proof must be very clear to support the will. (*Id.*) See *Handy v. The State*, 7 Har. & John. 42. So witnesses swearing in support of the will may be contradicted. (*Spencer v. Moore*, 4 Call, 423.)

NOTE 936—p. 502.

Provis v. Reed, 5 Bing. 435, S. P. The same case is more fully reported in 3 Moore & Payne, 4, upon the same point. *Doe, ex dem. Reed, v. Harris*, 7 Carr. & Payne, 330, S. P.

NOTE 937—p. 504.

Per Lord Manners, in *Concannon v. Cruise*, 2 Moll. 332. The general doctrine of the text, that a paper appearing on its face to be an original will thirty years old, shall be received without the usual proof by witnesses, or accounting for their absence, and showing their or the testator's hand-writing, has been adopted in the various courts of the United States, as far as they appear to have spoken to the point. (*Jackson, ex dem. Lewis, v. Laroway*, 3 John. Cas. 283, 286.) The amount of the doctrine seems to be, that, in such a case of apparent age, the law draws the inference that the ordinary proof, both direct and circumstantial, is all lost, and lets in such grounds of presumption as are more remote but of a more enduring character. This presumption is conclusive, and though the witnesses appear to be alive and within reach of process, that will not preclude the inferior proof. (*Doe, ex dem. Oldham, v. Wolley*, 8 Barn. & Cress. 22. *Doe, ex dem. Oldnall, v. Deakin*, 3 Carr. & Payne, 402; 2 Mann. & Ryl. 195, S. C. *Jackson, ex dem. Bowman, v. Christman*, 4 Wend. 277, 282, and the cases cited at the latter page by Sutherland, J. Per *Spencer, J. and Kent, C. J.* in

Jackson, ex dem. Burhans, v. Blanshan, 3 John. Rep. 292, 295, 297, 8.) The rule is put by Nelson, J. in *Fetherly v. Waggoner*, 11 Wend. 603, that the will, which comes to prove itself, must appear, on its face, to have been regularly executed; but Jackson, ex dem. Bowman, v. Christman, *supra*, holds that among those marks of regularity, it is not essential that the attestation clause should mention the formalities of execution, as that the witnesses subscribed in the presence of the testator. (4 Wend. 282.)

The more material difference between the English and American cases (we speak of a majority of the latter) lies in the date from which the thirty years are to be computed. In England it is, by the more recent cases, entirely settled that this is the date of the will, however recent the possession, for the presumption that the witnesses are dead or absent governs. (*Doe, ex dem. Oldham, v. Wolley*, 8 Barn. & Cress. 22; *S. C.* by title of *Doe, ex dem. Oldnall, v. Deakin*, 3 Carr. & Payne, 402, and 2 Mann & Ryl. 195.) Spencer, J. stated the same principle and was in favor of the same rule in *Jackson, ex dem. Burhans, v. Blanshan*, 3 John. Rep. 292; but was overruled by Kent, C. J. and Van Ness, J.; the other two judges giving no opinion. The supreme court of New-York, with which the supreme court of Pennsylvania concurred in *Shaller v. Brand*, 6 Binn. 435, 439, maintaining a more strict analogy to the principle of presumption in favor of ancient deeds and other writings, (*ante*, note 903, p. 1310 et seq.) therefore reckon from the time when the will appears to have taken effect in possession. (*Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221, 224. Nelson, J. in *Hewlett v. Cook*, 7 Wend. 374, and in *Fetherly v. Waggoner*, 11 id. 602.) In either view, it seems the will is to be first read, as evidence from its face, and then possession shown under it. (*Doe, ex dem. Lloyd, v. Passingham*, 2 Carr. & Payne, 209.) This is obviously, however, but a discretionary matter upon the order of evidence. See *ante*, note 500, p. 718. For the purpose of showing a corresponding enjoyment, the acts and declarations of third persons in possession are admissible. (*Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 John. Rep. 144.) See *ante*, note 452, p. 596, 597, et seq. Possession of all the land devised is not essential. It is enough that part has gone according to the will, and been enjoyed under it. (*Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221, 227; *Jackson, ex dem. Van Schaick, v. Davis*, id. 123, S. P. as to an ancient deed. *Bradstreet v. Clark*, 12 Wend. 602, 677.) Other acts of ownership in respect to the land devised, beside direct possession, are admissible as auxiliary proof in support of an ancient will. (*Jackson, ex dem. Hunt, v. Luquere*, 5 Cowen's Rep. 221.) And in some cases, where there could be no actual possession, the land lying wild and uncultivated, acts of ownership, or other evidence of the authenticity of the will, may come in place of possession; e. g. where there are certificates of its having been executed and recorded, there being proof of the age of the certificates, &c. (*Jackson, ex dem. Lewis, v. Laroway*, 3 John. Cas. 283.) So where it had been regularly proved and deposited in a proper office in England. (*Bradstreet v. Clarke*, 12 Wend. 602, 677.) In one case, the proof by witnesses being deficient, but the will thirty years old, it was received as proved, merely because it came from the proper depository, the prerogative office. (By Lord Chancellor Hart, in *Holton v. Lloyd*, 1 Moll. 32.) In another case, on a very ancient probate, though that was imperfect, a mere exemplification, without the original will, was received. (*Hall v. Gittings*, 2 Har. & John. 112, 121, 2.)

We conclude this head of the proof of wills, with a notice of some few decisions not immediately ranging themselves under propositions in the text.

The *onus probandi* of the will lies with the party appealing from the original court of probate. (*Comstock v. Hadlyme*, 8 Conn. Rep. 254. *Buckminster v. Perry*, 4 Mass. Rep. 593. *Brooks v. Barret*, 7 Pick. 94.)

Declarations of the testator at the time of tearing his will, replacing it in parts, were received to show that he meant to stop *in medio*, and not effect a revocation. (*Doe, ex dem. Perkes, v. Perkes*, 3 Barn. & Ald. 439.)

It is well settled that a will of lands or other real estate, made in a foreign country or neighboring state of the Union, must be executed according to the forms required by the *lex loci rei sitæ*. The following are a few of the authorities to that effect. *Kerr v. Moon's devisees*, 9 Wheat. 565. *Darby's lessee v. Mayer*, 10 id. 465. *Weston, J. in Crofton v. Isley*, 4 Greenl. 138. *Calloway v. Doe, ex dem. Joyce*, 1 Blackf. 372. *Robertson v. Barbour*, 6 Monroe, 527. And as to a will of lands lying in one state, its courts are not concluded, though the will be declared void by the court of another. (*Rice v. Jones*, 4 Call, 89.)

Though a will be formally proved, one witness may establish a fraud which will overthrow it, e. g. a substitution of one paper for another. So one witness to rebut a fraud may prevail over several. (*Lewis v. Lewis*, 6 Serg. & Rawle, 497, per Duncan, J.) As to weighing the credit of subscribing witnesses, where in their evidence they hesitate, &c. see *Mullen v. McKelvey*, 5 Watts, 399.

On the trial of an issue of *devisavit vel non*, it was held not competent, in attacking the will, to prove that the testator had a dislike to one of the subscribing witnesses, when such fact does not otherwise appear to be relevant. Nor can a subscribing witness be asked whether he would have attested the will had he known the dispositions contained in it, with a view to show fraud or imbecility. (*Spence v. Spence*, 4 Watts, 165.) The declaration of one of several devisees that the will was unduly obtained, was received as evidence on the trial of such an issue, especially to avoid the devise in his own favor. (*Brown v. Moore*, 6 Yerger, 272.)

NOTE 938—p. 531.

By the term *patent ambiguity*, in its broadest sense, may be understood "an ambiguity appearing on the face of the instrument." Its frequent use in this way, in connection with the general proposition, that a patent ambiguity admits of no explanation by matters extrinsic, has occasioned no inconsiderable degree of confusion, and led Mr. Justice Story to think that there must be an intermediate class of ambiguities, comprising those instances where the words are equivocal, but yet admit of precise and definite application by resorting to the circumstances under which the instrument was made. As an example, he put the case of a written contract assigning the party's interest in the *freight* of a ship; saying, that there, parol evidence would be admissible of the circumstances attending the transaction, to ascertain whether the word "freight" referred to the goods on board the ship, or an interest in the earnings of the ship. (*Feisch v. Dickson*, 1 Mason's Rep. 10, 11, 12. See also *Dupree v. McDonald*, 4 Dem. Eq. Rep. 211.)

Now this, and various other instances of a kindred character to be found in our subsequent notes, fall exactly within the general definition of a patent ambiguity. The terms used are in themselves of doubtful meaning, and consistently admit of more than one interpretation according to the subject matter in contemplation of the parties. The ambiguity is not *latent* in any proper sense; it arises from the known infirmity of language; it is inherent in the instrument; appearing on its face, and evincing a difficulty at the very moment of perusal. And yet it admits of explanation.

It will not do to say, therefore, that a patent ambiguity (meaning thereby merely an ambiguity patent or appearing on the face of the instrument) cannot be explained by evidence *abunde*; though such remarks are frequently found in the books. (See 4 N. Hamp. Rep. 21, 23, 4; 1 Mason, 11; 14 John. Rep. 9; 6 Mass. Rep. 440; 8 id. 83; 1 id. 69; 11 id. 29; 3 Halst. 79; 1 John. Ch. Rep. 235; 3 Serg. & Rawle, 607; 2 Marsh. Ken. Rep. 51.)

Mr. Starkie, however, has given the following definition of a patent ambiguity: "By *apparent ambiguity* must be understood an inherent ambiguity, which cannot be removed, either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence showing that expressions *prima facie* unintelligible are yet capable of conveying a certain and definite meaning." (2 Stark. Ev. 546, 7, 6th Am. ed.) But this evidently falls short of supplying a practical test by which to determine, *a priori*, whether a given instance of ambiguity, apparent on the face of the writing, is explainable or not, by evidence extrinsic. It leaves you, in a variety of cases, to go out of the instrument and experiment; and if the result is unsuccessful, it pronounces the ambiguity patent, and therefore fatal. Besides, it involves an unnatural limitation of the meaning of the term *patent*, which serves to perplex and bewilder the student; and no other object is answered by it, save that of avoiding the recognition of exceptions to the general rule, that patent ambiguities are not explainable save by construction.

The master of the rolls in *Colpoys v. Colpoys*, Jacob, 451, has directly pointed out the fallacy of saying, that a patent ambiguity is one which admits of no explanation by extrinsic evidence. "When the person or the thing is designated," he said, "on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his surname, and the christian name is not mentioned; is not that a patent ambiguity? Yet it is decided that evidence is admissible. So where a gift is of the testator's stock, that is ambiguous; it has different meanings when used by a farmer and a merchant," &c. He further adds, "To shew how mistaken the idea is that extrinsic evidence is never admissible in cases of patent ambiguity, we may refer to a case in the house of lords, unquestionably of that description, where the evidence was admitted; I mean the case of *Doe, dem. Jersey, v. Smith*, 3 Brod. & Bing. 553; (see text, p. 545, 6, S. C. ;) Mr. Justice Bayley thus states the principle on which it was introduced: 'The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity

on the face of the instrument ; because an indefinite expression is used, capable of being satisfied in more ways than one ; and I look to the state of the property at the time, to the estate and interest the settler had, the situation in which she stood with regard to the property she was settling, to see whether that estate or interest, or situation, would assist us in judging what was her meaning by that indefinite expression.' " The master of the rolls concludes by saying—"If it were necessary, I could refer to many other instances of resorting to extrinsic matter in cases of patent ambiguity." (*Colpoys v. Colpoys*, supra.)

Mr. Peake has shown, also, that a patent ambiguity is in many instances open to explanation by oral evidence. (*Norris' Peake*, 186, et seq.) So has Mr. Ram. (*Ram on Wills*, 32, note (o.) No. 24 Law Lib. Phil.) And our author, though he has not directly said so, has practically admitted and illustrated it by various cases in the text.

Several American decisions concur in the same view. (See *Ely v. Adams*, 19 John. Rep. 313, 317, per Spencer, C. J. delivering the opinion.) See the cases in our subsequent notes, relating to the admissibility of oral evidence to show the circumstances attending the execution of a written instrument, ambiguous on its face, with a view of ascertaining the subject or object intended.

Some patent ambiguities then, it appears, allow a resort to extrinsic evidence, and others do not. The latter class only seem appropriately to belong to the *ambiguitas patens* of Lord Bacon, designated in the text. An ambiguity is patent in this sense, when the mere perusal of the instrument shows plainly that something more must be added before the reader can determine which of several things is meant by it ; and then the rule is inflexible that no evidence to supply the deficiency can be admitted. The admission of such evidence, in many cases, would be, as his lordship said, "to make that pass without deed which the law appointeth shall not pass but by deed ;" in other words, it would be departing from the great leading principle which prevails on this subject, and allowing oral evidence to come in and ascertain that which the writing had left to the widest latitude of conjecture. He puts as an instance, "If a man give land to J. D. et J. S. et hereditus, and do not limit to whether of the heirs." (*Gresl. Eq. Ev.* 198.)

The following cases seem to have been regarded as within Lord Bacon's definition of *ambiguitas patens*. A. gave a bond to B., binding the former to convey to the latter one hundred and twenty acres of land, parcel of a tract containing a larger quantity, but the bond had no description whereby the 120 acres could be located or identified ; held, that extrinsic evidence of an intent that the 120 acres were to be laid off of the southernmost end of the tract was inadmissible, and that the bond was void except upon the principle of election. (*Huntt v. Gist*, 2 Har. & John. 493.) A bequest to the "poor children of a county, who attend a particular school," is void for uncertainty as to the persons designed. (*Dashiell v. The Attorney General*, 6 Har. & John. 1 ; S. P. 5 id. 392.) So, a devise to *twenty of the poorest* of the testator's kindred. (Said in *Dashiell v. The Attorney General*, 5 id. 399. See *Pow. on Dev.* 419 ; 3 Com. Dig. 412.) A devise to *the heirs of A. B.*, who is living, has been held void in Massachusetts. (*Hall v. Leonard*, 1 Pick. 27. See *Den, ex dem. Stith, v. Barnes*, 1 N. Car. Law Repos. 484 ; *Long v. Beaumont*, 1 P. Wms. 229 ; *Den, ex dem. Brooking, v. White*, 2 Black. Rep. 1010.) Otherwise, if he had been dead. (*Shaw v. Lord*, 12 Mass. Rep. 447.) "If the description in a conveyance is so uncer-

tain, that it cannot be known what estate was intended, the conveyance is void." (Said per Parsons, C. J. in *Worthington v. Hylyer*, 4 Mass. Rep. 205.) See in respect to a will, *Rothmahler v. Myers*, 4 Dess. Eq. Rep. 215. So, *semble*, if a person having several sons makes a devise to one of them without designating which. (*M'Dermot v. The United Ins. Co. 3 Serg. & Rawle*, 607.) But a mortgage or conveyance of *all the lots owned by the mortgagor in a particular town, to which he had either a legal or equitable title at the time*, is not void, but will pass those within the description, if they can be identified. (*Sterling v. Blair*, 4 Bibb's Rep. 288.) So as to a will containing a like general description; (*Jackson, ex dem. Livingston, v. Delancey*, 11 John. Rep. 36; *S. C. on error*, 13 id. 538, 9;) but, *semble*, otherwise as to a sheriff's deed. (*Id.*)

It may happen and frequently does, that the very evidence intended to elucidate an explainable patent ambiguity, shall result in bringing to light a *latent* ambiguity, not before known to exist. (*Gresl. Eq. Ev.* 201.)

A "latent ambiguity" would seem at first blush easily understood, and yet a difficulty may arise with respect to that also, from the loose manner in which the term has sometimes been used. Perhaps the clearest definition of this species of ambiguity is the one given by Mr. Sugden. *Ambiguitas latens*, he says, "is that which seems certain and without ambiguity, for any thing appearing upon the face of the instrument, but there is some collateral matter out of the instrument that breeds the ambiguity." (1 Sug. on Vend. 181, Am. ed. of 1836, from 9th Lond. ed.) And as it is raised by extrinsic evidence, it may fairly be dissolved by the same means. (*Id.* *Storer v. Freeman*, 6 Mass. Rep. 440, 441. *Watson v. Boylston*, 5 id. 417. *Stackpole v. Arnold*, 11 id. 23, 30. *Webster v. Atkinson*, 4 New-Hamp. Rep. 21. *Jackson, ex dem. Van Vechten, v. Sill*, 11 John. Rep. 201. *Peisch v. Dickson*, 1 Mason, 10, 11. *Mann v. Mann*, 1 John. Ch. Rep. 231. *Vernor v. Henry*, 3 Watts' Rep. 385. *Tuder v. Terrel*, 2 Dana's Rep. 49. *Edwards v. Richard*, 1 Wright's Rep. 597.) *Ford, J. in Hand v. Hoffman*, 3 Halst. 78, said, "It is the nature of a latent ambiguity never to appear on the face of the will; but to lie hidden in the *person*, or *thing*, or *subject*, whereof the will speaks." Other definitions are more complex, and therefore not so practically useful. "An ambiguity," says Roberts in his *Treatise on Frauds*, (p. 75,) "is properly latent in the sense of the law, when the equivocality of expression, or obscurity of intention does not arise from the words themselves, but from the delitescient state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by a mere developement of extrinsic facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words made use of." The location of lands, where the boundaries are distinctly pointed out in the deed, has been called explaining a latent ambiguity. (*Storer v. Freeman*, 6 Mass. Rep. 441.) This is right, where it turns out that the boundaries are obscure. In *Cole v. Wendell*, 8 John. Rep. 118, an ambiguity arising from the use of equivocal terms, was denominated and treated as latent, though it was clearly patent, but perhaps explainable. (See per Spencer, J. 19 John. Rep. 317.)

It is sometimes said in the books that a latent ambiguity never renders an instrument void, but a patent ambiguity does. It is true that a latent ambiguity does not necessarily avoid an instrument; and yet it is obvious that in many cases a latent ambiguity may turn out as fatal to an instrument as the most hopeless case of a patent

ambiguity. The extrinsic evidence adduced to explain it sometimes proves entirely unsatisfactory, and results in leaving the matter wholly to conjecture, in which case the instrument cannot be enforced. *Thomas v. Thomas*, stated post, p. 536, 7, is an instance where a latent ambiguity resulted fatally to a devise. (See also 1 Sug. on Vend. 182, Am. ed. of 1836, from 9th Lond. ed.)

Where a latent ambiguity is alleged, the party alleging it must show that there is one by pointed testimony before he can be allowed to resort to parol proof. Evidence which merely raises a conjecture is not sufficient as a basis for extrinsic enquiry. (*Walpole v. Chalmondely*, 7 T. R. 188. 1 Sug. on Vend. 183, ed. of 1836, from 9th Lond. ed.)

NOTE 939—p. 532.

The doctrine in the text has been repeatedly recognized and acted upon. It is no less applicable to deeds and other written instruments than to wills. Wherever a description or designation of the person or thing intended is applicable indifferently to more than one subject, extrinsic evidence is admissible to prove which of such subjects was intended. In addition to the cases cited in note (2) of the text, p. 532, see Bro. Abr. Nosome, 63; *Cane v. Cowper*, Moore, 104; *Pacy v. Knollis*, 1 Brown, 132; *Anon.*, Keilway, 49, (a); *Counden v. Clarke*, Hob. 32; *Lepiot v. Brown*, 1 Salk. 7; *Dowset v. Sweet*, Ambl. 175; *Doe, ex dem. Morgan, v. Morgan*, 1 Crompt. & Mees. 235; *Richardson v. Watson*, 4 Barn. & Adol. 787; *S. C. 1 Nev. & M. 575*; *Thomas v. Thomas*, 6 T. R. 671; *Osborne v. Wise*, 7 Carr. & Payne, 761, and what is said by Parke, B. at the conclusion of the case; *Jackson, ex dem. Shultze, v. Goes*, 13 John. Rep. 518; *Pritchard v. Hicks*, 1 Paige, 270; *Pinson v. Ivey*, 1 Yerg. 296; *Wusthoff v. Dracourt*, 3 Watts' Rep. 213.

A question has sometimes arisen whether, if a deed or other instrument be to A. B., and it turns out that there are two persons by that name, father and son, the former known as A. B. and the latter as A. B. *junior*, it is competent to show by oral evidence that the latter was intended though the addition of junior be omitted. It is clearly settled that this may be done. (*Coit v. Starkweather*, 8 Conn. Rep. 239. *Jones v. Newman*, 1 Black. Rep. 60.)

With respect to the evidence which is admissible for the purpose of determining which of several subjects was intended where the description is applicable to more than one—inasmuch as the question is, what the individual speaking through the instrument *intended* to have expressed; any evidence which, upon general principles, is relevant and material to that enquiry, will be admitted. (*Wigram on Extr. Ev.* 118.) In *Coit v. Starkweather*, *supra*, the evidence seems to have been direct, that the son negotiated for the deed, and that it was delivered to and intended for him. In the case of wills, it seems from the English decisions, that facts affording an inference of intention, and declarations by the testator at the time of making his will, are equally admissible. (*Wigram on Extr. Ev.* 118. See *Selwood v. Mildmay*, 3 Ves. 306; *Doe, d. Le Chevalier, v. Huthwaite*, 3 Barn. & A. d. 632; *Cheney's case*, stated in the text at p. 532; *Crounden v. Clarke*, Hobart, 32; *Hampshire v. Pierce*, 2 Ves. sen. 216; *Price v. Page*, 4 Ves. jun. 630; *Hodgson v. Hodgson*, 2 Vern. 293; *Beaumont*

v. Fell, 2 P. Wms. 140; Doe, d. Westlake, v. Westlake, 4 Barn. & Ald. 57; Steele v. Hoste, 6 M. & L. 192.) But declarations of intention, made before or after the date of the will, are, it has been said, inadmissible. (Wigram on Ex. Ev. 118. Thomas v. Thomas, 6 T. R. 671, stated post, p. 536, 7, of the text. Strode v. Russell, 2 Vern. 625. See Oidham v. Slater, 3 Sim. 84; Richardson v. Watson, 4 Barn. & Adol. 787.) See Whitaker v. Tatham, 7 Bing. 628; S. C. 5 Moore & Payne, 628. This distinction, however, if it exists, does not appear to have been uniformly kept in view, as will be seen by the above cases. It has been repeatedly held, nevertheless, that declarations made before and after the making of the will, and constituting no part of the *res gestæ*, are entitled to little, if any weight, in comparison with contemporary declarations. The latter have been called "the best evidence." (See Langham v. Sanford, 2 Mer. 6, 28; Strode v. Russell, 2 Vern. 625.) In Strode v. Russell, 2 Vern. 624, 5, Tracy, J. says, *no regard whatever* is to be had, in construing wills, "to expressions before or after the making of the will, which possibly might be used by the testator on purpose to control or disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements." See also Coalter, J. in Puller v. Puller, 3 Rand. 89; per Cabell, J. id. 90. *Semble*, that declarations before the will was made are of more weight than those made after. (Langham v. Sanford, *supra*. Whitaker v. Tatham, 7 Bing. 628.) And they must always relate to the intention which existed in the testator's mind, at the time he made his will; otherwise they are irrelevant. (Whitaker v. Tatham, 7 Bing. 628; S. C. 5 Moore & Payne, 628.) In Pennsylvania, declarations made before and after the execution of the will, are, it appears, admissible; (Vernor v. Henry, 3 Watts' Rep. 391;) especially as ancillary to other circumstances evolving the intent. (*Id.*) The question was upon the identity of a legatee, and the reasoning upon which the decision proceeds seems difficult to resist, except by restricting the rule allowing direct evidence of *intention*. It is as follows: "In the case of a latent ambiguity it is certain that explanatory declarations made at the time of execution are admissible, having been so ruled in Harris v. The Bishop of Lincoln, 2 P. Wms. 137; and Thomas v. Thomas, 6 T. R. 671. In the latter, however, previous professions indicative of a design to give the property in a particular way were excluded. Though I can see no good ground for it, naked declarations of such a design might possibly be deemed incompetent, for the reason that the important consideration is the state of the intention at the time of making the will, when all previous designs may have been abandoned; yet the objection would seem to be rather to the effect of the evidence than its competency, for the admitted existence of a testamentary purpose raises a presumption, however slight, of the continuance of it till rebutted by proof of misconduct or other circumstances to induce a presumption of a change of feeling towards the person previously intended to be favored. But what would be the effect of such a presumption when *strengthened* by circumstances? In order to show the correspondence of the party's relations and condition to the description by which he claims, to be accidental, would it not be open to proof from the other side, that the testator was a stranger to him, while he had treated the claimant who bears the name as the proclaimed successor to his estate? No argument built on a subtlety could oppose a conclusion so rational."

In respect to the admissibility of declarations to prove intention, and their comparative weight as respects the time when, and the circumstances under which they are

made, see ante, note 481, p. 646, 7, et seq. Their nature, as whether direct to the intent sought to be ascribed to the testator, or merely affording an inference of such an intent, must be attended to, in estimating the value of this species of evidence. (See *Farrar v. Farrar*, 5 Pick. 409.) Further observations relating to the above doctrine will be found in the concluding note to the present volume of the text.

The rule applicable where more persons or subjects than one are equally within the description, was recognized in *Miller v. Travers*, 8 Bing. 244. As that case is since the present edition of our author's treatise, and furnishes a valuable commentary upon many of the adjudications noticed in subsequent pages of the text, showing moreover how far they may be considered as overruled or qualified, we shall for the sake of convenient reference, introduce it in this place, and pretty much at length. There, the testator had devised "all his freehold and real estates whatsoever, situate in the county of Limerick in the city of Limerick," to certain trustees named in his will. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estate in the county of Clare. It was not disputed that the real estate in the city of Limerick passed under the devise, but the plaintiff contended that he was at liberty to shew, by parol evidence, that the testator intended his estates in Clare to pass under the same devise. The vice chancellor was of opinion that such evidence was admissible, and ordered that the parties should proceed to a trial at law on an issue, upon that principle. (*Wigram on Extr. Ev.* 89.) Against this decision the defendant appealed; and the lord chancellor requested the assistance of Tindal, C. J., and Lord Lyndhurst, (then chief baron,) the former of whom, in January, 1833, delivered the unanimous opinion of the three judges, deciding that the evidence adverted to was inadmissible, and reversing the order directing an issue. The judgment, after observing that the main question was, whether parol evidence was admissible to shew the testator's intention that his real estates in the county of Clare should pass by his will, proceeds as follows: "It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence, upon the same subject, calculated to explain what was the estate, or subject matter, really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*ambiguitas verborem latens, verificatione suppletur.*'"

"But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale: or where a man devises to his son John and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take. (*Bac. Max.* 23. *Hob. Rep.* 32. *Edward Alham's case*, 8 Rep. 155.) The other class of cases is that in which the description contained in the

will of the thing intended to be devised, or of the person who is intended to take, *is true in part but not true in every particular*. As where an estate is devised called A.; and is described in the occupation of B., and it is found that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to shew what estate is intended to pass, and who was the devisee intended to take, provided there is sufficient *indication of intention appearing on the face of the will to justify the application of the evidence*.

"But the case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to *introduce new words and a new description into the body of the will itself*.

"The testator devises all his estates in the county of Limerick, and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he had property in the city of Limerick, which answers to the description in the will, but no property in the county. *This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists*. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

"The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare; and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick.

"But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, *as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will*. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect *as the filling up a blank*, which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

"Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn v. Page, 3 T. R. 87.*

"But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection; which

copy was afterwards executed by him with all the formalities required by the statute of frauds ; the presumption is that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed and after the death of the testator. If such evidence is admissible to introduce a new subject matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to *introduce* new matter of devise, or a new devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made *in form* by the testator in his life time, would *really* be made by the attorney after his death ; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed.

“ And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for ; on the contrary, they will all be found consistent with the distinction above adverted to—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence ; *but that a new subject matter of devise, or a new devisee*, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

“ Thus in the case of *Lowe v. Lord Huntingtower*, 4 Russ. Rep. 581, in which it was held that evidence of collateral circumstances was admissible, as of the ages of several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purposes of ascertaining the true construction of the will ; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family ; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, ‘ *stand well with the words of the will.*’

“ The case of *Standen v. Standen*, (2 Ves. jun. 589,) decides no more than that a devise of all the residue of the testator’s real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

“ The case of *Mosley v. Massey and others*, (8 East, 149,) does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and *vice versa*, the court held that it was sufficiently to be collected from the words of the will itself which estate the testator meant to give to the one devisee, and which to the other, independent of their local description ; all, therefore, that was done was to reject the local description as unnecessary, and not to import any new description into the will.

“ In the case of *Selwood v. Mildmay*, (3 Ves. jun. 306,) the testator devised to his

wife part of his stock in the 4 *per cent.* Annuities of the Bank of England; and it was shewn by parol evidence, that, at the time he made his will, he had no stock in the 4 *per cent.* Annuities, but that he had some which he had sold out, and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the long annuities, it was held that such stock should pass rather than the will be altogether inoperative.

"This case is certainly a very strong one; but the decision appears to us to range itself under the head, that 'falsa demonstratio non nocet,' where enough appears upon the will itself to shew the intention after the false description is rejected.

"The case of *Goodtitle v. Southern*, (1 M. & S. 299,) falls more closely within the principle last referred to. A devise of *all that my farm called Trogue's Farm, now in the occupation of A. C.*' Upon looking out for the farm devised, it is found that part of the lands which constituted Trogue's Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of '*Trogue's Farm*,' and that the inaccurate part of the devise might be rejected as surplusage.

"The case of *Day v. Trigg*, (1 P. Wms. 286,) ranges itself precisely in the same class. A devise of *'all the testator's freehold houses in Aldersgate street,'* where, in fact, he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his *houses* there, and that as there were no freehold houses there to satisfy the description, the word '*freehold*' should rather be rejected than the will be totally void.

"But neither of these cases afford any authority in favor of the plaintiff; they decide only that where there is a *sufficient description in the will to ascertain the thing devised*, a part of the description which is inaccurate may be rejected, *not that any thing may be added to the will*; thus following the rule laid down by *Anderson, C. J.*, in *Goldb. Rep.* 131—'an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.'

"On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt v. Hort*, (3 Bro. C. C. 311,) and in many other cases.

"Now the principle must be precisely the same, whether it is the person of the devisee, or the estate, or thing devised, which is left altogether in blank. *And it requires a very nice discrimination to distinguish between the case of a will where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare.*

"In the case of *Doe d. Oxenden v. Chichester*, (4 Dow. P. C. 65,) it was held by the house of lords, in affirmance of the judgment below, that in the case of a devise of '*my estate of Ashton*,' no parol evidence was admissible to shew that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The chief justice of the common pleas, in giving the judgment of all the judges, says, 'If a testa-

tor should devise his lands of or in Devonshire, or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties.' Lord Eldon, then lord chancellor, in page 90 of the report, has stated in substance the same opinion. The case so put by Lord Eldon and the chief justice is the very case now under discussion.

"But the case of *Newburgh v. Newburgh*, decided in the house of lords on the 16th of June, 1825, appears to be in point with the present. In that case the appellant contended that the omission of the word '*Gloucester*,' in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estate in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

"The question, 'Whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word *Gloucester* had been inserted in the will,' was submitted to the judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

"As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would, therefore, be useless to grant the issue in the terms directed by the vice chancellor."

NOTE 940—p. 533.

In *New-York, Beaumont v. Fell*, stated in the text, seems to have been directly sanctioned in one instance. The case is very briefly reported, and perhaps imperfectly. According to the report it appears, that a bequest was made to "*Cornelia Thompson*" without any other description being added, or a single circumstance appearing on the face of the will, indicating a different intent. *Caroline Thomas* filed her bill claiming the bequest as intended for her. The defendants, who were the executors, admitted the material facts charged in the bill, viz. that the testatrix had been dead two years and that no person by the name of *Cornelia Thompson* had appeared to claim the legacy; that they believed the plaintiff to be the person intended, for she was a great favorite of the testator, &c. &c. "The chancellor," the report states, "upon the authority of *Beaumont v. Fell*, and *Bradwin v. Harper*, *Ambl.* 374, decreed" that the property bequeathed should be conveyed to the plaintiff. (*Thomas v. Stevens*, 4 John. Ch. Rep. 607.)

No other New-York case appears to have gone so far. In *Conolly v. Pardon*, (1 Paige's Rep. 291,) the testator bequeathed to his brother *Cormac Conolly*, and his two sisters, (naming them,) what should remain of his money after certain bequests, &c. The following day by a codicil he bequeathed to his nephew *Cormac Conolly*, son of his brother *Cormac Conolly*, the sum of \$500 for his ecclesiastical education; said sum to be taken from what he had bequeathed to his brother *Cormac*, and the sisters. It turned out that the testator had no brother named *Cormac*, but had a nephew by that

name, son of his brother James the complainant; the nephew, at the date of the will and codicil, being engaged about his classical studies in Ireland with a view to an ecclesiastical calling. He was the only nephew by that name; and the complainant was the only brother who survived the testator, unless another brother named Henry, who left the family residence in Ireland many years before, and who had not been heard from since, was still living. The Chancellor (Walworth) held, that James the complainant was the brother intended, and decreed accordingly. He said, "the reference to this devise in the codicil, and the description of his nephew as the son of his brother Cormac, shows conclusively that the complainant was the legatee intended. The cases are very contradictory on the subject of admitting parol evidence to correct mistakes in testamentary dispositions, but this case steers clear of those where the admission of parol evidence has been most restricted. If a legacy was given by a testator to his brother John, and it turned out in evidence that he had but one brother, there could be no doubt that the latter would be entitled, because the description of *brother* in that case would alone be sufficient, and the name might be rejected as surplusage." The learned chancellor barely referred to *Thomas v. Stevens*, supra, saying, that there, chancellor Kent went much further.

Cunolly v. Pardon, supra, was decided upon the principle of the rule *falsa demonstratio non nocet*. It is characteristic of the cases within that principle that there is a sufficient description of the object or subject intended, independent of the *falsa demonstratio*. In *Smith v. Smith*, 1 Edw. Ch. Rep. 189, (S. C. on appeal, 4 Paige, 271,) a legacy was left to Mary S., wife of Nathaniel S. Mary S.'s husband was named Abraham, and Sarah S.'s husband was Nathaniel S. Upon extrinsic evidence and circumstances it was held that Mary S. was intended. In *Vernor v. Henry*, 3 Watts' Rep. 385, the testator had given a legacy to *James Vernor Henry*, describing the legatee as his *nephew* and the *son of Elizabeth, a deceased sister of the testator*. James Vernor Henry claimed the legacy, as did also Robert R. Henry. It appeared in evidence that James was not the nephew, but a grand-nephew of the testator, and instead of being the son, he was the grandson of Elizabeth. Robert, on the other hand, was a nephew of the testator, and the only son of Elizabeth who was living at the date of the will. Upon the extrinsic evidence adduced the court decided in favor of James, as being the person intended.

The following case in which the court recognized *Beaumont v. Fell* as authority, was decided in Kentucky, A. D. 1834. A testator devised to his wife certain slaves, fifteen in number, the will importing a designation of each by name. In this designation the name of "Phillis" occurred twice. On the trial, it appeared by parol proof, that the testator at the date of the will owned *precisely the number* of slaves mentioned; all corresponding in name with those described, except in a single particular, and that was, that he owned only one slave named *Phillis*, but owned *Philip*, who was not mentioned in the will, unless one of the names "Phillis" was intended for him. Upon the proof adverted to it was held, that *Philip* passed under the devise in question. (*Tudor v. Terrell*, 2 Dana, 47.) The court of appeals in giving judgment said, "the question in this case is not whether the testator intended to devise to his wife that concerning which his written will is silent, but it is, what is the true import, application and effect, of a clause contained in the will? Upon this point there could have been no doubt, had no extrinsic fact been proved. But when it was prov-

ed that the testator owned only one slave named "*Phillis*," the manifest consequence was a latent ambiguity as to what slave the testator intended by the reiterated name "*Phillis*;" and to explain or settle that ambiguity, parol testimony was undoubtedly competent." They then considered how the case would have stood, had the testator owned no slave except one called Philip, and if he had devised to his wife a slave named *Phillis*. Under such circumstances, on proof that he owned no slave at the date of the will save Philip, the latter would pass. (Id. 50.) In a case of that impression it would seem, that the term *slave*, on reference to the extrinsic facts would be a sufficient description of the object intended, to authorize the rejection of the name as having been inserted through mistake, agreeably to the maxim *falsa demonstratio non nocet*. (See the cases on that subject, *supra*.) The learned court, however, without noticing the maxim adverted to, appealed directly to *Beaumont v. Fell*, as an authority in point for their conclusion on the case supposed. "The only difference," they said, "between the suppositious case and the actual case, or between the case supposed and this case, is, that in the former, the testator had but one slave, and devised but one, and in this case he had several and devised several, and therefore, possibly he intended not to devise to his wife as many by one, as are enumerated by name in the devise to her; and the person who drew the will may have inadvertently and erroneously written *Phillis* twice, and thus inserted fifteen instead of fourteen names. This may be possible, but it is not probable; and if we can ascertain with satisfactory certainty that there is no mistake in the number, the legal consequence must be that the mistake was in writing *Phillis* instead of *Philip*," &c. They then proceeded to notice various circumstances connected with the will, and the extrinsic facts, from which the inference of the mistake being in the name instead of the number, seemed to them irresistible. (*Tudor v. Terrell*, 2 Dana, 50, 1.) The case, therefore, so far as the decision itself is concerned, may in principle, be fairly classed among those, where, after rejecting the *falsa demonstratio*, enough remains to indicate the intent. That it was the design of the testator to give his wife *all the slaves he owned at the date of the will*, the court held to be clear; and if he had directly said so, a mistake in the name of one could in no wise be allowed to frustrate that which was otherwise sufficiently expressed; especially where the variance in respect to the name was so slight, (See *Wigram on Extr. Ev.* 122, 3. *Jackson, ex dem. Miner, v. Boneham*, 15 John. Rep. 226.)

In *Dowset v. Sweet*, Amb. 175, a legacy was to John and Benedict, sons of John Sweet; and though John Sweet had only two sons, viz. Benedict and James, the latter of whom it appeared the testator used to call *Jackey*, held, that James might take. There, after rejecting what was false in the description, enough remained to indicate the intent of the testator, and justify the application of extrinsic evidence. So where a legacy is given to "my namesake, *Thomas*, the second son of my brother," and the testator's brother has no son named Thomas, but his second son is William, the second son may take; (*Stockdale v. Bushby*, 19 Ves. 391. S. C. Coop. 229;) and where a devise was to S. H. second son of T. H., but in fact he was the third son; evidence of collateral circumstances was allowed to ascertain whether the testator had mistaken the name or not; (*Doe, ex dem. Chevalier, v. Huthwaite*, 3 Barn. & Ald. 632; see as to this case *Wigram on Extr. Ev.* 81;) a legacy was to "Charles Miller Standen and Caroline Eliz. Standen, legitimate son and daughter of Charles Standen,

now residing with a company of players;" and their claim was supported, though it appeared they were *illegitimate*; (Standen v. Standen, 2 Ves. Jun 589;) a legacy to "the Reverend Charles Smith of Stapleford Tawney, in the county of Essex, clerk," was sustained as a legacy to the Reverend *Richard* Smith, he answering in other respects to the description in the will. (Smith v. Coney, 6 Ves. 42.) "Margaret Jackson, by her will, gave one-sixth of the residue of her personal estate, in trust to be put out at interest, and the interest to be paid her niece, *Mary Bradwin*, for life, and after her death, one moiety of the one sixth to be paid to the said *Mary Bradwin*'s grand-children, the children of her daughter *Mary*, at their age of 21, and the other moiety to be paid to *Anne*, the daughter of her said niece, *Mary Bradwin*." *Mary Bradwin*, the niece, had two children, viz. *Mary*, the plaintiff, who was never married, and *Anne*, who married one B., and died before the making of the will, leaving two children, W. and R., who were also plaintiffs. The bill claimed one moiety to be paid to the plaintiff *Mary*, and the other to W. and R., alleging that the testatrix so intended, but by mistake of names had given a moiety to the children of *Mary* who never was married, and the other moiety to *Anne*, who was dead at the time." Proof was made that the testatrix was eighty years old when she made her will, and lived in Derbyshire; that *Mary*, the niece of the testatrix, and her family, lived at St. Albans, in Hertfordshire, and that the testatrix had never seen her niece's children or any of the grand-children. His Honor, the Master of the Rolls, decreed according to the bill. (*Bradwin v. Harpur*, Ambl. 374.) The reporter has added to the case a note as follows; "I was of counsel for the plaintiffs, and cited *Beaumont v. Fell*, and *Dowsett v. Sweet*; the former of which was much stronger than the present case, as the devisee (?) there, was described by her name only, but here is a sufficient certain description, independent of that part which is mistaken; viz. grand-children, and daughter. V. Plow. 191, in case of a grant, and *Dare v. Geary* in chancery, 12th June, 1789, in case of a will. If there is a certain description, and a further description is added, it is immaterial whether the additional description be true or false." (Id. 375.) The case of *Hodgson v. Hodgson*, 2 Vern. 593, may, it seems, be considered one of inaccurate description. There the question arose upon a direction in a will to pay £100, which the testator owed by bond to one *Shaw*. The money was not due to *Shaw*, but to *Alice Beck*, wife of one *Fitch*; and parol evidence was allowed to explain the intent. The Lord Chancellor probably considered that the description, "£100 which I owe by bond" was sufficient, and that the misdescription of the creditor might be rejected.

In *Jackson, ex dem. Dickson, v. Stanley*, 10 John. Rep. 133, a patent to "*David Hungerford*, a soldier," was produced by the plaintiffs who were heirs of *Daniel Hungerford*, and claimed as such; an act of the legislature was also produced by them, reciting the giving of the patent, declaring, moreover, that *Daniel Hungerford* was intended thereby, and enacting that the land should be deemed vested in him in the same manner as if he had been named in the patent. The ballot book in the Secretary's office, showed that the *Hungerford* intended by the patent, belonged to *McKean's* company in the first regiment, and proof was given that *Daniel* served in *McKean's* company, but that no such person as *David Hungerford* ever belonged to it. The defendant claimed under *David Hungerford*, and proved by some testimony that he served as a soldier in the New-York line, but no proof was adduced showing that

he belonged to either of the two regiments for which the lands, whereof those in question constituted a part, were appropriated. The jury, under the direction of the judge, found a verdict for the plaintiff. The case afterward came to be considered on motion for a new trial; and the verdict was sustained. It does not appear very clearly upon which of the two grounds pointed out by the learned chief justice, who delivered the opinion, the decision was put. At p. 138, it is affirmed that the patent was either void by means of the misnomer, or the parol proof supplied and corrected the mistake, and in either case the plaintiffs would be entitled to recover; for if the misnomer avoided the patent, then the title remained in the state until the act of the legislature, which, as was held, was to be regarded in the light of a legislative grant. Most stress undoubtedly was placed upon this view, for at p. 137, the chief justice speaks of the patent as containing no description or demonstration of the patentee beyond the name, and that being false, the heirs of *Daniel H.* could not take. Quere, however; might not the patent itself have been sustained as a valid grant to *Daniel H.*, within the rule *falsa demonstratio non nocet*? Rejecting the word *David*, the residue of the description, viz. "Hungerford a soldier," was true. And even conceding that to be too slight a manifestation of intent to justify the calling in of extrinsic evidence to help and apply it; still, as the patent probably referred to the act under which it issued, the latter would indicate the class of persons (viz. the "two regiments of infantry" spoken of in the case at p. 137) for whose use the lands were appropriated; and connecting these descriptions, which is allowable for this purpose, (*semble*, per Thompson, C. J. 13 John. Rep. 524,) they would constitute as much certainty as often appears in this class of cases. Then, if on extrinsic enquiry it could be shown that *David* never belonged to either of the regiments mentioned, and *Daniel* did, it would be quite safe to conclude that the christian name was *falsa demonstratio*, and to reject it accordingly. See *Jackson, ex dem. Miner, v. Boneham*, 15 John. Rep. 226.

The above cases are, in the main, consistent with the maxim, *falsa demonstratio non nocet*; and they concur, that the intention of the maker or party which the court is to effectuate, must be one which is expressed in the instrument. Hence, in almost every instance of inaccurate description, where the instrument has not been held void on that account, it is laid down as indispensable, that after rejecting the *falsa demonstratio*, enough of certainty must remain to ascertain the object or subject matter intended. Accordingly in *Thomas v. Thomas*, 6 T. R. 671, stated post, p. 536, 7, of the text, Lord Kenyon observed "When the rule for a new trial was moved for, I alluded to the maxim *falsa demonstratio non nocet*, but in doing so, I wished that the sense of that maxim should be attended to; I have always understood that such *falsa demonstratio* should be superadded to that which was sufficiently certain before; there must be *constat de persona*, and if to that an inapt description be added, though false, it will not avoid the devise." (6 T. Rep. 676.) See also the judgment in *Miller v. Travers*, stated ante, note 939, p. 1364, et seq.; per Hobart, C. J., Hob. 171; *Jackson, ex dem. Van Vechten v. Sill*, 11 John. Rep. 218, 219, 220, per Thompson, C. J. Per Weston, J. in *Wing v. Burgis*, 1 Shepley's Rep. 114; and per Wilde, J. in *Hall v. Leonard*, 1 Pick. 31. And see post, note 942, where many cases will be found, all agreeing that, to a just application of the maxim in question, a sufficient description in the instrument, after rejecting the *falsa demonstratio*, is requisite. In *Andrews v.*

Dobson, 1 Cox, 425, a legacy of £500 was given to James, son of Thomas Andrews, of Eastcheap, printer. There was no person of the name of Thomas Andrews in Eastcheap, but there was James Andrews, a printer, who lived there; he had one son named Thomas by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The plaintiff in this cause was the son by the first wife, who claimed the legacy, insisting that the testator meant "Thomas the son of James," instead of "James the son of Thomas;" and prayed some inquiry respecting these circumstances. But his Honor, Sir Lloyd Kenyon, said that, "though there were cases in which legacies were left to persons by nick-names, and evidence had been admitted to show that the testator usually called them thereby, yet he thought this (the present case) was beyond all precedent, and dismissed the bill." Where a patent was to *George Houseman*, and it appeared there was such a person who served in the *New-York line*, the patent moreover containing no further designation, and no reference to military services; held, not admissible to prove that the name of *George Homer*, a soldier in the *New-York line*, was intended, and that by mistake *George Houseman* was inserted. (Jackson, ex dem. Houseman, v. Hart, 12 John. Rep. 77.) See Jackson, ex dem. Mancius v. Lawton, 10 id. 23.

The defendant in ejectment, however, may always prove that the patentee named in the patent upon which the plaintiff relies, is a different person from the one under whom the plaintiff claims, though bearing the same name. And where the plaintiff introduced and claimed under a patent issued pursuant to an act recited in it, appropriating certain lands as military bounty lands, and the plaintiff proved that a man bearing the name of the patentee resided at Rhinebeck, but it clearly appeared by proof on the part of the defendant that the person at Rhinebeck had not been a soldier, held, that the plaintiff could not recover; and this, though no other person of the name of the patentee was shown to have existed otherwise than by the patent itself, except one who was too young to have been a soldier, or to be the person described. (Jackson, ex dem. Shultze, v. Goes, 13 John. Rep. 518.) See Jackson, ex dem. Woodruff, v. Cody, 9 Cowen's Rep. 140.

It will be seen that several of the above cases present instances where two persons appeared as claimants, one bearing the name but not answering to the rest of the description, and the other exhibiting a complete correspondence as to every part of the description except the name. Such were the cases of *Smith v. Smith*, 1 Edw. Ch. Rep. 199, and *Vernor v. Henry*, 3 Watts' Rep. 385, both stated supra, p. 1369. *Thomas v. Thomas*, 6 T. R. 671, stated in the text, p. 536, 7, seems to belong to the same class. (See Wigram on Extr. Ev. 84.) In these cases, though the words of the instrument do not ascertain which of the two was meant, they describe both. The extrinsic evidence is admitted to confine the language within one of its natural meanings. The court merely rejects; and the intention which it ascribes to the party who made the instrument, remains in it. If after going to the ultimate limit of extrinsic enquiry, it is still left uncertain which person was meant, the instrument will, so far at all events, be declared void. (See *Thomas v. Thomas*, supra; per McCoun, vice chancellor, in *Smith v. Smith*, 1 Edw. Ch. Rep. 192; per Gibson, C. J. in *Vernor v. Henry*, 3 Watts' Rep. 393.) See as to cases of lands equally within different parts of the description, post, note 942. As to the nature of the proof, it seems that the same

rule applies which obtains where the *entire* description indifferently embraces more persons or subjects than one. (See ante, note 939, p. 1362, et seq.; also *Smith v. Smith*, 1 Edw. Ch. Rep. 189; *Vernor v. Henry*, 3 Watts' Rep. 385; *Wigram on Extr. Ev.* 78, et seq.)

There is no universal rule determining absolutely as between the designation by name, and the additional particulars of description, which shall yield, where two persons are shown to exist, answering respectively, one to the former part of the description, and the other to the latter. Lord Bacon has some curious observations to show, that in the absence of the donee, a designation of him by name is the more worthy in certainty; whence a legal presumption of fact arises in case of a discrepancy, that the falsity is not in the name, but in the added particulars. (Bacon's *Maxims*, Reg. 25. Per Gibson, C. J. in *Vernor v. Henry*, 3 Watts' Rep. 393.) But suppose a person corresponding with the description in every particular, except the name, should appear; then, in the absence of any person bearing the name, the presumption would be that the mistake lay in the designation by name. And where both appear, the name, or the other part of the description, may prevail, according as the extrinsic circumstances shall show the mistake to be in the one or the other. (*Vernon v. Henry*, 3 Watts' R. 392, 3, 4. *Smith v. Smith*, 1 Edw. Ch. Rep. 189, et seq.)

In respect to the case mentioned in *Andrews v. Dobson*, supra, of a nickname or other reputed designation, the principle upon which parol evidence is admitted seems identical with that which allows an enquiry into the circumstances surrounding the maker of the instrument with a view to a right interpretation and application of the language which he has used. It is consistent with the office of exposition in the strictest sense; and though declarations of the party, &c. are freely admitted, they are not allowed to prove intention as an independent fact, but merely to explain and evolve the meaning of a description, *prima facie* obscure, but certain enough when construed in reference to extrinsic circumstances. No intention, save one sufficiently expressed, is, in such cases, allowed to be proved. (See *Parsons v. Parsons*, 1 Ves. jun. 266; *Powell v. Biddle*, 2 Dall. 70; *Edge v. Salisbury*, Ambl. 70; *Dowsett v. Sweet*, id. 175; *Baylis v. The Attorney General*, 2 Atk. 239; *Maybank v. Brooks*, 1 Bro. C. C. 84; *Goodinge v. Goodinge*, 1 Ves. sen. 230; *Rivers' case*, 1 Atk. 410; *Crounden v. Clerke*, Hob. 32. See per Gibson, C. J. in *Commercial Bank v. Clapier*, 3 Rawle's Rep. 339.) Upon the like principle and evidence, a call in an instrument for Clough Overton's survey, may be shown to have been intended for the survey of another person, but that, at the time, it was known as the survey of Clough Overton. (See *Seay's heirs v. Walton's devisee*, 5 Monroe, 368, 9.) Where land was conveyed to *Eliza Ann Castin*, which was the name of *Eliza Ann Scanlan* before her marriage, parol evidence was held admissible to show that the person bearing the latter name was the one intended, that the grantor knew her before her marriage, but was not aware of the fact of her marriage, and that there was no other person of the name used in the deed. (*Scanlan v. Wright*, 13 Pick. 523.) The court regarded this as the common case of a person known by different names. (Id. 530.) It has been said that if a bond be to A. B. instead of C. D., the latter may sue upon it, alleging and proving that it was given to him by the name of A. B. (Per Taylor, J. in *Thompson v. Gray*, 2 Stewart & Porter, 65.) But *quere*; unless C. D. was known by the name of A. B. also, or

there was some additional description beyond the name, by which C. D. could be identified.

The reader's attention should here be recalled to *Beaumont v. Fell*, cited in the text, and *Thomas v. Stevens*, stated at the commencement of this note. It is obviously impossible to bring those cases within the range of any principle judicially sanctioned by other decisions. They are directly at variance with all that numerous host of authorities which declare, that a will to be valid must express the intent of the testator; and that if such intent be not expressed the will must be adjudged void. This rule, which necessarily confines the office of extrinsic evidence to an exposition of the meaning of the language in the instrument, with the single exception of descriptions equally applicable to more than one person or thing, has been recognized and acted upon so often as to have acquired the force and familiarity of an axiom. (See the cases post, note 948.) In *Beaumont v. Fell* and *Thomas v. Stevens*, however, not only was the intent judicially ascribed to the testator unexpressed, but a contrary intent was manifested.

Upon the like reason these cases must be set down as incapable of being sustained, consistent with the doctrine of inaccurate description; for nothing, as we have seen, is clearer, than that the authorities relating to the rule, *falsa demonstratio non nocet* require, as a condition to its application, that after rejecting the erroneous part of the description, *a sufficient indication of the intention shall remain on the face of the instrument*, &c. (See the cases, *supra*, relating to inaccurate description; also those post, note 942; and the judgment in *Miller v. Travers*, ante, note 939, p. 1364 et seq.) But in *Beaumont v. Fell*, and *Thomas v. Stevens*, the entire description was false, and after rejecting it no expression of intent was left. In the former, the master of the rolls expressly conceded that there was *no addition of certainty* to help the case. (2 P. Wms. 142.)

It will be seen, post, p. 539 of the text, that in the case of a will, evidence is inadmissible to supply a total blank left for the devisee's name. Suppose the omission to insert a name, actually selected by the testator, happened through mistake, and that this could be clearly proved; would the court be going further in treating the name as inserted, than was done in *Beaumont v. Fell*, and *Thomas v. Stevens*, where one name was substituted for another? The real legatees were no more in the respective wills in the latter cases than in the former. "It would be thought strange advice to be given to professional gentlemen, that if, in preparing a will they should forget the name of a legatee, they should insert *any* name, rather than leave a blank for the right one." The mere circumstance that the mistake, in the case of a blank, is *patent*, and in *Beaumont v. Fell* and *Thomas v. Stevens* the difficulty was *latent*, will scarcely satisfy the enquirer who looks beyond the letter of a technical rule. (Wigram on Extr. Ev. 98, 9.)

What is there to distinguish *Beaumont v. Fell* and *Thomas v. Stevens*, from the case of *Miller v. Travers*, stated ante, note 939, p. 1364? In the former, the testator in every particular misdescribed the legatee intended; while in *Miller v. Travers* he misdescribed the estate intended. And if, as seems to be the rule, there is no difference between a misdescription of the *person who is to take*, and a misdescription of the *thing devised or bequeathed*, (*Tudor v. Terrell*, 2 Dana, 47, 50,) all the arguments in the judgment of *Miller v. Travers* seem to bear with resistless force against the cases under consideration. (See also the judgment of Thompson, C. J. in *Johnson v. Johnson*,

Van Vechten, v. Sill, 11 John. Rep. 218, 219.) It is true the case of Beaumont v. Fell proceeds upon an assumed distinction between a grant, or a devise of lands, and a legacy. The master of the rolls, in giving judgment, expressly said—"if this had been a grant, nay had it been a devise of land, it had been void by reason of the mistake both of the christian and surname;" and again, "By the common law, as well as by the statute, a devise of land ought to be in writing, and there would have been no writing to entitle Gertrude Yardley, had this been a devise of land; but this being a bequest of a personal thing," &c. made it, he said, "a different case, and as originally a bequest of a legacy was governed by and construed according to the rules of the civil canon law, so shall it be after making the statute of frauds, provided there be a will in writing." (2 P. Wms. 140.) This distinction, however, seems to be repudiated. (Wigram on Extr. Ev. 92, 3, et seq. 1 Story's Eq. 190, 1, and notes (1) and (2).) See also post, p. 548 of the text. It is however worthy of remark, as showing how far learned judges have suffered themselves to be misled by Beaumont v. Fell, that Lord Kenyon and Sir James Mansfield both cited it as applicable to devises of lands, notwithstanding the distinct concession of the master of the rolls, as above, to the contrary. (See per Lord Kenyon in Thomas v. Thomas, 6 T. R. 617; and per Sir James Mansfield in Doe, ex dem. Chichester, v. Oxenden, 3 Taunt. 156.)

On the whole, it seems, from the entire course of recent adjudication in England, that Beaumont v. Fell is treated there as anomalous, and opposed to sound principle. (See Wigram on Extr. Ev. 2d ed. and the observations there made in respect to this case.) The case of Thomas v. Stevens, we apprehend, will hardly be able to exempt itself from a similar fate.

NOTE 941—p. 533.

The case of Selwood v. Mildmay, stated in the text, seems referrible to the head of inaccurate description, but it is certainly an extreme one. (See what is said of it in Miller v. Travers, ante, note 939, p. 1366, 7.) The stock described in the will was "stock in the four per cent annuities of the Bank of England;" this the testator, at the time of making his will, had sold out, and he then owned no four per cent stock whatever; but the proceeds of his four per cent stock he had invested in *long annuities*, and the court allowed evidence to apply the description in the will so as to carry the latter. It is difficult to see in what point any correspondence existed between the description and the subject intended. (See Wigram on Extr. Ev. 79, 80.) The principle upon which Selwood v. Mildmay proceeded, therefore, however correct in itself, was altogether misapplied, and the case seems one which ought not to be followed in specie. (Id. 123, 4.)

NOTE 942—p. 533.

The case of Goodtitle, dem. Radford, v. Southern, stated in the text, seems fairly within the principle of inaccurate description. A just construction of the will seemed to require, that the words referring to the occupation of the farm should not control the

former part of the description, "*all that my farm called Trogue's farm.*" And these constituted a sufficient description, after rejecting the *falsa demonstratio*. (See Miller v. Travers. ante, note 939, p. 1364, et seq.)

The case of Day v. Trigg, 1 P. Wms. 286, ranges itself precisely within the same class. (See id. p. 1367.)

In a recent case there was a lease of "all that part of the park called or known by the name of Blenheim, or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of one R. S., lying in a direct line across the said park from the gate erected, &c. (setting out the abutments,) together with the farm houses, &c. belonging or appertaining to the said premises, and which are now in the occupation of the said R. S." It was held, that the land passed under the lease which was comprised within the description by the abutments, though not in the occupation of R. S. (Doe, ex dem. Smith, v. Galloway, 5 Barn. & Adol. 43.) Further as to the English doctrine of inaccurate description, see, 2 Roll. Abr. 52, tit. Grant, P. 14; Vin. Abr. 87, Grant, Q.; Doddington's case, 2 Coke's Rep. 33; Door v. Geary, 1 Ves. sen. 216; Hampshire v. Pierce, 2 id. 216; Dobson v. Waterman, 3 Ves. 303; Druce v. Davison, 6 Ves. 82; Penticost v. Lee, 2 Jac. & Walk. 207; Evans v. Tripp, 6 Mad. 91; Doe, ex dem. Gore, v. Langton, 2 Barn. & Adol. 680.

The American cases abound with illustrations in respect to the doctrine of inaccurate description of lands. If one grant his house in A., which formerly belonged to B., and it turns out that the grantor had at the time but one house in A., it shall pass, though it never belonged to B. (Den, ex dem. Proctor, v. Pool, 4 Dev. Rep. 374.) If one grant Whiteacre by name, and adds by way of further description that it descended from his father; Whiteacre shall pass, though it descended from the mother; because it was sufficiently identified before. (Den, ex dem. Riddick, v. Leggat, 3 Murph. Rep. 543. Den, ex dem. Proctor, v. Pool, supra.) If a deed call for land lying in the county of C., describing it by courses, distances and monuments, and it turns out that the lands lie in another county, that part of the description may be rejected and the rest take effect. (Boardman v. Reed's lessees, 6 Peters' Rep. 344, 5. Barclay v. Howell's lessee, id. 511. Stringer v. Young's lessee, 3 id. 320, 344.) Where the premises were described by a number, and then monuments, courses and distances, were given; it appearing that at the time, the grantor owned no lot of that number, but owned another lot, falling exactly within the other parts of the description; held, that the number in the description should be rejected as *falsa demonstratio*, and effect be given to the residue. (Jackson, ex dem. McNaughton, v. Loomis, 18 John. Rep. 81. See S. C. on error, 19 id. 449.) So, on the other hand, it appearing that the grantor did not own the land comprised within the description by monuments, courses and distances, but did own lands corresponding with the number, held that the latter should pass. (Lush v. Druse, 4 Wendell, 313. Jackson, ex dem. Smith, v. Marsh, 6 Cowen's Rep. 251.) Where land was described as lying on Cedar creek, waters of Broad river, and monuments &c. were added by way of further description; it appearing that no such land could be found on the river named, held that effect should be given to the remainder of the description, and it might be shown that the land lay on Catawba river. (See Middleton v. Perry, 2 Bay's Rep. 541, in connection with what is said of it, 1 Nott & McCord's Rep. 261, 2. See also Chapman v. Doe, 2 Leigh. 329.) Where land, set off on a levy, was described as part of lot No. 3, in a

designated range, and as being *in the southeast corner of that part of the lot which the judgment debtor bought of Harvey Wait*, to which a further description was added designating the land intended by courses, distances and monuments; it appearing that the debtor had purchased no land of Harvey Wait, but that he owned land agreeing with the description in other particulars; held, that the above words in italics might be rejected as *falsa demonstratio*, and the rest of the description take effect. (*Wing v. Burgis*, 1 Shepley's Rep. 111.) A testator devised "my whole share of all the lands I own which lies along Schoharie creek, which is connected with or belonging to the old farm, and known by the name of Ten Eyck's patent;" held, that a farm of the testator lying along the creek mentioned, but not known as Ten Eyck's patent, would pass. (*Doe v. Roe*, 1 Wendell, 541.) Many other cases have held, that where the subject matter of a deed of land can be identified by its name, and other calls in the instrument, the addition of false particulars, by way of further description, will not avoid the conveyance, but must be rejected as having been inserted through misapprehension or inadvertence. (See *Den, ex dem. Belk. v. Love*, 1 Dev. & Batt. 65. *Den, ex dem. Riddick, v. Leggatt*, 3 Murph. Rep. 539. And see the cases *infra*.)

In the application of this doctrine to instances *where a subject matter is found*, which may satisfy either part of a repugnant or contradictory description, but not the whole, that part of the description, which, according to settled principles of construction, is presumed to express with most certainty the intention of the parties, shall prevail over others of less importance. Accordingly, where a deed of lands describes the subject matter by monuments clearly identified, such as a river, a spring, a stream, a mountain, a marked tree, or other natural object; and courses, distances and quantity, are likewise inserted, which disagree with the monuments, the description by monuments shall, in general, prevail. For it is more likely that a party purchasing or selling land should make mistakes in respect to course, distance or quantity, than in respect to visible objects; which latter, from being mentioned in the deed, are presumed to have been examined at the time. (*Pernam v. Weed*, 6 Mass. Rep. 131. *Howe v. Bass*, 2 id. 380. *Jackson, ex dem. Erwin, v. Moore*, 6 Cowen's Rep. 706; S. C. on error, 4 Wendell, 58. *Jackson, ex dem. Young, v. Camp*, 1 Cowen's Rep. 605. *Jackson, ex dem. Ten Eyck, v. Frost*, 5 id. 346. *Doe, ex dem. Arden, v. Thompson*, id. 371. *Jackson, ex dem. Livingston, v. Barringer*, 15 John. Rep. 471. *Mann v. Pearson*, 2 id. 40. *Jackson, ex dem. Staring, v. Defendorf*, 1 Cain. Rep. 493. *Preston's heirs v. Bowmar*, 6 Wheat. 580. *Newson v. Pryor's lessee*, 7 id. 7. *Jackson, ex dem. The People, v. Wendell*, 5 Wendell, 142. S. C. on error, 8 id. 183. *M'Iver's lessee v. Walker*, 4 Wheat. 444. *Dogan v. Seekright*, 4 Hen. & Munf. 125. *Jackson, ex dem. Craigie, v. Wilkinson*, 17 John. Rep. 147. — *v. Beatty*, 1 Hayw. Rep. 376. *Jackson, ex dem. Havens, v. Sprague*, 1 Paine's Rep. 494. *Worthington v. Hylyer*, 4 Mass. Rep. 205. *Francis v. Hazlerig's Ex'rs*, 1 Marsh. Keo. Rep. 96. *Lawless v. Jones*, id. 16. *Wishart v. Cosby*, id. 382. *Helm v. Small*, Hard. Rep. 369. *Baker v. Seekright*, 1 Hen. & Munf. 177. *White v. Egan*, 1 Bay's Rep. 247. *Herbert v. Wise*, 3 Call's Rep. 209. *Marshall v. Currie*, 4 Cranch, 172. *Jackson, ex dem. Rogers, v. Gardinier*, 7 John. Rep. 217. *Thompson v. Gray*, 2 Stew & Porter, 60. *Wing v. Burgis*, 1 Shepley's Rep. 111. *Vose v. Handy*, 2 Greel. Rep. 322. *Alshire's lessee v. Hulse*, 1 Wright's Rep. 171. *Chinoweth v. Haskell's lessee*, 3 Peters' Rep. 96. *Den, ex dem. Reed, v. Schenck*, 2

Dev. Rep. 415. *Tymason v. Bates*, 14 Wendell, 671, 675, 6, 7, et seq. *Jackson, ex dem. Ellice, v. Britton*, 4 Wendell, 507. *Barclay v. Howell's lessee*, 6 Peters' Rep. 493, 510, 511. *Boardman v. Reed's lessee*, id. 323. *Jackson, ex dem. Sufferin, v. McConnell*, 19 id. 175.) Where land is designated by a name, as *Quicksale*, and then a description by metes and bounds is added, which includes more than Quicksale, the latter description shall prevail over the former. (See *Mundell v. Hugh*, 2 Gill & John. 206. *Hawkins v. Hanson*, 1 Harr. & McHen. 523. *Hall v. Gettings*, 2 Harr. & John. 112.) The monuments which shall control course, distance, &c. under such circumstances, may be any objects which are visible, fixed, and clearly ascertained; as the lands of other individuals, or their corners. (*Howe v. Bass*, 2 Mass. Rep. 330. *Pernam v. Wead*, 6 id. 191. *Wendell v. Jackson, ex dem. The People*, 8 Wendell, 190.) A *clearing* is within the rule. (*Jackson, ex dem. Butler, v. Widger*, 7 Cowen's Rep. 723. See *Wendell v. Jackson, ex dem. The People*, 8 Wendell, 190; *Tymason v. Bates*, 14 id. 690.) So is a *stake*, a *post*, a *stone*, &c. (*Jackson, ex dem. Roberts, v. Ives*, 9 Cowen's Rep. 661. *Alshire v. Hulse*, 1 Wright's Rep. 172. *Jackson, ex dem. The People, v. Wendell*, 5 Wend. 142, 146. S. C. on error, 8 id. 183.) A *highway*, also. (*Rich v. Rich*, 16 Wend. 663.) Where a grant describes a line as running on a designated course, from an ascertained point, "up and along a certain stream;" the line must follow the stream, though that involve a departure from the course called for. (*Jackson, ex dem. Ten Eyck, v. Frost*, 5 Cowen's Rep. 346.) And where a deed describes a line as running *across a river*, or *stoping at a river*, you must go across the river in the first case, and stop at it in the other, notwithstanding the course, distance, and quantity, designated in other parts of the description, may not correspond with such running. (*Newsom v. Pryor*, 7 Wheat. Rep. 7.) Where a line was described as running from one land-mark to another, and the description referred to no intermediate monument, nor any bevel or curve line; held, that the line must be run straight between the designated *termini*, without regard to either course or distance. (*Dogan v. Seekright*, 4 Hen. & Munf. 125. *Allen v. Kingsbury*, 16 Pick. 235.)

The monuments which are to exert this controlling influence over course, distance, &c., where land is found, which may answer either part of the description, must, in general, be *called for* by the instrument. (Per Walworth, Chancellor, in *Tymason v. Bates*, 14 Wend. 671, 680. *Reed v. Shenck*, 2 Dev. Rep. 415. See *Boardman v. Reed's lessees*, 6 Peters' Rep. 341, 2.) Some cases, however, especially in North Carolina, have gone further; holding, that where a deed describes the land by courses and distances only, and old marks are found on the ground, corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly agreeing with the courses and distances, that they may be well supposed to have been made for its boundaries, the marks shall be taken as the *termini* of the land. (Per Henderson, C. J. in *Reed v. Shenck*, 2 Dev. Rep. 417. — *v. Beatty*, 1 Hayw. Rep. 376, 7. See *Baker v. Seekright*, 1 Hen. & Munf. 177.) But these decisions have been regretted, and are difficult to be maintained. Where a subject matter is found, answering the description by courses and distances, and there is nothing in the deed from which a different intent can be inferred, than that so expressed, upon what principle can the description be limited by matters *aliunde*, and in respect to which the deed is silent? To *extend* the operation of the deed in such case, so as to embrace lands not within

the courses and distances, seems still more anomalous and objectionable. "For what passes the land not included by the description in the deed, but included by the marked *termini*? Not the deed; for the description contained in the deed does not comprehend it. It passes, therefore, by parol, or by a mere presumption." (Per Henderson, C. J. in *Reed v. Shenck*, 2 Dev. Rep. 417.) In *Jackson, ex dem. Livingston, v. Freer*, 17 John. Rep. 29, the parties were held to be governed by the lines actually run, and marked on the ground; but there, the description was by reference to a map on file, which the court deemed a virtual reference to the field book, or original survey, accompanying the map. The case, therefore, proceeded on the principle that the lines marked on the ground, were in effect, called for by the patent, and hence should control the course and distance mentioned in the map. (See also per Cowen, J. in *Rich v. Rich*, 16 Wend. 677. *Mclver's lessee v. Walker*, 4 Wheat. Rep. 444. But see *Jackson, ex dem. Overacker, v. Cole*, 16 John. Rep. 256.) In *Mclver's lessee v. Walker*, 4 Wheat. 445, 447, 8, *supra*, the proposition seems to have been distinctly recognized, that if there is nothing in the deed to control the call for course and distance, the land must be located by the courses and distances, according to the magnetic meridian.

So where there is a call for monuments, which are so defectively described, as to be incapable of being identified; e. g. a beech tree without any mark, standing among a number of trees of the same genus. (See *Greenup v. Lyne's heirs*, 2 Bibb's Rep. 369. *Chinoweth v. Haskell's lessee*, 3 Peters' Rep. 96. *Alshire v. Hulse*, 1 Wright's Rep. 171.)

So, of course, if the monuments called for, though sufficiently described, are gone, and their original location cannot be ascertained. (*Gymason v. Bates*, 14 Wend. 677, per Walworth, Chancellor. *Linscott v. Fernald*, 5 Greenl. Rep. 503. *Jackson, ex dem. Ellice, v. Britton*, 4 Wend. 507. *Alshire v. Hulse*, 1 Wright's Rep. 171.) In respect to hearsy and declarations in ascertaining the position of ancient monuments, &c., see ante, note 477, p. 628.

Where the disagreement is between course and distance, merely, it seems there is no rule which determines which shall yield. The one or the other may be preferred according to circumstances. (*Preston's heirs v. Bowmar*, 6 Wheat. 550.) And, *semble*, that in such a case, the equity of a party in possession, claiming under a title good in itself, is such a circumstance as should determine the question. (*Id.*)

Quantity must generally yield to course and distance; the latter being esteemed the most certain in the absence of other calls. (See *Jackson, ex dem. Havens, v. Sprague*, 1 Paine's Rep. 494, 497. *Jackson, ex dem. Livingston, v. Barringer*, 15 John. Rep. 472. *Powell v. Clark*, 5 Mass. Rep. 355. *Jackson, ex dem. Putnam, v. Bowen*, 1 Cain. Rep. 358.) If a grant be to S. S. of *one thousand acres, and no more*, describing it by certain lines which include two thousand acres, the two thousand acres shall pass; and quantity, it has been said, is in no way material, except where the boundaries are doubtful; and then it comes in with more or less force, according to the features of the particular case. (*Den, ex dem. Riddick, v. Leggit*, 3 Murph. Rep. 539.) See *Jackson, ex dem. Suffern, v. McConnell*, 19 Wend. 175. Where the distance given was *six chains or thereabouts*, and the quantity definite; held, that the latter should govern, as being under the circumstances most certainly indicative of the intent. (*Jackson, ex dem. Zimmerman, v. Zimmerman*, 2 Cain. Rep. 146.) Quantity may be a circumstance of decisive importance in a description, though it is not often

so. "If one own two lots in a town, one of half an acre, and the other of an acre, and grant his *acre lot*, or his lot *containing one acre*; in the absence of a more certain description, the deed shall not be void, but will pass the larger lot, although it may upon a measurement be a few feet over or under an acre; for the purpose was not to denote how much, but which parcel was meant." (Per Ruffin, C. J. in *Den, ex dem. Proctor, v. Pool*, 4 Dev. 374.)

The cases above cited will, in the main, be found to range themselves under the head of inaccurate description. On applying the instrument, it is discovered that all the calls or descriptive terms cannot be satisfied; and there being enough in the other part or parts of the description to ascertain the subject matter intended, the *falsa demonstratio* is rejected as surplusage, and the remainder of the description takes effect. This doctrine, we have seen, has been acted upon by the American courts in reference to two classes of cases. 1st. Where no subject matter can be found, corresponding with one part of the description. 2d. Where a subject matter is proved to exist, which might satisfy either part of the description taken separately, but from the fact of such parts being incongruous, both cannot take effect; in which instance the most certain part is preferred, and the other rejected, as having been inserted through misapprehension or mistake.

With regard to evidence of intention, the rule seems to be the same in both classes of cases. They are not to be confounded with instances where the description is found indifferently or *equally* applicable to more than one object or subject; for there, the enquiry is, what did the party *intend to express*? (See ante, note 939, p. 1362.) But in cases falling within the maxim, *falsa demonstratio non nocet*, the enquiry is restricted to the meaning of the terms used, and to the intent which the *language of the instrument expresses*. (See Wigram on Extr. Ev. 39, et seq. Id. 130, 1, 2, 3, et seq. Id. 137, 8. And see *Doe v. Roe*, 1 Wend. 541.) Where there is a description by monuments, and also by courses and distances, and on looking out of the deed, the two parts of the description are found to be repugnant, evidence of an intent that the most material and certain part should yield to the other, is not admissible. (See *Howe v. Bass*, 2 Mass. Rep. 390. *Allen v. Kingsbury*, 16 Pick. 235. *Dogan v. Seekright*, 4 Hen. & Munf. 125. *Reed v. Shenck*, 2 Dev. Rep. 415.)

In some cases, it has been said, it is clear, that "only that thing is meant in which all the particulars of the description concur." (Per Ruffin, C. J. in *Den, ex dem. Proctor, v. Pool*, 4 Dev. Rep. 373.) Where all the particulars are necessary to identify the thing described, evidence of an intent to embrace a subject matter not answering every part of the description, is inadmissible. (Id.; and see per Walworth, Chancellor, in *Wendell v. Jackson, ex dem. The People*, 8 Wend. 189. See a note containing the English doctrine in an extract from Preston on Abstracts, 6 Cowen's Rep. 720; also *Worthington v. Hylyer*, 4 Mass. Rep. 205, per Parsons, C. J.; per Spencer, J. in *Jackson, ex dem. Rogers, v. Clark*, 7 John. Rep. 224. *Den, ex dem. Riddick, v. Leggat*, 3 Munph. Rep. 539.)

In other cases, the description being by several particulars of *equal* importance, distinct things are found, of which one answers to one description, and another to the other, but neither answers to the entire description. Under such circumstances, it has been said, the conveyance would be inoperative, because it was intended to pass but one, and it cannot be determined which part of the description should be

rejected as surplusage. (Per Ruffin, C. J. in *Den, ex dem. Proctor, v. Leggat*, 3 Murph. Rep. 373.) But see per Parsons, C. J. in *Worthington v. Hylyer*, 4 Mass. Rep. 206, who says that both shall pass, rather than the conveyance be defeated. And quere, whether cases of this sort are not within the rule, stated ante, note 939, p. 1362, allowing extrinsic and direct evidence of intention, where two objects or subjects are equally within the entire description. Several decisions certainly have gone very far toward answering this question in the affirmative. (See Wigram on Extr. Ev. 78, et seq. *Thomas v. Thomas*, 6 T. R. 671, stated post, p. 536, 7, of the text. *Vernor v. Henry*, 3 Watts' Rep. 385, 391, 2, 3. *Doe v. Roe*, 1 Wend. 541. *Smith v. Smith*, 1 Edw. Ch. Rep. 189; S. C. 4 Paige, 271. *Barclay v. Howell's lessee*, 6 Peters' Rep. 498, 510, 511.)

As to evidence of intention, generally, and in respect to instances where a deed or other writing shall be deemed void for uncertainty, see post, note 948.

NOTE 943—p. 533.

It has been already stated in the preceding notes, that a description in an instrument may be sufficient, though it is in some respects erroneous; and it is to such cases only, it should seem, that the reason given in the text for admitting parol evidence (namely, that without it the instrument could not take effect,) is applicable; this reason not meaning that a description sufficient to apply the instrument can be dispensed with, but restricting the operation of the maxim, *falsa demonstratio non nocet*, to instances in which an entire agreement between the description, and its subject or object, does not exist, and thus evolving the rule in the words of the maxim *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*. Bacon's Maxims, Reg. 13. (2 Phil. Ev. 743, note (2), 8th ed.)

NOTE 944—p. 534.

The rule of Lord Bacon is, "that if there be some land, wherein all the demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are found to agree." (Per Parke, J. in *Doe, ex dem. Ashforth, v. Bower*, 3 Barn. & Adol. 459.) "If a testator devises property by a description which completely tallies with it, you are not at liberty to say that some property other than that with which the description tallies passed by the devise." (Per Sir Launcelot Shadwell, in *Newton v. Lucas*, 6 Sim. 60. See also *Doe, ex dem. Preedy, v. Holtom*, 4 Adol. & Ellis, 81.) This doctrine was very fully considered in *Jackson, ex dem. Van Vechten, v. Sill*, 11 John. Rep. 201. There, a testator devised to his wife *the farm he then occupied*, &c.; and it appearing that the testator owned and occupied a farm at the date of the will corresponding with the description, held, that oral evidence of an intent to devise to his wife another farm, in addition to the one he occupied, which other farm was, at the time the will was drawn, in the tenure of B., under a seven year lease from the testator, could not be received. (See post, note 960.)

Where lands in a deed were described as those deeded to the grantor by W. and also by reference to the record of W.'s deed; and this description applied to a five acre lot of the grantor; held, that parol evidence to show that a forty acre lot was intended, which the grantor owned in the same place, but which was deeded to him by W. and wife in a deed other than the one so referred to, was inadmissible. (*Bell v. Morae*, 6 N. Hamp. Rep. 205.)

Upon the same principle, that which, under all the circumstances, *most nearly* agrees with the description, shall be taken to have been meant, and no parol evidence contradicting such inference, or showing a different intention, can be received. (2 Phil. Ev. 743, 8th ed.) This would seem to be the result of a majority of the cases in respect to inaccurate description, ante, notes 940, 942. And see the cases post, notes 948, and 960, 961.

NOTE 945—p. 536.

See the judgment in *Miller v. Travers*, ante, note 939, p. 1567, 8.

NOTE 946—p. 537.

See ante, note 940, p. 1373, and the cases there cited as belonging to the same class with *Thomas v. Thomas*.

NOTE 947—p. 538.

To constitute a case of election, in the instance of a devise or bequest, it is necessary that the context of the will show that the testator intended to give the devisee or legatee the right of election. So of a gift, grant, &c. In the case put in Co. Litt. 145, a., where a gift is made of one of the donor's horses in his stable, it is manifest that the donor intends the donee should select. So in the case put in Bacon's Maxims, of the grant of ten acres of wood, in a place where the grantor has 100. (Per Denman, C. J. in *Richardson v. Watson*, 4 Barn. & Adol. 787; S. C. 1 Nev. & Mann. 567. Per Kennedy, J. in *Krider v. Lafferty*, 1 Whart. Rep. 317. See also ante, note 938, p. 1560, and the case of *Huntt v. Gist*, there cited.)

Upon an assumed analogy with the principle of the above doctrine, an ancient deed of "a certain piece of meadow ground containing one acre," was held capable of ascertainment by the subsequent acts of the parties, they having gone on and located under it. (*Krider v. Lafferty*, 1 Whart. Rep. 303, 317.) See, in connection with this case, those stated post, note 954.

NOTE 948—p. 538.

The cases in the text relating to wills from p. 538 to 540, are mostly instances where the testator has failed to express any certain intent; in other words, where the frame of the will is such as to leave the intention of the testator wholly conjectural.

That such a defect exists, may be obvious from the very face of the will; (see ante, note 938, p. 1360;) as where there is an omission of the devisee's name, and nothing in any other part of the will showing who was meant; (see p. 539 of the text;) so, it seems, where a devise is to *twenty of the poorest of the testator's kindred*; (ante, note 938, p. 1360;) or to *the real distressed poor of T. county*. (*Trippe v. Frazier*, 4 Harr. & John. 446.)

But instances of such extreme negligence in the framing of testamentary or other papers, will, it is hoped, rarely present themselves. It is not often that courts can pronounce, *primo intuitu*, that the language of an instrument expresses no sufficiently certain intent. Words and phrases may be even apparently insensible, and yet, when looked at in reference to the circumstances under which they were used, and all the facts to which they expressly or tacitly refer, it frequently turns out that they express a definite meaning, and are susceptible of precise application. (See post, note 957.) Hence, as we may see by the note just referred to, to ascertain whether an intent, and what kind of one, has been expressed, the law allows a resort to contemporaneous circumstances, so as to put the judge, as far as is practicable, in the place of the party executing the instrument; but if, notwithstanding all the lights to be gained in this way, the result is that the language is so loose and imperfect as not to express any definite intent, thus leaving the court to act upon conjecture merely, the instrument will be declared "void for uncertainty;" and no evidence of an intent expressed verbally, or *aliunde*, can be admitted to supply the defect.

Such is the general rule. Evidence to prove that the testator or maker of the instrument meant something which his language does not express, or that he intended to define what the instrument has left indefinite; in other words, evidence which, passing by and disregarding the written instrument, seeks to import into and engraft upon it, an intention *independent of its terms*, is not allowed. (See *Wigram on Extr. Ev.* 65, et seq.)

This general doctrine, excluding direct evidence of what the party intended, as contradistinguished from what his words express, has been recognized in various ways by many cases. In *Beaumont v. Field*, 2 Chitty's Rep. 275, lands had been granted, described as in the possession of a particular person, who had been dead some years before the making of the grant, and the jury found that the intention was to grant certain lands, but that the words were insufficient to express that intention; and held, that the verdict was right. Abbott, C. J. said, the question was not, abstractedly, what was the meaning of the grantor, but what was *his meaning by the words used*. See the observations of Wilde, J. to the same effect in *Comstock v. Van Deusen*, 5 Pick. 166.

The question of admitting direct evidence of *intention* has most frequently arisen in respect to wills. Accordingly, it has been laid down (either in *dictum* or decision) that extrinsic evidence of intention, as an independent fact, is inadmissible for the purpose of filling up a total blank in a will; (see post, p. 539 of the text, and the cases there in note (3);) or of supplying a devise or any other material provision, term or qualification, omitted by mistake; and for this purpose the clearest oral declarations of intent are inadmissible; (*Lady Newburgh's case*, 5 Madd. 364; *Anon.* 8 Vin. Abr. 188; *Rothmaler v. Myers*, 4 Dess. Eq. Rep. 190; *Iddings v. Iddings*, 7 Serg. & Rawle, 111; *Webb v. Webb*, 7 Monroe, 626, 7, 8, et seq.; *Tudor v. Terrel*, 2 Dana's Rep. 49; *Comstock v. Hadlyme*, 8 Conn. Rep. 254, 265, 6; *Reeves v. Reeves*, 1 Dev. Eq. 386;

Cesar v. Chew, 7 Gill & John. 127; *Duncan v. Duncan*, 2 Yeates' Rep. 202; *Sword v. Adams*, 3 id. 34; *Torbert v. Beulah*, 1 id. 432, 437; *Jackson, ex dem. Van Vechten, v. Sill*, 11 John. Rep. 201;) for that would be to make a will by witnesses and not by writing; (said in *Comstock v. Hadlyne*, 8 Conn. Rep. 266; *Avery v. Chappel*, 6 id. 270;) but see *Geer v. Winds*, 4 Dess. Eq. Rep. 85, where the court seem to have rectified a mistake in a will, by inserting the name of a legatee. Quere, as to this, unless the mistake be demonstrable from the structure and scope of the will; (see 1 Story's Eq. 191, 2;) though equity will in many cases interfere to correct deeds and agreements on the ground of mistake. (See *infra*.) So, declarations of the testator, and other evidence *aliunde*, are inadmissible to prove what was intended by an unmeaning or senseless word; (*Wigram on Ex. Ev.* 70, citing *Goblet v. Beechey*, reported 3 Sim. 24, but more fully stated in *Wigram*, at p. 139, et seq.;) or to show that he used words the meaning of which he did not understand; (*Reeves v. Reeves*, 1 Dev. Eq. 396;) or to prove that a thing *in substance* different from that described, was intended; (per master of the rolls in *Selwood v. Mildmay*, 3 Ves. jun. 306;) or for the purpose of changing the person described; (*Delmarc v. Rebello*, 1 Ves. jun. 412; and see the observations respecting *Beaumont v. Fell*, ante, note 940, p. 1375, 6;) or of reconciling conflicting clauses in a will; (per Lord Hardwicke in *Ulrich v. Litchfield*, 2 Atk. 372; *Field v. Eaton*, 1 Dev. Eq. Rep. 283;) or of proving to which of two antecedents a given relative was intended to refer; (*Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138; *Castledon v. Turner*, 3 Atk. 256;) or of explaining or altering the estate or interest devised; (*Cheney's case*, 5 Coke's Rep. 68; *Farrar v. Ayres*, 5 Pick. 404, 409; *Torbert v. Twining*, 1 Yeates' Rep. 432, 437;) of showing the sense in which the word "moneys" was intended to be used; (*Mann v. Mann's ex'rs*, 1 John. Ch. Rep. 231; S. C. on appeal, 14 John. Rep. 1;) or the word "relations"; (*Goodinge v. Goodinge*, 1 Ves. sen. 230; *Edge v. Salisbury*, Ambl. 70; *Green v. Howard*, 1 Bro. C. C. 31;) or what a testator meant by the word "plate"; (*Nichols v. Osborn*, 2 P. Wms. 419; *Kelly v. Powlett*, Ambl. 605;) or by the words "lands out of settlement;" (*Strode v. Russell*, 2 Vern. 621;) or that the word "heirs" was used in a sense different from its legal meaning; (*Den, ex dem. Stith's heirs, v. Barnes*, 1 N. Car. Law Repos. 491;) or that the word "close" was used as synonymous with *farm*, where from the context it appears that it was used to express an *inclosure*; (*Richardson v. Watson*, 4 Barn. & Adol. 799, per Parke, J.;) or of increasing or abridging the effect of words used; (*Torbert v. Twining*, 1 Yeates' Rep. 437;) of showing that a word was used in a secondary or popular sense, when the context, or circumstances *aliunde*, indicate that the testator used it in its primary or in a technical sense; and so *vice versa*; (see *Wigram on Ex. Ev.* 15 to 36; *Mann v. Mann's ex'rs*, 1 John. Ch. Rep. 231; S. C. on appeal, 14 John. Rep. 1;) or of controlling to any extent a technical rule of verbal construction; (per Kenyon, C. J. and Lawrence, J. in *Lane v. Earl of Stanhope*, 6 T. R. 352, 354; *Torbert v. Twining*, 1 Yeates' Rep. 437;) or of proving which of several testamentary guardians was intended to have the actual care of children; (*Storke v. Storke*, 3 P. Wms. 51; 2 Eq. Cas. Abr. pl. 13;) but see *Anon.* 2 Ves. sen. 56, which, however, seems reconcileable with the general doctrine upon the ground, that if guardians disagree, a court of equity has jurisdiction independently of the will, and then the evidence may be resorted to as a guide for the independent judgment of the court. (*Wigram on Ex. Ev.* 70, note (g).) Direct evidence of in-

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tention is inadmissible also for the purpose of proving what was to be done with the interest of a legacy till the time of payment ; (Mansel v. Price, Sugd. on Vend. 183, Am. ed. of 1836, from 9th Lond. ed. ;) or of proving that by a bequest of residue a particular sum was intended ; (Brown v. Langley, 2 Eq. Cas. Abr. 416, pl. 14 ; 8 Vin. Abr. 197, pl. 36 ; see Dyose v. Dyose, 1 P. Wms. 305, disapproved by Lord Thurlow in Fonnereau v. Poyntz, 1 Bro. C. C. 472, and by Sir W. Grant in Page v. Leapingwell, 18 Ves. 476 ; and see 1 P. Wms. 306 ;) or of proving that an executor was intended to be a trustee of residue for next of kin ; (Bishop of Cloyne v. Young, 2 Ves. sen. 95 ; White v. Williams, Coop. 58 ; Langham v. Sandford, 2 Mer. 17 ; see the last note to the present volume of the text, pl. 10 ;) or of proving that an executor was intended to take beneficially, where, upon the face of the will, it was apparent that he was intended to be a trustee ; (Langham v. Sanford, supra ; also the note above referred to, pl. 10 ;) or of proving that a portion was intended to be a satisfaction of a bequest ; (Freemantle v. Bankes, 2 Ves. 85 ; see the note above referred to, pl. 8 ;) or that a legacy in a codicil was intended to be a substitution for a legacy in the will ; (Hurst v. Beach, 5 Madd. 351 ; see the note above referred to, pl. 9 ;) or of proving that a devise to a wife was intended to be in bar of dower ; (Leake v. Randall, 1 Vin. Abr. 188, G. a pl. 3 ;) or of supplying a use or trust ; (Leake v. Randall, supra ;) or of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoperation of the personal estate ; (Bootle v. Blundell, 1 Mer. 193 ;) or of proving that the intention, in appointing a debtor to be executor, was to release the debt ; (Brown v. Selwyn, Cases Temp. Talbot, 240 ; S. C. on appeal, 2 Bro. P. C. 607 ; see Marvin v. Stone, 2 Cowen's Rep. 731 ; Winship v. Bass, 12 Mass. Rep. 201 ; Stevens v. Gaylord, 11 id. 259 ;) or of rebutting a presumption which arises from the construction of words, simply *qua* words ; (per Lord Thurlow, 2 Bro. C. C. 527 ;) or of raising a presumption ; (Rachfield v. Careless, 2 P. Wms. 157 ;) of increasing a legacy ; (per Lord Hardwicke in Goodinge v. Goodinge, 1 Ves. sen. 231 ;) or of increasing that which is defective ; (Anon. 8 Vin. Abr. 188, G. pl. 1 ;) or of adding a legacy to a will ; (Whitton v. Russell, 1 Atk. 448 ;) or of proving what interest a legatee was intended to take in a legacy ; (Lowfield v. Stoneham, 2 Strange, 1261 ;) or of ascertaining an intention which, upon the face of the will, was indeterminate ; (see the text at p. 538 to 540 ; also ante, note 938, p. 1360, 1, and supra, p. 1384 of this note ;) or of proving that words of limitation were intended to be construed as words of purchase ; (Bret v. Rigden, Plow. 340 ; and see Doe v. Kett, 4 T. R. 601 ; Maybank v. Brooks, 1 Bro. C. C. 84 ;) or of proving that executors who had acted in part and then renounced, were intended by the testator to act only to the extent to which they had acted ; (Doyle v. Blake, 2 Scho. & Lefr. 240 ;) of varying the *legal effect* of a will ; (Farrar v. Farrar, 5 Pick. 409 ; Mann v. Mann's ex'rs, 1 John. Ch. Rep. 231 ; S. C. on appeal, 14 John. Rep. 1 ; Hall v. Leonard, 1 Pick. Rep. 31, per Wilde, J. ; Cesar v. Chew, 7 Gill & Johnson, 127 ;) or generally of proving intention ; (McCay v. Hugus, 6 Watts' Rep. 345 ; Cesar v. Chew, 7 Gill & John. 127 ; Richards v. Dutch, 8 Mass. Rep. 506 ; Wigram on Ex. Ev. 73, and the authorities there cited.)

As to the meaning of the terms "*void for uncertainty*," Mr Wigram has shown how difficult it is in many cases to apply them. The class of decisions above adverted to, preclude a court from ascribing to the maker of the instrument any intention which the instrument itself does not express ; and where the meaning of the words

of an instrument has been either settled by decision, or are clear upon the face of the writing, and there is nothing in the circumstances *aliunde*, calling for a departure from their decided or apparent sense, the application must be accordingly, notwithstanding that the words may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. In these instances, exposition is safe against the inroads of *conjecture*. (Wigram on Extr. Ev. 15, 76.) But where the strict and primary sense of the words is excluded by the circumstances of the case, and it is left to the court to construe them in some popular or secondary sense; or where it is doubtful whether the words express any certain meaning; the judgment and discrimination of the court is, of necessity, brought into action, and the difficulty suggested presses with considerable force. "It is impossible, with reference to such cases, to draw any precise line, by which, in the application of extrinsic evidence to the exposition of the will, exposition is to be distinguished from conjectural interpretation. The test to be applied in each particular case is this:—Do the words of the will, when all the circumstances of the case are known, express the intention which is ascribed to the testator? The court which interprets the will must be satisfied that they do so, and no other rule can, in the abstract, be laid down.

"If it be said, that this is raising a question rather than propounding a rule—the answer to such an observation must be, that the test is as precise as the nature of the subject will admit. The master of the rolls, Lord Alvanley, in deciding on a will of doubtful construction, does not appear to have thought that a more precise test could be proposed. As to the irresistible inference, he says, I do not know what is meant by that; i admit it must be such an inference *as leaves no doubt upon the mind of the person who is to decide upon it*. It must be *irresistible to my mind*." (Id. 76, 77. *Brummel v. Prothero*, 3 Ves. 113, per Lord Alvanley.) The following cases, in addition to those referred to in the text, and *supra*, p. 1384 of this note, may be looked into as illustrating the doctrine on this subject. *Waite v. Templer*, 2 Sim. 524. *Attorney General v. Sibthorp*, 2 Russ. & Mylne, 107. *Smith v. Smith*, 4 Paige, 271, S. C. 1 Edw. Ch. R. 189. *Rothmaler's adm'x v. Myers*, 4 Dess. Eq. Rep. 215. *Simon v. Barber*, 5 Russ. 112. *Harrison v. Harrison*, Tam. 278. *Neathway v. Ham*, id. 316. See also the cases *ante*, note 938, p. 1360, 1.

In most of the above cases, and in many others decided in a similar way which will be introduced in our subsequent notes, relating to parol evidence to vary &c. written instruments, (see *post*, p. 547, et seq. of the text, and the notes,) the ostensible object of the testimony offered, was to *construe* and *apply* the terms of the writing. The rule in such cases confines the enquiry to the *meaning of the words used*; and hence, all extrinsic evidence tending to prove, not what the party *has expressed*, but what *he intended to express*, is obviously calculated to throw no light on the real matter in dispute. (See Wigram on Extr. Ev. 74. Also *ante*, notes 939, 940. 942.)

The point, therefore, as to the admissibility of evidence to prove intention, seems to resolve itself mainly into a question of relevancy. And to determine it, we must look, as in other cases, to the issue, and the purpose and object for which the testimony is offered. Where a party is allowed to show that the instrument does not truly express the intention, as in equity on relief being sought against a deed or agreement be-

cause of mistake, fraud, &c. &c., and on similar issues at law, as where fraud, illegality of consideration, &c. is set up to invalidate the instrument, proof of intention is then relevant. For in those cases one principal enquiry is, what did the party *intend to express*? Hence, declarations of the party executing, his instructions to the draftsman, and other similar evidence tending to show what the instrument was designed to be, are, in such instances, and under certain qualifications, admissible. (See post, p. 552, and 567, et seq. of the text, and the cases cited in our notes *infra*, relating to proving mistake, fraud in the execution, &c. &c.)

So in many cases where the evidence relates, not to the construction, but to the *execution* of the instrument. As where a question arises whether an instrument was in fact delivered; or if handed over to some person, whether it was delivered absolutely, or only on a condition. In these, and similar instances, the execution being mostly a matter *in pais*, oral declarations of intention connected with the delivery may come in as part of the *res gestæ*; or, as against the party claiming in virtue of it, his subsequent declarations are competent. (See *per Savâge, C. J.* in *Jackson, ex dem. Titus, v. Myers*, 11 Wend. 536. *Clark v. Gifford*, id. 310, 313. *Powers v. Russell*, 13 Pick. 69, 75. Ante, note 888, p. 1281 to 1286; also post, note 969, and note 973.)

The case of *Robertson v. Dunn*, 2 Murph. Rep. 133, seems to belong to this class. There it was doubtful from the face of a writing whether it was designed to operate as a deed of gift, or a will; and oral declarations of the maker, contemporaneous with the execution, in which she spoke of it as a "deed of gift," requested one of the witnesses to attend court and prove it that it might be recorded, &c. &c., were admitted by way of answering the allegation of its being a will. The evidence was not received for the purpose of construing the language, but simply to disprove the execution of the instrument *as a will*. In some cases of a kindred character the enquiry seems to have taken a still wider range. See *Witherspoon's heirs v. Witherspoon's ex'rs*, 2 McCord's Rep. 520; *Wigle v. Wigle*, 6 Watts' Rep. 522; *Hansborough's ex'rs v. Thom*, 3 Leigh, 147.

A like doctrine may apply in several of the United States, where it is doubtful on the face of an instrument, whether it is a deed or a simple contract; in which case the circumstances attending the execution, such as declarations accompanying the delivery, and other facts material to the intent in that particular, seem to have been held admissible. (See ante, note 884, p. 1277, et seq.)

But where the question is one of *construction* simply, evidence of declarations, &c., offered, not as ancillary to a right understanding of the words or language of the instrument, but to prove intention itself, as an independent fact, is irrelevant. Let us look at a few illustrations on this head, relating more immediately to declarations.

Nollekins, the sculptor, by a codicil to his will, desired that "all the marble in the yard, the tools in the shop, bankers, *mod*, tools for carving," &c., should be the property of the plaintiff. Parol evidence of a female servant of the testator was tendered, who was the attesting witness to the codicil in question, that, before she subscribed her name, she read over the codicil in the presence and hearing of the testator, and that when she came to the word "*mod*," she asked the testator what he meant by it, and he replied, "*models*." Sir John Leach, vice chancellor, held the testimony inadmissible, but allowed an enquiry as to the meaning of the *term itself*, from the testi-

mony of sculptors. (*Goblet v. Beechey*, Wigram on Extr. Ev. 139. S. C. less fully reported, 3 Sim. 24.)

The following case seems to have been held open to proof of intention. An indictment was for stealing a bank note, alleged as payable at the "*Mechanics' and Traders' Bank*;" the prosecutor produced a note payable at the "*Mech's and Traders' Bank*," and then proved by the cashier that *Mech's* was intended as an abbreviation of the word *Mechanics*. This testimony was held proper. The specific objection taken was, that the ambiguity was patent, and, therefore, unexplainable; but the court did not think the principle as to patent ambiguities applied to the case. "We are not," they said, "giving a construction to a contract, but proving the identity of a note described," &c. (*Hite v. The State*, 9 Yerg. Rep. 357.)

If a right of way is obscurely granted, direct evidence of the *intent*, by declarations of the parties, and their agreement which resulted in the grant, is inadmissible. (*Comstock v. Van Dusen*, 5 Pick. 166. *Osborn v. Wise*, 7 Carr. & Payne, 761. See *Wynkoop v. Burger*, 12 John. Rep. 222.)

Admissions of a party cannot be resorted to for the purpose of showing an intent additional to, or different from, the one expressed, on a question of interpretation merely. (*Hamilton v. Neel*, 7 Watts' Rep. 517.)

That direct evidence of intention as contradistinguished from evidence to show the intent expressed by the words or language of an instrument, is inadmissible, see further, *Puller's ex'rs v. Puller*, 3 Rand. Rep. 83; *Rothmaler v. Myers*, 4 Dess. Eq. Rep. 190; *Iddings v. Iddings*, 7 Ser. & Rawle, 111; *Kimball v. Morrell*, 4 Greenl. 363; *Webb v. Webb*, 7 Monroe, 627; *Comstock v. Hadlyme*, 8 Conn. Rep. 254; *Wade v. Howard*, 6 Pick. 492, 500; *Reeves v. Reeves*, 1 Dev. Eq. Rep. 386; *Cesar v. Chew*, 7 Gill & John. 127; *Webster v. Atkinson*, 4 N. Hamp. Rep. 24; *Duncan v. Duncan*, 2 Yeates' Rep. 202; *Swords v. Adams*, 3 id. 34; *Torbert v. Beulah*, 1 id. 432; *Avery v. Chappel*, 6 Conn. Rep. 270; *Field v. Field*, 1 Dev. Eq. Rep. 283; *Mann v. Mann's ex'rs*, 1 John. Ch. Rep. 231, S. C. on appeal, 14 John. Rep. 1; *Den, ex dem. Stith's heirs*, 1 N. Car. Law Repos. 491; *Torbert v. Twining*, 1 Yeates' Rep. 437; *Hall v. Leonard*, 1 Pick. Rep. 31; *Farrar v. Farrar*, 5 Pick. 409; and see other cases, *supra*, and in the notes, *infra*.

An exception, (and it seems the only one, strictly speaking,) to the general rule, excluding evidence of intention, is allowed, as we have seen, where the language of the instrument is applicable indifferently to more than one object or subject. There, the enquiry, it seems, is, which of the objects or subjects was intended by the party; in other words, which one he *meant to describe*? and then, evidence of declarations made by him, showing his intent, are admissible. (See *ante*, note 939, p. 1362, 3; also the judgment in *Miller v. Travers*, 8 Bing. 244, stated in the same note. Wigram on Extr. Ev. 118. *Osborn v. Wise*, 7 Carr. & Payne, 761. See likewise *ante*, notes 940, 942.) Where a way is granted, and there are two ways to which the description applies, evidence of declarations of the grantor is admissible to identify the one intended. (*Osborn v. Wise*, 7 Carr. & Payne, 761.) The same rule obtains where a monument in a deed is called for, and it turns out that there are two of the same kind. (See the cases *post*, note 957.) An interesting case on this subject has arisen and been decided in Massachusetts. A deed described land as bounded on a certain pond; and upon applying the deed to the local objects embraced within

its descriptive terms, it appeared that the pond was a natural pond which was raised more or less by means of a dam existing and in use at the time of the conveyance; held, that parol evidence going to show an understanding and agreement contemporaneous with the giving of the deed, that a certain bank or barrier of the pond should be the boundary of the land, was admissible. (*Waterman v. Johnson*, 13 Pick. 261.) The court, in giving their opinion, base it on the peculiar circumstances of the case. They concede that "if the description in the deed, in its natural construction or legal effect, was, to fix the limit at any particular line, as for instance, low water or high water mark, no parol agreement of the parties could restrain the operation of the deed and fix other limits. But," they add, "considering the description in its application to the subject matter, that is, a pond neither wholly natural nor wholly artificial, and that there is no settled rule of legal construction which fixes the line of such a pond, and so there is a latent ambiguity, we think it was competent for the plaintiff to show that the parties, at the time of the conveyance, intended and agreed that a certain natural bank or barrier, which answers the descriptive words, at least, as well as any other, was the monument or marginal line which they understood as the boundary of the pond." They liken it to the case where a deed is drawn, and certain monuments referred to which are not erected till afterwards, and then the parties go on and put up the monuments. (See *Makepeace v. Bancroft*, 12 Mass. Rep. 469. *Owen v. Bartholomew*, 9 Pick. 526, 7.) Such monuments will be deemed the monuments intended by the description; and yet, the putting of them up, and the consent and agreement of the parties in relation thereto, must be proved by parol. "If it is competent to show, by parol evidence, that certain monuments have been erected and fixed, at or about, or soon after the time of the execution of the deed, as and for the monuments meant and intended in the descriptive parts of a deed, *a fortiori* it is admissible to adduce similar proof, to show that certain monuments actually existing at the time, were the monuments intended, where there are two or more which equally well answer the description." (*Waterman v. Johnson*, supra.)

It seems that where a policy of insurance may equally embrace one or the other of two species of goods, the representation, or parol evidence, may be resorted to, to ascertain which was meant. (*Parks v. The General Interest Assurance Co.*, 5 Pick. 34, 37, 8.)

The foregoing are called cases of latent ambiguity; but the same doctrine applies, according to a very late English case, where two persons or things are equally within the disputed portion of the instrument, and the fact that there are two such persons *appears on the face of the instrument*. Thus, a testator by his will gave several legacies to George Gord, the son of George Gord, and to George Gord, the son of John Gord, and there was also a devise in the will to George Gord, the son of Gord. It seems, though not expressly stated in the case, that there were two persons living at the time of the making of the will, George, the son of John Gord, and George, the son of George Gord. The latter was the lessor of the plaintiff, and claimed the land in question under the devise to George Gord, the son of Gord; and "he offered evidence of declarations by the testator, shewing that he was the intended devisee." The evidence having been received, the propriety of its admission was brought before the court of exchequer, by motion for a new trial; and judgment was given that the evidence was proper. (*Doe, ex dem. Gord, v. Needs*, 2 M. & W. 129.) "The

point to be considered," said Parke, B., delivering the opinion in this case, "is, whether evidence was properly admitted, to shew what person the testator meant to designate by the description of George Gord, the son of Gord. If upon the face of the devise, it had been uncertain whether the deviser had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens* within the meaning of Lord Bacon's rule, (Maxims, 25,) which ambiguity could not be helped by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father which might have occasioned a doubt whether the testator had finally fixed on any *certain* person in his mind. The deviser has clearly selected a particular individual as the devisee. Let us then consider what would have been the case, if there had been no mention in the will of any *other* George Gord, the son of a Gord: on that supposition there is no doubt upon the authorities, but that evidence of the deviser's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the court to place itself in the situation of the deviser, and to construe his will, it would have appeared that there were, at the date of the will, *two* persons to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is he has the manors both of North S. and South S.; in which case, says Lord Bacon, "it shall be holpen by averment, whether of them was that which the party intended to pass." The learned judge then cited Altham's case, 8 Coke's Rep. 155, *a*, Counden v. Clarke, Hob. 32, and Doe, ex dem. Morgan, v. Morgan, 1 Crompt. & Meas. 235, as authorities exactly in point, and said, "the characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator, has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects, to which the description of the will applies; and to determine which of the two the deviser understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills. There would have been no doubt whatever of the admissibility of evidence of the deviser's intention, if the devise to *George Gord, the son of Gord*, had stood alone, and no mention had been made in the will, of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of *George, the son of Gord*, prevent the application of the rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect, for this purpose, than proof by extrinsic evidence of the existence of those persons, and that they were known to the deviser, would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known; and the present case really amounts to no more than this, that the person to whom the imperfect description ap-

appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which so far as it goes is perfectly correct. In the case of *Doe, ex dem. Morgan, v. Morgan*, above referred to, precisely the same circumstance occurred."

The case of *Cole v. Wendell*, 8 John. Rep. 116, seems to range along with the principle of *Doe, ex dem. Gord, v. Needs*, supra. There A. agreed in writing to receive of B. 60 shares of the stock of a certain Bank, on which ten dollars per share had been paid by B.; to deliver to B. his note for \$667; to pay him the balance in cash, and an advance of five per cent; but as it was uncertain to which of two things, sufficiently ascertained by the instrument, (viz. the nominal amount of the shares, or the sum paid on them by B.,) the provision as to the five per cent advance was applicable; held, that parol evidence of the agreement and conversation between the parties, cotemporary with the execution of the writing, was admissible to show the intent. See also *Goddard v. Charles*, 2 Nott & McCord, 45, 51, 52.

Consistently with the general rule excluding direct evidence of intention, declarations are sometimes admissible, as evincing some contemporaneous fact or circumstance, ancillary to a right understanding and application of the terms of an instrument, according to the principle of the cases post, note 957. See *Wigram on Extr. Ev.* 64, 125.) Thus, in *Goodinge v. Goodinge*, 1 Ves. 231, a testator devised a legacy to such of his nearest relations as his executors should think poor and objects of charity. Evidence was rejected of the testator's intention not to confine it to relations entitled under the statute of distributions. The Lord Chancellor (Hardwicke) said, "Although parol evidence cannot be read to prove instructions of the testator, after the will is reduced to writing, or declarations as to the persons whom he meant by the written words of a will; yet that is different from reading it to prove that the testator knew he had such relations, to establish which fact it may be read; but it cannot go any further." So as to a deed, where, in order to its just application, or the assessment of damages on a covenant contained in it, the grantee's knowledge of particular facts, contemporaneous with the giving of the deed, becomes material. "His declarations of his knowledge at the time would be the best evidence." (*Leland v. Stone*, 10 Mass. Rep. 459, 461. See what was said in *Comstock v. Van Dusen*, 5 Pick. 166. Also *Harlow v. Thomas*, 15 id. 66, stated post, note 961, and *Venable v. McDonald*, 4 Dana's Rep. 336, stated post, note 957.) On a similar principle, where, on the sale of a slave, there was a general warranty of soundness by simple contract in writing, and the vendee prosecuted for a breach, alleging a defect in one of the arms of the slave; held, that if the defect was known to the vendee at the time, the general warranty would not extend to it, and, therefore, evidence was admitted to show that the vendor told him of the defect during the negotiation, and before the sale was completed. (*Schuyler v. Russ*, 2 Cain. Rep. 202.) And in the cases where a legacy or devise has been made to a person by a nick-name, parol evidence to show that the testator usually called such person by his nick-name, is, it seems, admissible. (Per Sir Lloyd Kenyon, in *Andrews v. Dobson*, 1 Cox's C. C. 425. *Parsons v. Parsons*, 1 Ves. jun. 266. *Powell v. Biddle*, 2 Dall. 70; and see the cases in respect to nick-names, ante, note 940, p. 1374.)

Other cases allowing evidence of declarations proving or tending to prove material facts collateral to the question of intention, (*Wigram on Extr. Ev.* 15,) are not so easily discriminated from those where direct evidence of intention has been held inadmissible. Still, in principle, the distinction is broad and palpable. *Ely v. Adams*, 19 John. Rep. 313, furnishes an illustration. There, written instructions had been given by the plaintiff in an execution, to the sheriff, who had the defendant in custody, to allow the defendant "as much indulgence as he could with safety to himself, and without hazarding, in any way, the debt." The sheriff being prosecuted, a question arose as to the extent of indulgence which the officer was allowed by the writing to show the prisoner; and the court admitted evidence of the conversation which occurred at the time the instrument was drawn, not by way of proving intention directly, but for the purpose of showing facts collateral to the question of intent, and consistent with the terms of the instrument. They expressly recognized the general rule, however, as laid down by Mr. Peake, that "no evidence of an *expressed intention* can be received to explain an ambiguity on the face of the instrument, and thereby to make that valid, which, of itself, would not avail." (*Id.* 317.) In *Barringer v. Sneed*, 3 Stewart's Rep. 201, the agreement was silent as to the time of doing the act contracted for, in which case, as was held, the legal effect would be to allow a *reasonable time*. On the trial, an oral agreement, and declarations contemporaneous with the writings were offered, tending to show that the act was to be performed in *eleven days*. The court would not permit the evidence to go to the jury, otherwise than as showing what the parties considered a reasonable time. (*Id.* p. 202, 3, et seq.) Where a covenant was that a ship should take goods on board "forthwith," Lord Tenterden, C. J. ruled, that a conversation at the time about her being ready in two days, should not affect the construction; but he allowed evidence to show the known situation and circumstances of the ship when the contract was made, with a view of ascertaining what was meant by *forthwith*. (*Simpson v. Henderson*, 1 Mood. & Malk. 300.) If the conversation had tended to show the known situation of the ship at the time, it would doubtless have been allowed, as evidence collateral to the question of intent.

It is difficult to see upon what precise principle the following cases proceed, though perhaps they may stand along with those which respect declarations collateral to the question of intent; at all events they by no means infringe upon the rule which excludes direct evidence of intent, as an independent fact. In *Birch v. Depeyster*, 1 Stark. Rep. 210, the contract between the owners of a ship, and the captain, was, that the latter was to receive a specified sum "in lieu of privilege and primage;" and to show that the term *privilege* did not exclude the captain's right to the cabin, he offered a conversation between him and the owners, preliminary to the writing, in the course of which the owners expressly stated that he was to have the cabin entirely to himself. The other side objected, that only the general mercantile meaning of "privilege" was admissible—but Gibbs, C. J. said, the word was of so indeterminate a signification, that he must receive the evidence. The same case is better reported by Campbell, (4 Camp. 385,) from which it appears that in the conversation which took place contemporaneous with the contract, the captain enquired, "what privilege will you allow me?"—whereupon one of the owners answered, "we cannot allow you any privilege, but there is a large cabin, and you may make what you please of it." And Gibbs, C. J. thought, if mercantile usage could be allowed to explain what was un-

derstood by *privilege*, he might hear the construction put upon the term by the parties themselves. (Id. 388.)

In *Taylor v. Briggs*, 2 Carr. & Payne, 525, the sense of the phrase, "cotton in bales," used in a charter party, was disputed. Evidence of collateral circumstances, such as usage of trade, &c., was resorted to, and among other things, as is said in the report, "the broker, through whom the charter party was entered into, gave evidence of what was said at the time;" but Abbott, C. J. after the testimony was received, said, "I think if there be a written agreement signed by the parties, and a particular construction of it will much benefit one party and injure the other, that sort of evidence is of too dangerous a nature to be relied on; and the question I shall leave to the jury is—what was meant by the term bale?"

NOTE 949—p. 539.

See *Hall v. Leonard*, 1 Pick. 31. *Hoffman v. Porter*, 2 Brock. 158. Also ante, note 938, p. 1360; and see the next preceding note, p. 1384.

NOTE 950—p. 540.

In Massachusetts, it has been said, in a general way, that where a contract has been reduced to writing, and the name of the contracting party has been omitted, the omission may be supplied by extrinsic evidence. (Per Parker, C. J. in *Brown v. Gilman*, 13 Mass. Rep. 159.) See S. P., stated by Porter, J. in *Penniman v. Barremore*, 6 Mart. Lou. Rep. 497, who says the omission may be supplied by *parol*.

In Pennsylvania, an award was that "an order for £550 should be given on —," mentioning no name; and it was held, that the omission might be supplied by *parol*. The case is badly reported, but it is probable there was some certainty added, by which the person intended could be identified. (*Lynn v. Risberg*, 2 Dall. 180. See *Grier v. Grier*, 1 id. 172.)

If a date of an instrument be omitted, it may be supplied by evidence of the actual time of delivery. (*Kenner v. Creditors*, 8 Mart. Lou. Rep. N. S. 36. See the cases post, note

In Louisiana, a bond was perfect in every respect, except that in the penal part, after the words *fourteen hundred and ten*, the word "dollars" was omitted; but the bond having been given pursuant to a judge's order, directing one in the sum \$1400, the court thought the omission a mere clerical error, which might be supplied, even in an action on the bond, where there existed as high or higher evidence by which to act. (*Penniman v. Barremore*, 6 Mart. Lou. Rep. N. S. 494, 496.)

Cases of mere clerical omission are frequently aided by construction. As, where a bill produced appeared to be for fifty, without the addition of pounds, held, that the sum *fifty* in the margin, expressed in figures, preceded by the sign "£," removed all doubts, and showed that the word *fifty*, in the body of the bill, was *intended* for pounds. (See *Penniman v. Barremore*, 6 Mart. Lou. Rep. 497, 8, Porter, J. *Hunt v. Adams*, 6 Mass. Rep. 519.)

As to instances where a contract has been left incomplete in some particular, and there existed either an express or implied authority to supply the defect, which was afterwards done, see *May v. Harding*, 6 Mass. Rep. 300; *Boyd v. Protherson*, 10 Wend. 93; *Clute v. Small*, 17 Wend. 238; *Chitty on Eills*, ed. of 1836, p. 206, 7.

NOTE 951—p. 540.

Mr. Gresley has classed the cases cited in the text along with those where the written evidence is not the exclusive medium of proof, and the facts evinced by it may as well be proved by parol. (*Gresl. Eq. Ev.* 196, 7.) Such is the law with regard to receipts, memoranda, &c. &c. (See ante, note 860, p. 1211.) See also S. P. in Massachusetts, as to the registry of a vessel, *Vinal v. Burrill*, 16 Pick. 401.

In Massachusetts the records of a parish, as to grants of money, may, in certain cases, be falsified and contradicted by parol. (*Bangs v. Snow*, 1 Mass. Rep. 181.)

On a writ de homine replegiando in Pennsylvania, against one who held the plaintiff in slavery, the defendant offered evidence to show that the name of Ruth, which appeared in the registry, was intended for Lucy, the plaintiff; but the evidence was rejected. An error in the christian name, say the court, is essential unless corrected by another description annexed, as wife, bishop, earl, &c. (*Lucy v. Pumfrey*, *Addis. Rep.* 380. See *Campbell v. Wallace*, 3 Yeates' Rep. 572.)

NOTE 952—p. 540.

The rule governing the admissibility of parol evidence, with reference to the sense of the words used in the written instrument, is thus laid down by Lord Ellenborough, in the case of *Robertson v. French*, 4 East, 135. "Terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, or by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words." See also *Math. Pres. Ev.* 44. *Taylor v. Briggs*, 2 Carr. & Payne, 525. *Smith v. Wilson*, 3 Barn. & Adol. 728. *Clayton v. Gregson*, 4 Nev. & M. 602. *Bold v. Rayner*, 1 M. & W. 343. *Blackett v. Royal Exchange Ins. Co.*, 2 C. & J. 249. *Wigram on Extr. Ev.* 13 et seq. Per *Savage, C. J.* in *Boorman v. Johnston*, 12 Wend. 573.

NOTE 953—p. 541.

See *Morrison ads. Barksdale*. 1 Harp. Eq. Rep. 101, 2. *Bank of England v. Anderson*, 3 Bing. N. C. 666. *Rogers v. Goodwin*, 2 Mass. Rep. 475.

In a case in the circuit court of the United States, a question arose as to the meaning of the words, "loaf sugar," in the tariff act of 1816, ch. 107; and whether *crushed loaf sugar* was within the terms, or only sugar in loaves. Mr Justice Story held, that all statutes like this one must be interpreted, not according to the abstract propri-

ety of language, but according to their meaning in trade and commerce, and in buying and selling; and that merchants, refiners, confectioners, and grocers, might be examined as witnesses for the purpose of ascertaining the commercial import of the phrase in question. Upon testimony of this character the case was put to the jury to say, whether *crushed* loaf sugar was "loaf sugar" in the technical commercial sense; and they found upon the evidence that it was not. (United States v. Breed, 1 Sumn. Rep. 159.) A case in the English Exchequer seems to conflict with the above. There it appeared that by an act of parliament, (27 Geo. 3, c. 23, § 5, 7,) cast plate glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney General at the trial produced books explaining the process and the terms of art in the manufacture, and the defendants offered to prove the technical meaning of the word *squaring* to be, cutting the glass into the shape in which it is intended for the market, whatever that shape might be. This was refused; and upon a motion for a new trial, Lord Chief Baron Eyre said, "In explaining an act of parliament, it is impossible to contend that evidence should be admitted; for that would make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer, a judge may well inform himself from dictionaries, or books on the particular subjects, concerning the meaning of any word. If he does so at *Nisi Prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point he lays down." (Attorney General v. The Cast Plate Glass Co., 1 Anstr. 39.)

NOTE 954—p. 543.

Several cases in the English courts, besides those noticed in the text, recognize the propriety of allowing usage to be introduced with a view of explaining ancient instruments. See *Blankley v. Winstanley*, 3 T. Rep. 279, 288. *The King v. Miller*, 6 T. Rep. 268. *Kitchen v. Bartsch*, 7 East, 61, per Lord Ellenborough. *Bailiffs, &c. of Tewkesbury v. Bricknell*, 2 Taunt. 120. Also 2 Stark. Ev. 562, et seq. 6th Am. ed. *Governors of Lucton School v. Scarlett*, 2 Y. & Jer. 330.

Mr. Starkie admits that the general doctrine has been applied to *private* as well as *public* instruments; but it is obvious, he says, that the reasons for allowing it in the former case apply with much less force, inasmuch as the mere assent and acquiescence of a private person, who may have been ignorant of his rights, affords a presumption very inferior in weight to that which is to be derived from long established usage. He thinks it doubtful whether such evidence, to influence the construction of a private instrument, would now be received in a court of law. (2 Stark. Ev. 564, 5, 6th Am. ed.) *Quere*. The latter branch of this intimation is based mainly upon the disapproval of *Cooke v. Booth*, stated post, p. 547 of the text. The cases, however, in which that disapproval is found, (see *id.* notes (3) and (4),) are not, we think, to be understood as questioning the application of the rule to private instruments, because

they are such; but as merely condemning the application of the rule to that particular case.

Evidence of usage, to aid in construing ancient instruments, seems little else than inferior evidence of facts which would have been contemporaneously admissible for the same purpose. The object is to get at the meaning of the instrument at the time it was written; and the reason for the admission of this species of evidence will determine the limits within which it is to be confined. If the usage is not consistent with that meaning of the instrument, which, by the rules of law might have been attributed to it at its date, the evidence cannot be received. (See per Spencer, J. in *Jackson, ex dem. Livingston, v. Ten Broeck*, 16 John. Rep. 14, 23, 4. Per Nott, J. in *South Carolina Society v. Johnson*, 1 McCord's Rep. 41, 45.) And here seems to lie the specific objection to *Cooke v. Booth*. The construction which the instrument must have received at its date, was different from that allowed to be put upon it by the subsequent acts of the parties; for the courts in England have always leaned against construing a covenant to be for a perpetual renewal, unless it was perfectly clear that such was the sense of the covenant. (See *Baynham v. Guy's Hospital*, 3 Ves. 298. *Moor v. Foley*, 6 id. 237. See also what is said by Sir James Mansfield, in *Iggulden v. May*, 2 N. R. 451; 5 Bos. & Pull.) Indeed, considering the strength and uniformity of the adjudications against the construction which the acts of the parties were allowed to force upon the covenant in *Cooke v. Booth*, it may well be considered as a case where usage was admitted to *control and vary*, if not to *contradict* the clear import of the instrument, which, as we have seen at p. 541 of the text, cannot be done. So in *Cortelyou v. Van Brundt*, 2 John. 362, it was held, that where the language of a deed admits of but one construction, and is clear and pertinent, it cannot be controlled by any different exposition to be derived from the practice under it. In *Parsons v. Miller*, 15 Wend. 561, a deed of premises, known as "Fire Place Beach," was dated in 1770, containing a clause that the grantee should permit the inhabitants of a particular place "to pass and repass, to fish, fowl and hunt, and to go to their meadows, and to do any business they shall have to do on said beach, as they used to do before this conveyance." The question arose whether the right of taking sea-weed from the beach was within the reservation; and for the purpose of establishing such right, usage, subsequent to the date of the deed, was offered. The court held the evidence inadmissible. And per Savage, C. J. delivering the opinion; "Deeds are to be expounded by their terms, where there is no ambiguity, and neither parol evidence nor usage can be admitted to contradict a deed. 3 John. Cas. 4. 5 Wend. 547." He adds what was said by Spencer, J. in *Jackson, ex dem. Livingston, v. Ten Broeck*, 16 John. Rep. 23; and then observes, that the cases there cited "show that the evidence is proper only in cases of ancient deeds, and where there is an uncertainty as to what was meant by the terms made use of by the parties." A reservation of a right of way *through* a lot and cellar, cannot be varied by parol evidence of usage so as to make it embrace only a right of way *to* the cellar, there being nothing in the context or contemporaneous circumstances to show that to be the intent. (*Choate v. Burnham*, 7 Pick. Rep. 274. See *Wyukoop v. Burger*, 12 John. Rep. 222. *Comstock v. Van Deusen*, 5 Pick. Rep. 161. *Osborn v. Wise*, 7 Carr. C. Payne, 761.)

Several cases in New-York, relating mainly to questions of boundary arising upon

deeds of conveyance, exhibit a startling departure from the general doctrine, by allowing acts of the parties, such as practical location, &c. &c., to overrule the explicit language of the instrument. These were all considered and commented on in the later case of *Adams v. Rockwell*, 16 Wend. 285, by which the rule on this subject was brought back to an almost unqualified accordance with the principle of *Cortleyou v. Van Brunt*, 2 John. Rep. 362, *supra*. See also *Jackson, ex dem. Suffern, v. McConnell*, 19 Wend. 175. *Den, ex dem. Reed, v. Shenck*, 2 Dev. Rep. 415. *Allen v. Kingsbury*, 16 Pick. 235, 239.

But the above decisions, which relate principally to private instruments, will be found perfectly consistent with the admissibility of usage to explain *ambiguous* instruments. Mr. Dane lays it down as "now, on the whole, a well settled rule of evidence, that the acts of the parties, or usage, may be proved to explain doubtful words or clauses in a deed or other sealed instrument." (3 Dane's Abr. 363, § 17. See also *Rosc. Ev.* 11. 1 Sug. on Vend. 139, Am. ed. of 1836, from 9th Lond. ed.) Where the description in old grants is vague, "and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents are of great weight" in applying them. (*Jackson, ex dem. Schenck, v. Wood*, 13 John. Rep. 346. *Adams v. Rockwell*, 16 Wend. 310, 311, per Mason, senator. *Owen v. Bartholomew*, 9 Pick. 520. *Allen v. Kingsbury*, 16 id. 239. *Gove v. Richardson*, 4 Greenl. 327.) The general doctrine, and the rule for testing the admissibility of this species of evidence, was most clearly laid down in *Livingston v. Ten Broeck*, 16 John. R. 14, 23, 4. There, too, as in most other New-York cases, its application to private deeds was distinctly sanctioned; for it was held, that where a grantor in a deed dated in 1804, gave to the grantee the privilege of cutting timber to be used for "building," the acts of the grantee and his heirs, subsequently performed, with the knowledge of the grantor and his heirs, were admissible to show that the word *building*, it being equivocal, was understood at the time in such a sense as to allow the cutting of timber for *building fences* as well as *houses*.

The cases mainly pertain to deeds characterized as ancient. The admissibility of this species of evidence was recognized, however, in *Choate v. Burnham*, 7 Pick. Rep. 274, *supra*, as applicable to a deed dated in 1818, only eight or ten years before the trial. No qualification of the rule, in respect to the age of the deed, was suggested. See also *Allen v. Kingsbury*, 16 Pick. 239, per Wilde, J. *Haven v. Brown*, 7 Greenl. 421. *Fowle v. Bigelow*, 10 Mass. Rep. 379.

NOTE 955—p. 544.

S. P. *Jackson, ex dem. Murphy, v. Van Hoesen*, 8 Cowen's Rep. 325.

NOTE 956—p. 545.

See a case decided on the same principle, *Colpoys v. Colpoys, Jacob*, 451. Also *Jeacock v. Falkener*, 1 Bro. P. C. 296. *Brown v. Thorndike*, 15 Pick. 400.

NOTE 957—p. 546.

To ascertain whether a case presents explainable ambiguity, or inaccurate description, "a comparison must necessarily be instituted between the description in the instrument, and the subject matters which, it is contended, are sufficient to satisfy it. To do so with certainty, and to make the decision of the judge, in expounding an instrument, independent of the accidents of his greater or less knowledge of the sense of the words used by the writer, and of the facts to which they may be applicable, it is evidently necessary that parol evidence should be admitted, to shew what is the sense of the words used, and what are the facts to which they may be applicable. With this view, evidence must be admissible, of all the circumstances surrounding the author of the instrument." (2 Phill. Ev. 731, 2, 8th Lond. ed.)

The right of resorting to extrinsic contemporaneous circumstances in aid of written instruments has been most fully and frequently illustrated, perhaps, by the cases relating to the exposition of wills. On this head, Mr. Wigram lays down the following proposition as being the result of the English cases: "Every claimant under a will has a right to require, that a court of construction in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare." (Wigram on Extr. Ev. 59. Id. 138.)

There seems to be no material distinction between wills and other instruments in this respect. (Id. 59, note (b).) For the general doctrine as applicable to wills, deeds, &c., see the text from p. 543 to 546, 7; also per Parke, J. in *Doe, ex dem. Templeman, v. Martin*, 1 Nev. & Mann. 524. *Guy v. Sharp*, 1 Mylne & Keene, 602, per the Lord Chancellor. Per Shaw, C. J. in *Brown v. Thorndike*, 15 Pick. Rep. 400. *Sargent v. Towne*, 10 Mass. Rep. 303, per Cur. *Greel. Eq. Ev.* 201. Per Van Ness, J. *Doe, ex dem. Barnes, v. Provoost*, 4 John. Rep. 63. *Webster v. Atkinson*, 4 New Hamp. Rep. 21. *Shelton v. Shelton*, 1 Wash. Rep. 53, 56. *Fowle v. Bigelow*, 10 Mass. Rep. 383, 4. *Heald v. Cooper*, 8 Greenl. 36. Per Wilde, J. in *Comstock v. Van Dusen*, 5 Pick. 166. *Ely v. Adams*, 19 John. Rep. 313, 317. *Leland v. Stone*, 10 Mass. Rep. 461. *Fitting v. United States Bank*, 11 Wheat. 59. *Edrington v. Harper*, 3 J. J. Marsh. 355. *Brown v. Haven*, 3 Fairf. Rep. 164. How far contemporaneous and other declarations are admissible upon the principle of the above cases, see ante, note 948, p. 1388 to p. 1392, 3.

In the simplest case that can be put, inquiry *aliunde* must be made for the subject or object to which the instrument refers, before the court can declare its application. If, in the description of an estate, it is designated *correctly* as Blackacre, there must be evidence to shew what land it is that is known by that name. (Per Coleridge, J. in *Doe v. Holtom*, 4 Adol. & Ellis, 81. See *Doe, ex dem. Gore, v. Laughton*, 2 Barn. & Adol. 680.) So where land was described in a devise as "a tract of land called the Beaver Dam;" held, that parol evidence might be resorted to to explain the ambiguity and apply the devise to the subject matter intended. (*Hatch v. Hatch*, 2 Hayw. Rep. 32.) The like resort to extrinsic or parol evidence is necessary and allowable, where a devise or deed is of the *home farm on which the testator or grantor*

dwells. (Doolittle v. Blakesley, 4 Day's Rep. 265. Venable v. McDonald, 4 Dana's Rep. 336. See Whitaker v. Sumner, 9 Pick. 308, 311.) So if a deed or devise be of an estate purchased of A., or a farm occupied by B., extrinsic evidence must be allowed to show what land it was that had been purchased of A., or which B. occupied. (Per Sir W. Grant, 1 Meriv. 653. See Jackson, ex dem. Van Vechten, v. Sill, 11 John. Rep. 201. Jackson, ex dem. Lowell, v. Parkhurst, 4 Wend. Rep. 369.) Parol evidence, however, can only be resorted to when it does not appear that there is better evidence in the party's reach. Accordingly, where premises in a deed were described as those purchased of A., and nothing further was added, held, that the deed from A. to the grantor must be produced, in order to locate the thing granted. (Jackson, ex dem. Lowell, v. Parkhurst, 4 Wend. 369.) Otherwise, where there is a further sufficient description by metes and bounds. (Harlow v. Thomas, 15 Pick. 66.) Where a man sells *all the slaves he owns at A., or his share of his father's estate*, parol evidence is necessarily allowed, in the first case, to show how many slaves he had at A., and in the second, how much of his father's estate he would be entitled to. (See Barkley v. Barkley, 3 McCord, 269. South Carolina Society v. Johnson, 1 McCord, 41.)

So where lands are described in a deed, devise, or other instrument, by metes, bounds, courses, &c.; you must necessarily go out of the instrument to identify the land by extrinsic evidence ascertaining the bounds. (See Robertson v. McNiel, 12 Wend. 581. Scott v. Sheakley, 3 Watts' Rep. 52. Wing v. Burgis, 1 Shepley's Rep. 111.)

This enquiry may result in showing the existence of two objects equally within the description, and then the case will fall within the principle of those ante, note 939, p. 1362, et seq. (See also ante, note 940, p. 1373; note 942, p. 1381, 2, and note 943, p. 1389, et seq.) As where the head of Swan Creek is called for, and two creeks are set up by the respective disputants, or two places as the head of Swan creek; parol evidence is allowed to show which creek is the one intended, and which of the two places is the head of it. So, also if a tree is called for, and there are two trees, or the line of a given tract, and there are two tracts of the same name. (Hammond v. Ridgley, 5 Harr. & John. 215. Claremont v. Carlton, 2 N Hamp. Rep. 373. Blake v. Dougherty, 5 Wheat. 359. Storer v. Freeman, 6 Mass. Rep. 440, 441. See also South Carolina Society v. Johnson, 1 McCord. 47, 48. Linscott v. Fernald, 5 Greenl. R. 496. Brown v. Haven, 3 Fairf. 164.) Where a deed calls for a "highway," parol evidence is admissible to locate the *highway de facto*, and that will be deemed the call intended, in preference to the *recorded highway*; even though the latter corresponds most nearly with the course and distance. (Rich v. Rich, 16 Wend. 663.)

The propriety of looking at extrinsic contemporaneous circumstances, in instances like the preceding, is clear and undoubted. Upon the same principle, in a variety of other cases less simple in their character, facts presumably present to the mind of the author of the instrument, such as the local situation and general condition of the subject matter claimed to be within the description, the name by which it was known, the visible marks upon it, &c. &c., may be resorted to in order to evolve and effectuate the real intent. Accordingly, where a river was named as the boundary of land, under such circumstances as to convey the land to the centre or middle of the river,

and thus include, prima facie, an island lying nearest the bank where the premises were situate; held, that if the island was of such length, and so near the centre, as to cause the stream on each side of it, singly to be considered and called in common parlance *the river*, and not branches or parts of it, that fact might be shown, with a view of limiting the deed, and exempting the island from its operation. (Claremont v. Carlton, 2 N. Hamp. Rep. 369, 372, 3.)

In *Storer v. Freeman*, 10 Mass. Rep. 435, the question was upon the meaning of the word *shore*, when used as expressing a boundary on the sea where the tide ebbs and flows. Two deeds were introduced, made by the same grantor, and relied upon by the plaintiff; the first purported to convey twelve and a half acres within certain bounds, two of which were, "running from a certain stake there described, N. 28° W. to the shore, &c., thence by the shore to the other land of the said C." The other deed, which was to a different grantee, and bore date the next day after the first, purported to convey the like quantity of acres, adjoining, on one side, the land described in the other. Among the boundaries, one line ran from a heap of stones, northwestwardly seven rods, to a heap of stones, "at the shore, &c., at William Elwell's corner, so called, thence by the shore," to the land conveyed in the first deed. The court held, that none of the monuments having been located, the deeds only carried the land prima facie to high water mark. They, however, suggested, for the benefit of the plaintiff, if he should again try the cause, that this construction might be varied by parol. "In the second deed," they said, "a boundary line is described to run to a heap of stones by the shore, at *Elwell's corner*. The shore has two sides, high water mark, and low water mark. *Elwell's corner* is described as a known monument. If it is at low water mark, it is by the shore, as well as if it was at high water mark. Now, if it be a fact that this corner was a known monument at low water mark, the plaintiff might be admitted to prove it by oral testimony. Then the boundary line, running to *Elwell's corner*, would cross the flats to low water mark; and the next boundary line running by the flats, must run by the same side of the flats on which *Elwell's corner* stands; and thus the flats would be included by the boundaries of the land conveyed by the second deed. And further, from this fact the first deed would receive a different consideration, as it was executed by the same grantor. For, as the boundary line running from *Elwell's corner*, runs to the land conveyed by the first deed, if that line run by the low water mark, then the land conveyed by the first deed must also extend to low water mark; and we should presume that the word *shore* was used untechnically, and without legal accuracy, as importing low water mark." See further, the case of *Waterman v. Johnson*, 13 Pick. 261, stated ante, note 948, p. 1389, 1390.

Where a mortgage described the premises as *two hundred and forty-five acres of land on which A. V. then* (at the date of the mortgage) *lived, bounded according to two deeds to A. V. from C. and F.*, which latter deeds embraced 365 acres; held, that proof showing a son of A. V. in the actual and visible occupancy of 100 acres, parcel of the 365 acres, at the very time the mortgage was given, (the 100 acres having been, before that, defined and set off to the son under a gift from A. V.,) was admissible not only, but the jury might infer from it that the one hundred acre piece was not parcel of the land mortgaged. (*Venable v. McDonald*, 4 Dana's Rep. 336.) See

Leland v. Stone, 10 Mass. Rep. 459, stated post, note 948; see also *Harlow v. Thomas*, 15 Pick. 66, and other cases in connection with it, post, note 961.

Where the plaintiff sued on a general warranty in writing of the soundness of a slave, and the defect complained of was in one of the arms; the defendant was allowed to prove by parol the circumstances and condition of the slave at the time of the sale, and what then passed between the parties, so as to establish that the defect was open and visible not only, but communicated to the plaintiff; and held, that such being the case, the defect was not covered by the general warranty. (*Schuyler v. Russ*, 2 Cain. Rep. 202.) See ante, note 948, p. 1392.

Where a right of way granted is *prima facie* obscure, the state of the premises at the time of the grant may be proved, in order to see whether it has or has not been sufficiently described. (See *Ostborn v. Wise*, 7 Carr. & Payne, 761. *Comstock v. Von Dusen*, 5 Pick. 166.)

In Pennsylvania, the defendants, a canal company, were sued for injuries done by them to the plaintiff's lands, in constructing their canal. On the trial, they relied on a sealed contract, by which they agreed to purchase, and the plaintiff to sell, at a fixed price per acre, *the land which might be occupied by the canal, then about to be made*; the purchase money to be paid as soon as the quantity of land should be ascertained, and the deed made out; held, admissible for the plaintiff to prove, that at the time of making the contract, the line or route of the canal was designated by stakes set up through the plaintiff's lands, and in this way identify the lands in reference to which the contract was made, so as to lay the foundation for proving damages beyond the lands agreed to be sold. (*Bertsch v. the Lehigh Coal and Nav. Co.* 4 Rawle, 130.)

The manner in which property has been used and enjoyed, may be important, in connection with its visible marks, condition, &c. In the case of personal property, even its *accidental or temporary locality* at the date of the instrument, may exert a decisive influence on the question of construction; especially when connected with proof of the *rank and occupation of the party*. By a will of a musical instrument maker, giving his *household furniture*, a piano forte might or might not pass, according to the circumstance of its being in his dwelling house, or in his ware house. (See *Patt v. Jackson*, 1 Bro. P. C. 222.) A bequest of jewels by a nobleman would pass all; but if by a jeweller, it would not pass those he had in his shop. (*Colpoys v. Colpoys*, Jacob, 451, said by Master of the Rolls.) If a person of rank buys a service of plate suitable to his quality, and never uses it, yet it may pass as *household furniture*. (*Kelly v. Powlet*, Ambler, 610. A tradesman has a dozen of silver-handled knives and forks, which he commonly uses, and has besides a service of plate, which perhaps he bought as a good bargain; the service would not pass as *household furniture*. (Id.) See *Bunn v. Winthrop*, 1 John. Ch. Rep. 329. In *Le Farrant v. Spencer*, 1 Ves. sen. 97, a captain of an East India ship gave by will, "all his household furniture, linen, plate and apparel, whatsoever." The testator died possessed of plate, India and dimity goods, and some rough diamonds. Lord Hardwicke directed a reference to the master to distinguish what goods he had for his own domestic use, and what for trade or merchandize, "without which," he said, "it was impossible to determine of the extent of the bequest." Where there is a gift of the testator's stock, that is ambiguous; it has different meanings when used by a farmer, and a merchant. (*Colpoys v. Colpoys*, Jacob, 451, said per Master of the Rolls.)

The following cases show how evidence in respect to the mode of use, &c. may affect instruments relating to real property. A testator, by his will, devised his plantation on John's Island, containing 540 acres. He had two tracts on John's Island, one of cleared land, which he planted, containing 390 acres; and at the distance of 2 or 3 miles, a tract of pine land, containing 147 acres. Parol evidence was received to show, that the tract of pine land had always been used with the other, and was necessary to it; that the two tracts had always been considered to form one plantation; and that the testator's son and heir at law had admitted the right of the devisee to both; and these facts were held to establish the intent of the testator to pass both tracts under the devise. (Wilson, adm'r, ad. Robertson, Harp. Eq. R. 56.) The term *appurtenances*, which generally carries whatever is "usually letten or occupied with the land," (Flow. 170,) is a plain instance of ambiguity, calling for the aid of extrinsic evidence; and parol proof must be allowed to ascertain what is within the term, unless the extent of the claim appears on the face of the instrument; and even then, to ascertain what waters, what dams, or what races, have been used and occupied as appertaining to the property purchased, such evidence will in many cases be necessary. (Hall v. Benner, 1 Pennsylv. Rep. 402, 409.)

Though a testator, having freehold and leasehold property in the same place, by a devise of his lands and tenements in that place, passes only his freehold lands; or by a devise of his messuages, lands and tenements in that place to uses applicable only to freehold property, may be considered as intending to devise only his freehold property; (Rose v. Bartlett, Cro. Car. 292, cited by Sir John Leach, in Hobson v. Blackburn, 1 M. & K. 579; Thompson v. Lady Lawley, 2 Bos. & Pull. 303 :) yet a different construction may be put upon the will, and the leasehold pass, if a different intention can be collected from the circumstance of the leasehold property being blended in enjoyment with the freehold, although the limitations be to uses strictly applicable to freehold property only. (By Sir John Leach, Hobson v. Blackburn, 1 M. & K. 571; Goodman v. Edwards, 2 id. 759. Newton v. Lucas, 6 Sim. 54, and on appeal, 1 M. & K. 391.) See also the cases of Lowe v. Lord Huntingtower, and Standen v. Standen, cited and commented on in the judgment of Miller v. Travers, ante, note 839, p. 1366. Lane v. Earl of Stanhope, 6 T. Rep. 345.

The nature and value of the *interest*, which the party had in the property designated, may be very material. (See ante, p. 544, of the text. Jackson, ex dem, Murphy v. Van Hoesen, 4 Cow. Rep. 325.) Suppose a testator should use the words "all my estate and property in manufactories;" or "all my wharf property;" or "all my ferry estate." There being many manufacturing corporations, in the case first put, it would be uncertain, whether the testator, intended stock in manufacturing corporations, which is personal property, or an estate in lands and buildings employed as manufactories. So there being many incorporated wharf companies, holding property of great value, it would be uncertain in the second case put, whether the testator intended shares in a corporation, or an estate in fee simple. So of the ferry estate, it would be uncertain whether it meant a chattel interest in the franchise of a ferry, or a farm and house used in connection with a ferry, and thus denominated. In all these cases, it seems, evidence *aliunde* may be resorted to to show the situation and circumstances of the testator, in reference to the property devised, and thus explain

and apply the description. (Per Shaw, C. J., in *Brown v. Thorndike*, 15 Pick. 400, 1. See *Lettingwell v. Elliott*, 8 Pick. 455, stated post, note 961.)

In *Ellsworth v. Buckmyer*, 1 Nott and McCord, 151, it was held, that where words in a will are susceptible of reference to a freehold in lands, or rents which had previously accrued, parol evidence was admissible to show that there were no rents or income, or very little, upon which the will could operate, and therefore that an estate in the land was meant.

A somewhat striking case is that of *Wardsworth v. Ruggles*, 6 Pick. Rep. 63. There a testator bequeathed to his wife, "all rents in arrear, on the real estates at Lynn." It appeared that the real estates mentioned, were not the property of the testator, but belonged to the wife; and memoranda, written and signed by the former, and his acts, were resorted to, to show that he meant, not merely rents unpaid by the tenants, but all the money he had ever received for rent or otherwise from the Lynn property, together with interest.

Where persons are described or referred to in a writing, it may be material to enquire as to their situation and circumstances at the time; their relation to the maker of the instrument; the state of feeling which had subsisted between the latter and them, previously; and a more or less minute acquaintance with the domestic condition of the maker, his family &c. &c., is also frequently requisite to the true interpretation of his words. The influence of circumstances of the above nature will be seen by examining several of the cases, ante, note 840. *Wilde's case*, 6 Coke's Rep. 16, relating to a devise to one and his *children*, also furnishes a familiar example. The word *children*, as there employed, was equivocal; it might have been used as a word of limitation, and then the estate would be an estate tail to the father, or it might have been intended as a word of purchase, and then the estate would be a joint life estate to the father and children. It was, therefore, necessary to resort to matters *dehors*, and inquire whether the devisee had children or not, at the time, and according to this fact, introduced by parol evidence, the words of the will would have the one or the other construction. (See this case stated and approved by Shaw, C. J., 15 Pick. 400.) Prima facie, the term *children* in such cases shall be taken to be a word of purchase; but extrinsic circumstances may show it to be a word of limitation. (*Sander's case*, 4 Paige, 293. *Oates v. Jackson*, 2 Strange, 172.) The term "children" may be construed to mean *grand children*, there being no *children* in the primary sense of that word. (See *Ewing's heirs v. Handley's Ex'rs*, 4 Litt. Rep. 349. *Izzards v. Izzards' Ex'rs*, 2 Dess. Eq. Rep. 303. *Deveaux v. Barnwell*, 1 id. 497. *Drayton v. Drayton*, id. 329. *Tier v. Pennell*, 1 Edw. Ch. Rep. 354.) So, of course, *step-children* may come in but if there be children in the primary sense, parol evidence, it has been held, is not admissible to show that step children were intended. (*Fouke v. Kemp*, 5 Harr. & John. 135.) The word *child*, prima facie, means a legitimate child; and if there be a legitimate child, an illegitimate one cannot be proved to have been intended. If it be shown *aliunde* that there was no legitimate child, this, along with other extrinsic circumstances, may vary the interpretation of the term, so as to embrace within it an illegitimate child. So with regard to the term *children*. (See *Wigram on Extr. Ev.* 42, 29. *Gardner v. Heyer*, 2 Paige's Rep. 11.) If the description be *children* of A. B., though in the first instance legitimate children only shall be intended, yet if it be shown that A. B. had, at the time the will was made, one legitimate and one illegitimate child, and that the latter had

acquired the reputation of being a child of A. B., this will allow the illegitimate child to take with the other. For the one legitimate child will not satisfy the word "children." (*Gill v. Shelley*, 2 Russ. & M. 336. See this case in connection with *Wilkinson v. Adam*, 1 Ves. & B. 462. 12 Price, 470.) Further as to the extrinsic circumstances which will let in illegitimate children, see *Woodhouslie v. Dalrymple*, 2 Mer. 419. *Beachcroft v. Beachcroft*, 1 Madd. 430. *Bayley v. Snelham*, 1 Sim. & Stu. 78.

Under different circumstances, the word "family" may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children, excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he may have sprung. All these applications of the word, and some others, are found in common parlance; and in expounding it in a case of a will, the meaning in which the testator employed the word must be gathered by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will. (Per Lord Langdale, in *Blackwell v. Bull*, 1 Keen. 176. See 18 John. Rep. 402, 3.) Accordingly, where a testator made his will and thereby directed that his business of a cheese-monger should be carried on by his wife, "Sarah Bull, and his son John, jointly, for the mutual benefit of his family;" and then died shortly after, leaving his widow Sarah, and the said John Bull with five other children, infants: held, that the widow as well as the children were comprised in the word *family*. (*Blackwell v. Bull*, supra.) An ineffectual attempt was made to ascertain the sense in which the testator used the word *family* in *Doe, ex dem. Hayter, v. Joinville*, 3 East, 173, and the will declared void by reason of the ambiguity. See further, *Harland v. Trigg*, 1 Bro. Ch. Rep. 152. *Nowlan v. Nelligan*, id. 491.

The word *son*, means an immediate descendant, there being nothing to control its primary signification; but it may have other applications where extrinsic circumstances show that it could not have been used in this sense. (See *Wigram on Extr. Ev.* 30. *Steele v. Barrier*, 1 Freem. 292 and 477. 8 Vin. Abr. 310, pl. 9.) If a deed be to "A. B. and son," the former having several sons, and it appears that, at the date of the deed, A. B. and one of the sons were in partnership, and that "A. B. and son" was the style of the firm; this will identify the son intended. (*Semble*, *Hoffman v. Porter*, 2 Brock. Rep. 157, 159.) If a deed should be made to the grantor's son John, of the house in which he (John) lives, and it turns out that the grantor had two sons by that name; yet if one was in Europe, at the date of the deed, and the other in the house, there could be no doubt as to which was intended. (*Barkley v. Barkley*, 1 McCord's Rep. 273. See per Denman, C. J. in *Richardson v. Watson*, 4 Barn. & Adol. 787. S. C. 1 Nev. & Mann. 567.) Where a dispute is whether a deed of conveyance was intended for one or two persons bearing the same name, an enquiry into the circumstances attending the negotiation for the deed, and its execution, would obviously in most instances be decisive. (See *Coit v. Starkweather*, 8 Conn. Rep. 289.)

The cases of *inaccurate* description of persons or things, cited ante, notes 840, 842, are mostly very strong illustrations of the extent to which extrinsic enquiry into contemporaneous circumstances may go, with a view to a right interpretation and application of the language of an instrument. We saw by those cases that a description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so, to enable a court to identify the person or

subject matter intended. (See also ante, note 839, and the judgment in *Miller v. Travers*, there stated.)

Various other cases illustrate the general doctrine above considered, with respect to the necessity of looking out of the instrument, to the circumstances attending its execution, and all the facts to which its terms either expressly or tacitly refer. Almost every writing, indeed, refers in one of these ways to extrinsic circumstances, the knowledge of which is in a greater or less degree important to its just interpretation.

Thus, a bequest of a female *slave and her increase*, may mean *future increase*, or children *already born*; and evidence of the circumstances of the testator with regard to his slaves, as well as of the condition and situation of the slave in question, is admissible to explain and apply it. (*Reno's ex'r v. Davis*, 4 Hen. & Munf. 283. *Puller's ex'r v. Puller*, 3 Rand. 83.)

The word, "freight" has several meanings in common parlance; and if, by a written contract, a party were to assign his freight in a particular ship, parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board the ship, or an interest in the earnings of the ship; in other words, to show in which sense the parties intended to use the term. (Said per Story, J. in *Peish v. Dickson*, 1 Mason, 10, 12.)

In *Simpson v. Henderson*, 1 Mood. & Malk. 300, in an action for a breach of covenant that a ship should take goods on board "forthwith," Lord Tenterden, admitting that the word in strictness meant "immediately," received evidence of the circumstances of the ship, and the situation of the parties, to shew that it could not have been used in that sense. "It was known to both parties that the ship needed some repairs, at least to be coppered, and some time," he said, "must be allowed for that." See *Ely v. Adams*, 19 John. Rep. 313, and other cases relating to S. P., stated ante, note 948, p. 1393.

If A. grant one an annuity of £10 a year *for counsel*, in case he be a physician, it will be understood of his counsel in physic; if a lawyer, in law; and so in any other profession. (Pow. on Con. 384, 5. 3 Dane's Abr. 576, § 11.)

The certificate of a notary, stating that notice of protest was put in *the* post office, may be explained by showing at what post office the notice was mailed. (*Gale v. Kemper's heirs*, 10 Lou. Rep. (Curry) 205.)

In Virginia, a writing signed by B. C. and D., recited that A., a constable, had levied, &c., that the sale had been forbidden, &c., and then set out a promise to indemnify A., *agreeably to law*, without specifying the acts which A. was to do, and against which he was to be indemnified; held, that A. might prove the fact of the writing having been executed and delivered to him on the day, and at the place of sale, &c., and thus make it an agreement to indemnify him for removing and selling the property. (*Crawford v. Jarrett's adm'r*, 2 Leigh, 630.)

A submission to abide the award "of the arbitrators now about to sit," may be shown, by resorting to the circumstances under which it was executed, to have been intended as a submission to certain individuals, with power to call in an umpire. "It is rendering certain by parol, that which the parties did not intend to make certain by writing." (*Sharp v. Lipsey*, 2 Bail. Rep. 113.) A note is payable to commissioners, &c., without naming them; parol evidence showing who the commissioners at the

time were, may be received to identify the payees. (*Mundine v. Crenshaw*, 3 Stew. & Port. 87.)

Where a policy of insurance purports to have been effected on account of *owners*, without designating the particular owners intended; evidence of the circumstances attending the execution of the policy is admissible to show that less than the whole number of owners was intended. (*Catlett v. Pacific Ins. Co.* 1 Wend. 561. S. C. 4 id. 75.) None but an *owner*, however, can be shown within the intention. (*Id.*, 4 Wend. 79, per Walworth, Chancellor.) See also *Lawrence v. Van Horne*, 1 Cain. Rep. 276. *Murray v. The Columbia Ins. Co.* 11 John. Rep. 311. *Lawrence v. Sebor*, 2 Cain. Rep. 203. *Foster v. The United States Ins. Co.* 11 Pick. 85. *Turner v. Burrows*, 5 Wend. 541.

Where an instrument of compromise recited that, *whereas great difficulties had arisen, &c.*, and the subjects of the difficulties were not distinctly set out so as to render it certain whether a particular thing afterward drawn in controversy was actually included in the compromise; held, that parol evidence of the difficulties previously existing was admissible in order to identify those intended to be settled by the writing. And the refusal of the party, for a time, to sign the writing, because it would preclude the claim now set up, was regarded as strong proof against him of the fact of its being one of the difficulties intended to be embraced within the compromise. (*Wood v. Lee*, 5 Monroe, 59, 60.)

In *South Carolina Society v. Johnson*, 1 McCord's Rep. 41, an action of debt was brought against the defendant as one of the sureties of P. T., on a bond for the faithful performance of the duties of P. T. as treasurer of the South Carolina Society. P. T. was elected treasurer in 1803, and had continued to be re-elected from year to year, down to 1814. The bond was given on his first election, and since then no other bond had been taken. The defendant was a member of the society. There was nothing on the face of the bond, showing how long its obligations were to continue; and the default complained of did not occur till after 1813. The court held, that the duration of the bond must be measured by the term of office—that it should be construed as it would have been at the time of its creation—and it being shown *aliunde* that according to the rules of the society, the treasurer was to be elected annually, the defalcation in question was adjudged not to be covered by it; and this, although the bond contained no express reference to the rules of the society, and there was some evidence going to show that it was the practice of the society not to take new bonds on re-elections of the same officer. The case was precisely the same, it was said, as though the general law had fixed the duration of the office; for the rules of the society are a law to its members. The court referred to several English cases, in support of the view taken, and also to *Commissioners of Public Accounts v. Greenwood*, 1 Dess. Eq. Rep. 450, as directly in point. They considered *Hughes v. Smith*, 5 John. Rep. 168, as the strongest one in favor of the plaintiff; but the learned judge, who delivered the opinion, doubted that case. He said, however, that it was even deducible from *Hughes v. Smith*, that if the office of deputy had expired with that of the sheriff, or if he had been actually re-appointed, the obligation of the bond would have ceased.

The following case seems to belong to that class allowing a resort to circumstances connected with the subject matter or thing to which a written instrument relates,

with a view of ascertaining the meaning of its terms. The defendant, who had contracted in writing to erect certain houses at stipulated prices, (*semble*.) claimed on the trial, that the roofs, which were *shed roofs*, should be allowed as extra work. The contract was silent as to the kind of roofs; and the defendant, to preclude the supposition of the shed roofs being contemplated by the contract, offered the testimony of an architect, "as to the price paid for erecting the houses described;" probably, (for the case is imperfectly reported,) the testimony was designed to show that the price paid, or agreed upon, was strikingly inadequate, if shed roofs were intended. The evidence was excluded on the trial; and on this ground the verdict was set aside and the cause remanded, with directions to the judge to hear the testimony. (*Thomson v. Brothers*, 5 Mill. Lou. Rep. 275.) The court treat the case as presenting *latent* ambiguity; and they say—"If a house be let or leased on a given rent, without saying whether it be a monthly or yearly one, parol evidence is certainly admissible to establish that the rate manifests that the parties contemplated a yearly one." (*Id.* 279.) See *Krider v. Lafferty*, 1 Whart. Rep. 317.

A doctrine analogous to that of some of the foregoing cases, allowing you to identify matters described or referred to in a general way, applies frequently where a record is introduced to prove a former suit, and, from the generality of the pleadings, it is left doubtful what matters in particular were tried and determined. (See ante, note 692, p. 971, 2. Also ante, note 590, p. 833. *Lampton v. Jones*, 5 Monroe, 235, 6, 7.) So as to awards upon arbitration, where the submission is general in its character. (See ante, note, 697, p. 1038, 9.)

In allowing evidence *aliunde* as to contemporaneous circumstances, with a view of explaining ambiguities in instruments, the law proceeds upon a principle akin to that which prevails in the construction of statutes. There, courts, in cases of doubt, institute an inquiry into the circumstances contemporaneous with the making of the statute—not only into the law upon the facts to which it professes to relate, but also into the circumstances which make the interference of the legislature necessary. (See *Heydon's case*, 3 Coke's Rep. 7, b. *Wells v. Porter*, 2 Bing. N. C. 729. *Devonshire v. Lodge*, 7 Barn. & Cress. 39.) But evidence of contemporaneous circumstances cannot control the sense, or extend the effect of a statute, beyond what a fair interpretation of the words will warrant. Accordingly, where the putative father of a bastard procured the passing of a private statute, whereby the name of the bastard was changed to that of the father, and the former was declared "forever hereafter to be legitimated and made capable to possess, inherit, and enjoy, by descent, &c., as if he had been born in lawful wedlock;" held, that the bastard was not rendered legitimate to any particular person; and evidence that the putative father applied for, and obtained the passage of the act, would not render the bastard legitimate as to him. (*Drake v. Drake*, 4 Dev. R. 110, 116, 117.) See ante, note 953.

"It is upon the principle above adverted to, namely—that all writings tacitly refer to the existing circumstances under which they are made, that courts of law admit evidence of particular usages and customs in aid of the interpretation of written instruments—whether ancient or modern—whenever from the nature of the case, a knowledge of such usages and customs is necessary to a right understanding of the instrument. The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." (*Wigram on Extr. Ev.* 57, 8. 2 Ev.

Poth. 214.) "Parol evidence may be given to apply the written contract to the subject matter—in some instances to explain expressions used in a peculiar sense, when used by particular persons and applied to particular subjects. It is perfectly right and consistent with fair dealing, to give effect to language used in a contract as it is understood by those who make use of it." (Per Savage C. J. in *Boorman v. Johnston*, 12 Wend. 573.) See also the rule laid down by Lord Ellenborough in *Robertson v. French*, 4 East 135, stated ante, note 952, p. 1395. "The true and appropriate office of a usage is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere presumptions and implications, and acts of a doubtful nature. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied." (Per Story J. in the *Schooner Reeside*, 2 Sumn. Rep. 569, 570.)

Certain usages are to be found among numerous classes in relation to their particular calling, and these are often to be attended to in the interpretation of their contracts. The usage explains and ascertains the intent; and not being in opposition to any principle of general policy, or inconsistent with the terms of the instrument, it comes in very much in the same way as the *lex loci*, (1 Sumn. Rep. 223,) and incorporates itself with the terms of the writing. The general doctrine has been applied most frequently to mercantile contracts, but it is obviously not restricted to these, but extends to contracts in various other departments of business, mechanical, professional, agricultural, &c. &c. (*Heald v. Cooper*, 8 Greenl. 33. *Williams v. Gilman*, 3 Greenl. 276. *Barber v. Brace*, 3 Conn. Rep. 9. *United States v. Arredondo*, 6 Peters' Rep. 715. *Gibson v. Culver*, 17 Wend. 305, 6, et seq. *Homer v. Dorr*, 10 Mass. Rep. 26. *Gordon v. Little*, 8 Ser. & Rawle, 533. *Willings v. Consqua*, 1 Peters' C. C. Rep. 225. *Van Ness v. Pacard*, 2 Peters' Rep. 143. Post, p. 553, et seq. of the text. *Yeates v. Pim*, 1 Holt, 95. S. C. 2 Marsh. Rep. 141, 6 Taunt. 446. *Powell v. Horton*, 2 Bing. N. C. 688. *Harris v. Nicholas*, 5 Munt. Rep. 483. *Yeaton v. Bank of Alexandria*, 5 Cranch, 492. *Wood v. Hickok*, 2 Wend. 501. *Sewall v. Gibbs*, 1 Hall's Rep. N. Y. C. P. 602. *DeForest v. Fulton Fire Ins. Co.* id. 84. *Wait v. Fairbanks*, Bray'. Rep. 7.)

In an action for a breach of covenant, to pay, on the expiration of a lease, £60 per thousand for 10,000 rabbits, which the plaintiff covenanted to leave on a warren; held, that parol evidence was admissible to show, that, by the custom of the country, a thousand meant 100 dozen. (*Smith v. Wilson*, 3 Barn. & Adol. 723.)

So, where there was a covenant in a lease of coal mines, to get all the coal lying under certain closes, not deeper or below "the level of the bottom of said mine," it was held, that parol evidence was admissible to show, that among miners, "level" would be construed in the sense of geological stratum, and might therefore mean a line above or below the horizontal depth of the bottom of the mine mentioned. (*Clayton v. Gregson*, 4 Nev. & M. 602.)

Where a contract was made between Coopers and log-dealers, by which the former agreed to pay the latter \$3 for each and every thousand feet of merchantable boards that certain logs, to be cut by the latter, and deposited on Kennebeck river, at a given point, might be estimated to make; the plaintiffs, who were the log-dealers, insisted that the contract was entered into in reference to a usage among persons in their line

of busines along the Kennebeck river, to estimate the quantity of boards which may be realized from a log or lot of logs, before they were sawed, by a scale called the *Eruns-wick* scale; whereas the defendants, on the other hand, contended that the *Eruns-wick* scale was erroneous—that the plaintiffs must be holden to the strict quantity, or at farthest, to an estimate by another scale called the *Learned* scale, which they said was more exact in reference to the logs in question. Under these circumstances the court held, that if the usage existed, alleged by the plaintiff, and was so generally understood that the parties in contracting must be presumed to have had reference to it, then, an estimate according to the *Brunswick* scale should control. (Heald v. Cooper, 8 Greenl. 32.)

The phrase, “mystery and art of tanning business,” in an indenture of apprenticeship, will include the art of currying, or not, according to the general sense of the place where it is used; in Kentucky the terms *tanning business*, include, it seems, the entire process of making leather. (Said in Barger v. Caldwell, 2 Dana 130, 1.)

The force of usage is most fully illustrated by the cases relating to the construction of bills of lading, charter parties, policies of insurance, and other contracts of a commercial nature.

Parol evidence was held admissible to show that, by mercantile usage, the term *roots*, in a policy of insurance, is confined to such as are perishable in their nature; and that therefore *sarsaparilla*, not being perishable in this sense, though a *root* within the general meaning of the term, was not embraced by the memorandum in the policy. (Coit v. The Commercial Ins. Co., 7 John. Rep. 385.) The term *sea letter*, contained in a policy, may be shown by mercantile usage to mean “certificate of ownership.” (Sleight v. Hartshorne, 2 John. Rep. 531.) Whether the term “cargo,” in a policy of insurance, shall embrace *live stock*, may be settled by usage among insurance companies. (Allegre’s adm’r v. The Maryland Ins. Co. 2 Gill & John. Rep. 136. See Chesapeake Ins. Co. v. Allegre’s, heirs, id. 164.)

Where a policy provided that in case of loss the same was to be paid in ninety days after “*proof and adjustment thereof*,” held, that parol evidence showing what papers were by usage to be furnished to the insurers as proof under such a provision was admissible. (Allegre v. The Maryland Ins. Co. 6 Harr. & John. 408.)

An insurance was affected on a ship at London, insuring the ship from thence to the East Indies, the ship warranted to depart with convoy. It was shown that the ship went from London to the Downs, and from there with convoy, and was lost. The defendant insisted that there had been a breach of the warranty by departing from London without convoy. *Sed per cur.*, the clause “warranted to depart without convoy,” must be construed according to the usage among merchants, i. e. from such places where convoys are to be had, as the *Downs*. (Lethulier’s case, 2 Salk. 443.)

Various expressions in bills of lading are to be understood in reference to particular usages. A *clean bill of lading*, which imports that the goods are to be stowed *under deck*, may be construed to allow a stowage *upon deck*, or otherwise, according to the usage between the places contemplated by the contract as the *termini* of the voyage. (Semble, Cherry v. Holly, 14 Wend. 26. Barber v. Brace, 3 Conn. Rep. 9.) So usage may authorize what might otherwise be considered a deviation in respect to

the voyage. (See *Lawrence v. McGregor*, 1 Wright's Rep. 193.) But evidence of intent, as an independent fact, by declarations, &c. &c., would not be admissible; for the intent must be sought in the language of the bill of lading; (See *Cherry v. Holly*, *Barber v. Brace*, and *Lawrence v. McGregor*, supra;) except so far as it is to be deemed a mere receipt. (See *Wood v. Perry*, 1 Wright's Rep. 240. See also *Bartlett v. Rogers*, 7 Miss. Rep. 297, stated ante, note 192, p. 212. *May v. Babcock*, 4 Hamm Rep. 334, stated ante, note 194, p. 216.) The question whether a local usage might be resorted to, to show that the ordinary exception as to *perils of the seas*, in a bill of lading, would include an injury by rats, arose in *Aymer v. Astor*, 6 Cowen's Rep. 633. *Savage, C. J.*, expressed a very decided opinion in the affirmative. The other judges dissented, though upon what precise ground does not appear. In the case of the Schooner *Reeside*, 2 Sumn. 567, the bill of lading specified that the goods were "to be delivered in good order and condition, dangers of the seas only excepted;" and the point was, whether a local usage between New-York and Boston, (the *termini* of the voyage,) might be admitted to influence the contract so far as to exempt the carriers from liability for all damages save what arose from their own neglect. Mr. Justice Story excluded the usage, on the ground that, if admitted, it would go, not to *interpret or explain*, but to *vary and contradict* the contract. The same doctrine was held in *Turney v. Wilson*, 7 Yerg. 340.

The phrase "British weight," in a charter party, may mean *gross weight*, or *nett weight*; and evidence of usage is admissible to show which was meant. (*Goddard v. Bulow*, 1 Nott & McCord, 45.) It was expressly laid down, in *Taylor v. Briggs*, 2 Carr. & Payne, 525, that if the words "cotton in bales," used in a charter party, had acquired a particular meaning in regard to the trade between Liverpool and Alexandria, to which trade the instrument related, such meaning should apply.

Various other phrases and expressions may be applied differently, according to the subject matter, and the particular usage in reference to it, existing at the time of the contract; thus, what shall constitute a good delivery of goods at a particular place, no consignee being named, may depend upon the usage at that place; (See *Galloway v. Hughes*, 1 Bail. Rep. 553; and see as to the meaning of the term "deliver," *Furniss v. Hone*, 8 Wend. 247.) The term "coppered ship," in a written application for insurance, may have different meanings according to the usage at different places. (*Hazzard v. The New England Marine Ins. Co.* 1 Sumn. Rep. 218.)

In *Bold v. Rayner*, 1 M. & W. 343, evidence of mercantile usage was admitted, that a bought note of goods to be delivered from "the Speedy or Charlotte, expected to arrive"—and a sold note of the goods "ex Speedy and Charlotte to arrive"—meant the same thing, and that the seller had the option to deliver the goods from either vessel.

For other cases of usage relative to mercantile contracts, see post, p. 556, et seq. of the text. Also *Gabay v. Lloyd*, 3 Barn. & Cress. 793. *Blackett v. Royal Exchange Assurance Co.* 2 Crompt. & J. 249.

Bills of exchange and notes are no exceptions to the rule in regard to usage. (See note to *Yeates v. Pim*, 1 Holt, 95.) Accordingly, a custom among banks in the District of Columbia, to demand payment on the *fourth* day after a note became due, was allowed to be shown in an action against an endorser, and he was held liable, though by the settled rules of the common law, he would have been discharged by

reason of failure to make demand on the third day. (*Renner v. Bank of Columbia*, 9 Wheat. 581. See also *Bank of Columbia v. Magruder's heirs*, 6 Harr. & John. 172, 180. *Bank of Washington v. Triplett*, 1 Peters' Rep. 25. *Mills v. United States Bank*, 11 Wheat. 431.) See further as to usages at particular banks, *Kennebeck Bank v. Page*, 9 Mass. Rep. 157. *Kennebeck Bank v. Hammatt*, id. 159. *Widgery v. Munroe*, 6 id. 449. *Weld v. Gorham*, 10 id. 366. *Blanchard v. Hilliard*, 11 id. 85. *Wentworth v. Chase*, id. 87, note. *Leavitt v. Simes*, 3 N. Hamp. Rep. 14, 16, 17. *Bank of Utica v. Smith*, 18 John. Rep. 230. *Loring v. Gurney*, 5 Pick. Rep. 16.

In respect to the quality or character of a usage, admissible to influence the construction of a contract of any sort, (for the rule in this respect seems to be the same, whether the contract be written or verbal, sealed or unsealed,) it must appear to be so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to, and in conformity with it. (See the cases *supra*. Also *Eager v. The Atlas Ins. Co.* 14 Pick., 143, 4, per Wilde, J. *Snowden v. Warder*, 3 Rawle, 101, 107. *Smith v. Wright*, 1 Cain. Rep. 44. *Van Ness v. Pacard*, 2 Peters' Rep. 148. *Loring v. Gurney*, 5 Pick. Rep. 16. *Renner v. Bank of Columbia*, 9 Wheat. 581, 584, 5, et seq. *Lawrence v. McGregor*, 1 Wright's Rep. 192. *Kendall v. Russell*, 5 Dana, 501. *Barksdale v. Brown*, 1 Nott & McCord, 517. *Barber v. Brace*, 3 Conn. Rep. 9. *Lawrence v. Stonington Bank*, 6 Conn. Rep. 529. *Paull v. Lewis*, 4 Watts' Rep. 402. *Thomas v. O'Hara*, 1 Rep. Const. Ct. So. Car. 508. *Collings v. Hope*, 3 Wash. C. C. Rep. 149. *Hayward v. Middleton*, 3 McCord's Rep. 121.) And whether such is the case with regard to the usage in question, must generally be tried like other matters of fact, by the jury, if there be one. (See *Heald v. Cooper*, 8 Greenl. 33. *Williams v. Gilman*, 3 id. 276. *Rushforth v. Hadfield*, 7 East, 224. *Gibson v. Culver*, 17 Wend. 306, 7, 8. *Van Ness v. Pacard*, *supra*.)

The usage need not be general, i. e. extending over the whole country. It will be seen by the cases already cited, that usages of particular classes, and peculiar to certain localities, have been freely received. Many of the cases cited *infra* will be found full to this point. Indeed, the doctrine extends to the admission of usage at individual houses, and offices, provided the usage is brought home to the knowledge of the parties in some way, so as to establish that they contracted in reference to it. (See *Gabay v. Lloyd*, 3 Barn. & Cress. 793; and see the cases *supra* as to usages at banks. *Wood v. Hickok*, 2 Wend. 501.)

Its *antiquity*, moreover, is of no importance, further than as a circumstance in aid of the main point, which is, to show that the parties knew of the usage, and intended to adopt it as the law of their contract. (*Per cur.* in *Thompson v. Hamilton*, 12 Pick. 425, 428, 9. *Kendall v. Russell*, 5 Dana's Rep. 503.)

We frequently meet with general propositions like the following—"a usage must be reasonable"—and "can never be received to contradict a settled rule of law." (See *Frith v. Barker*, 2 John. Rep. 335. *Eager v. The Atlas Ins. Co.* 14 Pick. 141. *Homer v. Dorr*, 10 Mass. Rep. 26. *Henry v. Risk*, 1 Dall. 265. *Bowen v. Jackson*, Whart. Dig. ed. 1822, p. 252, § 358. *Stoeber v. Whitman*, 6 Binn. 416. *Rankin v. American Ins. Co.*, 1 Hall's Rep. N. Y. C. P. 619. *Brown v. Jackson*, 2

Wash. C. C. Rep. 24. *Winthrop v. The Union Ins. Co.* 2 id. 9. *Barksdale v. Brown*, 1 Nott & McCord, 517.)

Edie v. the East India Company, 2 Burr. 1216, will, it is apprehended, be found the nucleus of most of this doctrine; and when considered in reference to the particular facts to which it was applied, is undoubtedly correct. There, *Ld. Mansfield* had received evidence at nisi prius of the custom of merchants, that in a case of a bill of exchange payable to order, the endorsement was restrictive, unless that also contained the word order. At the bar, on motion for a new trial, he and the other judges concurred, that the law being settled, the custom of merchants could not control it; that is to say, would not subvert the law of the land, as such; not that the parties might not make the endorsement restrictive by special agreement, or, by the customary course of some particular business, make an exception in their own case, leaving the general law to take its course. But there the bill of exchange was drawn in the East Indies, and the main evidence came from Bankers in London. Their opinion was allowed by *Lord Mansfield* to overturn a rule of law which pervaded the whole empire, and indeed the whole commercial world. the court *Cowen, J.* delivering the opinion, *Gibson v. Culver*, 17 Wend. 308.) *Rushforth v. Hadfield* 7 East, 225, lays down the true doctrine. There the court agreed, that evidence of usage was admissible to enlarge the rights of carriers. The defendants claimed a lien on the goods carried, not only for the price of carrying them in particular, but for a general balance due to them for previous carriage. The law denies to carriers a claim for a general balance; but a long train of evidence was received, to show that custom, and a particular course of trade, among a particular sort of carriers, had overcome the law. The jury found against the defendants; but the evidence was so imposing that they moved for a new trial. *Chambre, J.* who tried the cause put it to the jury, whether the usage was so general as to warrant them in presuming that the parties, who delivered the goods to be carried, knew of it, and understood that they were contracting in conformity to it; if not, the general rule of law would entitle the plaintiffs to a verdict. All the judges concurred that a custom of this kind, which is, *quoad hoc*, to supersede the general law of the land, should be clearly proved, and the interested encroachments of persons engaged in a particular trade, watched with great jealousy. None of them disapproved the qualifications under which the case went to the jury; and *Lord Ellenborough C. J.*, and *Grose J.*, put it on the ground of a usage so general, and so uniformly acquiesced in for a length of time, that the jury would feel themselves constrained to say it entered into the minds of the parties, and made a part of the contract. But all this has nothing to do with the abstract question of competency. Usage, when it goes to change the law, is always hard to be made out; yet if counsel propose to prove such a usage, and think they can establish it, there is, it seems, no rule of law which forbids the attempt. (*Gibson v. Culver*, 17 Wend. 305, 307, 8, 9, et seq.)

The doctrine on this subject has been considerably discussed in South Carolina. There, a usage of the river trade, for the carrier of goods to look to the produce and consignee, alone, for freight, was set up as a defence to the person who sent them; and it was held, that the usage might be proved. *Gantt, J.* who delivered the opinion, conceded that it would be difficult to make out the usage in such cases; but that had nothing to do with its competency. In respect to the unreasonableness of the usage, he said, that "although at the first blush the custom alleged may appear unreasonable

and such as ought not to prevail, this is by no means conclusive that the usage was not a good one in law. In such cases recourse is had to artificial and legal reason; and thus considered the usage may be shown to be beneficial to the boatmen themselves." He further observed—"It is competent for a man or a body of men to renounce a common law right, if they think proper; and if, in relation to the river trade, either from views of interest, on the part of boat owners, or other politic considerations, expediency has pointed out the propriety, and usage has sanctioned it, then it might become the law by which the contract should be expounded." (*Middleton v. Heyward*, 2 Nott & McCord 9.) But see *Heyward v. Middleton*, 3 McCord's Rep. 121.

The fact of a particular thing being sanctioned by usage so general, uniform and extensive, as to raise the presumption that all who deal in reference to its subject, are presumed to have knowledge of the usage, and to contract in reference to it, would seem in itself to be very cogent evidence of its expediency and reasonableness, as it respects the class of persons among whom it prevails; and if not objectionable in any other point of view, the simple question should be, is it a *usage*? (See the observations of Cheves, J. in *Barksdale v. Brown*, 1 Nott & McCord 521.)

This accords with the elementary notion as to the origin of usages and customs generally, in respect to which it has been said, that where the people of a particular class or place "find any act to be good and beneficial, and apt and agreeable to their nature, and dispositions, they use and practice it from time to time, and so by frequent iteration and repetition of the act, a custom is formed." (*The Case of Tanistry*, Davies' Rep. 87.) Thus the customs of Gavelkind and Borough English have grown up, and although contrary to the common law, are allowed to be good. (*Id.* 88.)

A strong case for showing that a local usage is not necessarily bad, because opposed to the general law, is that of *Snowden v. Warder*, 3 Rawle's Rep. 101. There, a usage in Philadelphia for vendors of cotton in that city, to be answerable for defects, without either fraud or express warranty being proved, was established, and a vendor held liable accordingly. This was virtually permitting that class of dealers to abrogate the common law, which else must have applied, and introduce the civil law principle in its stead.

The result of the authorities, therefore, seems to be, that a particular usage in reference to the contract in question, may be proved to influence its construction, though contrary to some rule of general law; and then it will be a question of fact, triable like other facts, whether the parties contracted in reference to the usage, or not; in other words, whether they did or did not intend to adopt the usage, instead of the general law, as the rule for interpreting their contract. (See *Gordon v. Little*, 8 Ser. & Rawle, 533. *Snowden v. Warder*, 3 Rawle, 101. *Renner v. Bank of Columbia*, 9 Wheat. 581, 584, 5. *Jones v. Fales*, 4 Mass. Rep. 245. *Kennebeck Bank v. Page*, 9 Mass. Rep. 155. *Kennebeck Bank v. Hammatt*, *id.* 159. *Widgery v. Monroe*, 6 *id.* 449. *Weld v. Gorham*, 10 *id.* 366. *Wood v. Wilcox*, 9 Wend. 349. *Blanchard v. Hillard*, 11 Mass. R. 85. *Middleton v. Hayward*, 2 Nott. & McCord, 9. *Halsey v. Brown*, 3 Day's Rep. 346.) See post, notes 974, 975.

Limitations upon this right, however, do undoubtedly exist; and cases may often arise where the court must adjudge the usage absolutely void in itself. If that which is thus sought to be incorporated with a contract, would be void, as an express

stipulation, the evidence cannot be allowed. Hence, usages sanctioning what is *malum in se*, or *malum prohibitum*, are invalid. (Snowden v Warder, 3 Rawle, 107. Bryant v. The Commonwealth Ins. Co., 6 Pick. 131.) Usages favoring the taking of unlawful interest, and trenching upon the policy of the statutes on that subject, are bad; (Dunham v. Dey, 13 John. Rep. 44;) though, usage among bankers has been said to have sanctioned certain practices which else would have been deemed usurious. (See per Savage, C. J. in Bank of Utica v. Wager, 2 Cowen's Rep. 712, 766. S. C. reversed on error, 8 id. 398.) Usages in restraint of trade are void; (*semble*, Williams v. Gillman, 3 Greenl. Rep. 281;) so of usages originating in, and continued by violence, oppression and fraud, or contrary to the general good; and such, it has been said, are, for the most part, those usages and customs which have been adjudged void by the English courts, as "unreasonable," "against common right," "contrary to law," &c. &c. (Davies' Rep. 89.) A usage sanctioning what is unjust, and against good morals, is bad; e. g. a usage among banks, not to correct mistakes in counting money, unless discovered before the person leaves the room; (Gallatin v. Bradford, 1 Bibb's Rep. 209;) or a custom of mechanics to charge for materials according to a standard which would give them pay for materials never furnished; (Whitesides v. Meredith, 3 Yeates' Rep. 318; see Kendall v. Russell, 5 Dana's Rep. 501.) So of a custom to commit acts of trespass upon others' property; (Waters v. Lilly, 4 Pick. 145;) and a custom of agents to depart from the instructions of their principals. (Barksdale v. Brown, 1 Nott & McCord, 517.) A custom of masters to sell the cargo of a stranded vessel, without necessity, has been characterized as a usage against "faith and common honesty," and therefore bad. (Bryant v. The Commonwealth Ins. Co., 6 Pick. Rep. 145.) Quere, whether a local usage, exempting proprietors of carrier vessels from all responsibility in respect to goods committed to their charge, except for injuries arising from the negligence of the master, would not be void, as contrary to the general good, and subversive of the interests of trade and navigation. (See what was said by Story, J. in The Schooner Reeside, 2 Sumn. Rep. 574, 5. Also per Cowen, J. in Cole v. Goodwin, 19 Wend 272, et seq.)

It follows, from what has been said, that evidence of usage may be received to vary, in some sense, the *legal effect* of a written instrument. (But see Eager v. Atlas Ins. Co. 14 Pick. 144; as to what is there said, however, *quere*.) *Prima facie*, every contract is to be understood as containing, in some sort, an implied reference to the general law; but when a state of facts is made out, which rebuts that presumption, and shows that the parties intended to adopt a particular usage as the rule of interpretation, the latter shall prevail, provided it be such a usage as the parties had a right to adopt. But it is obvious, that where the contract itself manifests an intention, either directly or indirectly, to exclude the usage, no evidence of it can be received, without overstepping the limits of *exposition*. (See ante, note 949, p. 1394, et seq.) "A custom or usage of trade, is only allowable as one mean to arrive at the intention, never to thwart or control it. If the stipulations of a contract indicate an *intention* in the obligor, variant from the usage, then should the stipulations prevail; otherwise, an obligation may be imposed contrary to the intention, though provided against by the express terms of the contract." (Per Ewing, J. delivering the opinion of the court in Kendall v. Russell, 5 Dana's Rep. 501, 502.) See per Story, J. in Schooner Reeside, 2 Sumn. Rep. 570.

What shall be deemed such an expression of intention, inconsistent with the usage, as to exclude the latter, is many times a question of considerable difficulty. The general rule is clear; no extrinsic evidence of usage can be received to vary, add to, or contra dict, the plain sense of the contract, when once properly ascertained. (See *Mumford v. Hallett*, 1 John. Rep. 439. *Rankin v. The American Ins. Co.*, 1 Hall's Rep. N. Y. C. P. 619. *The Schooner Reeside*, 2 Sumn. Rep. 56, and *Turney v. Wilson*, 7 Yerg. Rep. 540, stated supra, p. 1411, of this note. *Stoeyer v. Whitman's lessee*, 6 Binn. Rep. 516, stated post, note 974. *Turner v. Burrows*, 5 Wend. 541, 547. *Parsons v. Miller*, 15 id. 562. *Snowden v. Warder*, 3 Rawle, 107. *Yeates v. Pim*, 2 Marsh. Rep. 141. *Holt's Rep.* 95, S. C. *Blackett v. Royal Exchange Assurance Co.*, 2 Crompt. & Jer. 244. See ante, note 954, p. 1397; also post, notes 974, 5.) But the application of it depends so much upon particular forms of expression, and terms in the contract, which may happen to strike different minds in different ways, (see ante, note 948, p. 1386, 7) as well as upon various collateral and extrinsic circumstances, that it is not extraordinary to find learned judges disagreeing somewhat on this point. That disagreement, as we have seen, is most strikingly apparent in those cases where usage has been invoked to supersede some rule of general law. Then the presumption that the parties contracted in reference to the general law, must be overcome, before the usage can be applied; and very slight indications of intent, appearing in the instrument, have been seized upon as corroborating that presumption, to the extent of excluding the usage altogether. This is illustrated by many of the cases supra.

In *Eager v. Atlas Ins. Co.*, 14 Pick. Rep. 141, it was held to be the general law, as to insurance of vessels, that in adjusting a partial loss on a ship which has been repaired, the proceeds of the old materials not used in the repairs are first to be deducted. The underwriters claimed, in virtue of a local usage at Boston, (the place where the policy was made,) that they had the right of deducting one third new for old, from the gross amount of the expenses of repair. The policy was according to a form which had been recently adopted by all the insurance companies at Boston, and contained an express reference to certain usages of the Boston insurance companies; but none in respect to this. There were some stipulations, moreover, in the policy, touching partial losses, which, however, were aside of the point designed to be established by the usage. Another fact adverted to by the court, was, that the question as to the general law had been settled in New-York years before the present policy was under-written, and for some time before had been pending in Massachusetts for decision. (Id. 144.) "From these, and other circumstances," the court said, "the presumption is strong that the parties did not treat, as to the mode of adjustment, on the basis of usage, but on that of the existing law, however it might be decided. When the contract refers to the customs and rules of insurance in Boston, and specifies how far they shall constitute part of the contract, it must be inferred that the parties did not intend that it should be affected thereby beyond the extent specified; especially as the form of the policy was no doubt settled with great care and deliberation." (Id. 144, 5.) These considerations were deemed quite sufficient to settle the question of usage; but another was added, viz.: that the contract being one of indemnity, and the mode of adjustment contended for by the under-writers being one which would deprive the insured of a full indemnity, the usage was op-

posed to the essence of the contract. (Id. 145.) See as to the mode of adjustment in such cases, according to the general law, *Byrnes v. National Ins. Co.*, 1 Cowen's Rep. 265; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259; see also the opinions of Messrs. Nichols, Phillips and Jackson, *Amer. Jurist*, vol. 5, pp. 252, 262, and vol. 6, p. 45, together with the authorities cited. Where a brick yard was let to H., by E. and L., the owners, under a contract that H. should make bricks in the yard, hire the workmen, &c., give in his time and services, and pay a certain sum for every 1000 bricks made, as rent; E. and L. stipulating that they would attend to selling the bricks, purchasing the materials, collecting the bills, &c.; the parties to share the profits and loss, equally, and E. and L. to have the right to retain the bricks or money collected, in their possession, to the amount of all sums, &c. advanced by them from time to time to H.; held, that the bricks made under the contract were the joint property of the parties, and such being the plain intent expressed, evidence of a usage tending to vary the effect of it in such a way as to show that H. had no property in the bricks, but only a claim to a certain share of the profits, was inadmissible. (*Macomber v. Parker*, 13 Pick. Rep. 175.) In *Keudall v. Russell*, 5 Dana's Rep. 501, the plaintiff sued to recover for laying brick in a building. The covenant under which he performed the work, bound him to lay *as many brick as the defendant might need to complete the building*; for which the defendant bound himself to pay a given sum *per thousand, for each thousand brick laid*. On the trial, the plaintiff claimed to recover according to a local custom, allowing the quantity of brick laid to be ascertained, by assuming, as a basis of calculation, that the whole was solid work, and not regarding openings, such as doors, windows, &c. The court held the terms of the contract plainly expressive of a different intent, viz: that the plaintiff should be compensated only for the brick actually laid, and so the usage was inadmissible. (See also *Whitesides v. Meredith*, 3 Yeates' Rep. 318.)

There are various usages of trade and commerce, which have been so often proved as matters of fact, and have so far incorporated themselves with the general law, that courts will judicially recognize them. (See *Consequa v. Willings*, 1 Peters' C. C. Rep. 230. *Snowden v. Warder*, 3 Rawle, 105. *Wilcox v. Wood*, 9 Wend. 349. *United States v. Horrendo*, 6 Peters' Rep. 715. *Thomas v. O'Hara*, 1 Rep. Const. Ct. So. Car. 306.) But particular usages, such as those of which we have been speaking, must be proved specially. And the circumstances of the usage being *prima facie* "unreasonable," "against the general law," "restricted within very narrow limits," of comparatively "recent origin," &c. &c., always come in to enhance the difficulty of showing that the parties contracted in reference to it, and intended to make it the law of their case. (See *Gibson v. Culver*, 17 Wend. 307, 8, 9. *Wilcox v. Wood*, 9 id. 349. *Middleton v. Heyward*, 2 Nott & McCord, 9. *Gordon v. Little*, 8 Ser. & Rawle, 535. *Eager v. Atlas Ins. Co.*, 14 Pick. 143, 4. *Snowden v. Warder*, 3 Rawle, 105. *Thomas v. O'Hara*, 1 Rep. Const. Ct. So. Car. 306. *Furnis v. Hone*, 8 Wend. 266. *Allegre's adm'r v. The Maryland Ins. Co.*, 2 Gill & John. 136.) And perhaps this is the sense in which many cases are to be understood, which lay down the proposition that a usage, to be obligatory, must be certain, uniform, reasonable, and sufficiently ancient to be generally known, &c. (See the case of *Kendall v. Russell*, 5 Dana's Rep. 501, and what is said at p. 503, 4.)

When the question is of a custom or usage, and it is not known to those, who,

from their business and connexions have the best means of knowing it, ignorance of it is, in some sense, positive testimony of its non-existence. Thus, suppose the question to be as to the existence of a usage of trade in a foreign port, according to which the rights of parties are to be decided—and that there are two foreign witnesses, both merchants belonging to the place, and dealing in the same business, one of whom testifies in support of the usage, and the other is ignorant of it; in such case it seems the usage cannot be said to be proved; especially if other merchants from the place are in court and not called on. (Per Parker, C. J., in *Parratt v. Thatcher*, 9 Pick. 426, 431.) The fact that the usage has been resisted by some, and those insisting upon it, or others of the same class, consenting to a qualification or abandonment of it in consequence of such resistance, may be quite material on the general enquiry. (See *Kendall v. Russell*, 5 Dana's Rep. 501, 503, 4.)

There is a distinction between enquiring of a witness for the *common understanding* as to the effect or import of a contract, susceptible of a clear interpretation, and evidence of custom or usage. The latter is admissible, if at all, as a means of interpreting the sense in which the *parties* understood the language in question; while the former may only show the understanding of others, which is immaterial, unless it be also the understanding of the parties. (*Paull v. Lewis*, 4 Watts' Rep. 402, 403.) So, *semble*, as to the general understanding of the country in regard to the sense of particular words, easily understood; e. g. the word *acre*, in a land contract. (*Id.* 403, 4.) See ante, note 948, p. 1388, as to direct evidence of what a party declared he meant by a term *prima facie* unmeaning.

A question arose at *nisi prius*, as to the meaning of the word "cargo," in reference to a ship, and whether it included the whole loading; the counsel cited *Sergeant v. Read*, 2 Strange, 1228, to show that it did; and he was referring to *Entick's Dictionary*, when he was interrupted by Tindal, C. J., who said—"It is a question of mercantile construction. You had better lay aside your dictionary, and appeal to the knowledge of the jury; for, after all, the dictionary is not authority." (*Houghton v. Gilbert*, 7 Carr. & Payne, 701.)

There is another class of cases, where a more direct enquiry must be allowed as to the meaning of writings. Those hitherto considered, relate mainly to instances where the judge is supposed capable of assigning to the words some signification, without the necessity of resorting to extrinsic evidence. If the contents of an instrument, however, are utterly unintelligible in themselves, either from being written in characters which are difficult to be decyphered, or in a language which the court does not understand, &c., the propriety of enquiry *aliunde* is still more apparent.

In the progress of the arts, and the ever changing pursuits of mankind, new terms are daily devised among artists and others, in whose peculiar departments they are used, and when not understood, there can be no rational objection to admit the evidence of persons conversant with their meaning, to explain them. (See per Chancellor, in *Sleight v. Hartshorne*, 2 John. Rep. 542.) In a case where a sculptor gave by his will, all his "bankers," evidence was allowed to show that "bankers" meant solid pieces of wood, on which were placed blocks of marble about to be worked. (*Goblet v. Beechey*, 3 Sim. 24. See S. C. more fully reported, *Wigram on Extr. Ev.* 139, et seq.) In the same will, the word "mod" was found, and liberty was given for trying to ascertain its meaning by the evidence of persons generally conversant with

the subject matters to which the will related. (See this case, ante, note 948, p. 1389; also see *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 336.) And as a general rule, if a party has expressed himself in terms, with which, as a member of a particular trade, he is familiar, but which are not understood by the court, the evidence of persons acquainted with the meaning of such terms is admissible. (*Wigram on Extr. Ev.* 35. *Attorney General v. The Glass Plate Co.*, 1 Anstr. 39. *Smith v. Wilson*, 3 Barn. & Adol. 729. *Richardson v. Watson*, 4 Barn & Adol. 787.)

So if the hand writing in an instrument is obscure, and difficult to be read, the evidence of persons skilled in decyphering writing is admissible, to shew what the writing is. (*Masters v. Masters*, 1 P. Wms. 425. *Norman v. Morrell*, 4 Ves. 769. *Goblet v. Beechey*, supra. *Armstrong v. Burrows*, 6 Watts' Rep. 266. *Remon v. Hayward*, 2 Adol. & Ellis, 666.)

And if a foreign language is used, persons acquainted with it may be called. (See *Armstrong v. Burrows*, 6 Watts' Rep. 266, 263. *Wigram on Extr. Ev.* 34. *Wushoff v. Dracourt*, 3 Wats' Rep. 240.) So of provincialisms; they may be explained by persons residing in the same district. (*Gresl. F.q. Ev.* 199.)

A case of a somewhat novel aspect, apparently involving the principle of some of the preceding ones, arose in Kentucky, on a prosecution under the statute against duelling. The indictment was for sending a challenge in the form of a letter, as follows:

"July 2nd, 1833.

"I am in receipt of yours of this date, declining one of the demands made of you in my card of the 29th. You will now afford me the satisfaction which is due from man to man, under similar circumstances.

Respectfully, HENRY C. POPE.

Mr. George D. Prentice.

"P. S. My friend Mr. Allen is authorized to make any arrangements necessary.
H. C. P."

The indictment set out the letter, and alleged that the meaning and intent was, a challenge to fight with deadly weapons, to wit: with pistols. The defendant demurred, and thus presented the question substantially whether it was competent, for the prosecutor to show, by extrinsic evidence, that the letter meant a challenge to fight in the manner averred. The court of appeals held in the affirmative, sustaining the indictment. They said, the court could not judicially know the "technics of duellists," nor be presumed to possess a judicial knowledge respecting the accustomed etiquette and and forms observed in negotiations preliminary to those beligerent interviews erroneously denominated affairs of honor—that when the parties interchange written communications, if neither can be convicted unless those *documents* literally import a challenge or an acceptance to fight in single combat with deadly weapons, the statute would become a mere *brutum fulmen*, without any practical efficacy; that the writings constitute only one species of evidence, which may be explained or applied, or aided by oral evidence; and that, so far as the court could know, witnesses might be able to prove that the challenge was or should have been understood to be a challenge to fight with pistols, or with the usual weapons, and that pistols were the customary weapons among duellists. (*Commonwealth v. Pope*, 3 Dana, 418.) See further *Commonwealth v. Rowan*, id. 395. *Commonwealth v. Hart*, 6 J. J. Marsh. 119.

It may be well to observe before concluding this note, that though it is generally the province of the court to construe instruments, where the meaning is to be collected from the instrument without the aid of extrinsic evidence; yet in cases like those above considered, where the meaning is to be judged of by facts *aliunde* in connection with the written language, very much must be left to the jury. It has been laid down, as to such cases, that the construction is "usually matter of fact for the jury." (Per Williams J. in *Jennings v. Sherwood*, 8 Conn. Rep. 127;) that "an admixture of parol with written evidence draws the whole to the jury." (*Sidewell v. Roberts*, 1 Pennsylv. Rep. 386. per Gibson C. J., citing *Welsh v. Dugar*, 3 Binn. 377, *Denison v. Wurtz*, 7 Ser. & Rawle, 372, *Moore v. Miller*, 4 id. 279, *Watson v. Blaine*, 12 id. 131, *Overton v. Tracy*, 14 id. 311, *Brown v. Campbell* 1 id. 176. Also see *Wharf v. Howell*, 5 Binn. 499.) See further, *Etting v. United States Bank*, 11 Wheat. Rep. 59, and *Goddard v. Pratt*, 16 Pick. 412, from which it seems more accurate to say, that the point of construction is for the jury, under proper directions from the court. Where the writing is illegible, or obscure, the question what the letters really are, is a matter of fact to be decided by the jury. (*Armstrong v. Burrows*, 6 Watts' Rep. 266.) But see *Remon v. Hayward*, 2 Adol. & Ellis, 666, which seems the other way. Further as to S. P. see *Jackson, ex dem Swain, v. Ransom*, 18 John. Rep. 107.

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We have seen by many examples in our preceding notes under this head, that there is hardly a conceivable case where it may not be said, that the writing refers to something extrinsic for the ascertainment of the object, person, or subject matter intended. The reference is either *express*, as to names, monuments, lines, or other descriptive or identifying circumstances called for; or it is *implied*, as, to the circumstances surrounding the author of the instrument, and presumptively present to his mind at the time he made it, but in respect to which the writing is entirely silent. Many cases belonging to both classes, are adverted to in our next preceding note.

Upon the same principle, where one writing refers to another, either tacitly or expressly, both are to be construed together; and one may correct an erroneous description contained in the other; or even vary, or add to, as well as explain it. Thus, if a patent refer to a plat annexed, and if, in the plat, a water course be laid down as running through the land, the tract must be so located as to include the water course, and to conform as nearly as may be to the plat; though the lines run do not agree with the courses and distances mentioned in the patent; and though neither the certificate of survey, nor the patent, calls for the water course. (*McIver's lessee v. Walker*, 4 Wheat. 444. See *Jackson, ex dem Havens, v. Sprague*, 1 Paine's Rep. 494, et seq.) Otherwise, in an action of covenant against incumbrances, on a deed containing a reference to the grantor's title deed on record, and then adding a full description by metes and bounds; such reference may aid in indentifying the lands, but shall not operate to limit the description by metes and bounds. (*Harlow v. Thomas*, 15 Pick. 66 stated pos., note 961.) Further, that two writings thus connected by reference may be read and construed as one instrument, see *Jackson, ex dem. Lowell, v. Parkhurst*, 4 Wend. 374. *Bliss v. Branham*, 1 J. J. Marsh. 200. *Jackson, ex dem. Swain*,

v. Ransom, 19 John. Rep. 107. And see Parks v. The general Interest Ins. Co. 5 Pick. 34, as to when and how far, a written application for insurance may be considered in construing a policy. Clearly, if *expressly* referred to in the latter, both should be read together. (Id. 37.)

The reference from one writing to another, may be quite indirect, or by implication only. Where there was a reference in a patent to a map on file, this was construed as an implied reference to the field book connected with the map, and the whole construed together. (Jackson, ex dem Livingston, v. Freer, 17 John. Rep. 29, ante, note 942, p. 1380.)

Two writings, executed at the same time, in relation to the same subject matter, have, in many cases, been deemed one instrument, with a view to the construction of either. That they are contemporaneous, and kindred in respect to subject matter, is frequently inferrible from circumstances appearing in the writings themselves. A familiar instance is that of a conveyance of lands or chattels, apparently absolute, and a separate contemporaneous agreement respecting a conveyance by the grantee, to the grantor, on payment of a sum loaned, &c. Though neither expressly and directly refers to the other, yet, being in fact parts of one transaction, bearing the same date, and describing the same lands, the one will often qualify the other, and the whole be deemed a mortgage. (See Bennoch v. Whipple, 3 Fairf. Rep. 346, 349. McDowell v. Hall, 2 Bibb's Rep. 610.) Otherwise, where they are not simultaneous, or parts of one transaction. (Bennoch v. Whipple, supra. See Hale v. Jewell, 7 Greenl. Rep. 435. French v. Sturdivant, 8 id. 435. Kelly v. Thompson, 7 Watts' Rep. 401, 404, 5.) And sometimes, where they are simultaneous, the construction may be, that the whole, instead of amounting to a mortgage, manifests a *defeasible purchase*; and then the question how far parol evidence is admissible to show that a mere security or mortgage transaction was intended, frequently arises. On this general doctrine, see 4 Kent's Comm. 143. Robinson v. Cropsey, 2 Edw. Ch. Rep. 138, 142, et seq. and the cases there cited. Reading v. Weston, 7 Conn. Rep. 143. S. C. id. 409, 8 id. 117. Wharf v. Howell, 5 Binn. 499, and see post, note 961. Kerr v. Gilmore, 6 Watts' Rep. 405. Colwell v. Woods, 3 id. 138.

In Dillingham v. Estill, 5 Dana's Rep. 21, the plaintiff sued for a breach of warranty of soundness, contained in a bill of sale of two slaves; the defendant pleaded that the following writing—"I, Benjamin Estill, (the vendee,) *release said Dillingham from any responsibility of said negroes, as witness, my hand—Benjamin Estill*"—was executed simultaneously with the bill of sale, &c.; averring, that it was intended as an integral part of the bill of sale, and to operate as a defeasance or release of the warranty. The court of appeals overruled a demurrer to the plea; holding, that however incongruous and extraordinary such an entire contract might be, both writings must be construed together, if they were in fact cotemporary. It was argued that the writings could not be connected by parol testimony, or by averment merely. The court, in respect to this, said—"It has been decided that one writing cannot be connected with another, unless it in some way refers to it. But if that here relied on was cotemporary with the bill of sale, it can be understood as referring to it without any parol proof. For, surely, if a vendor of slaves make a bill of sale with warranty, and, at the *same time*, the vendee deliver to him a writing, stipulating that he shall not be responsible for 'the *said negroes*,' the latter agreement, without any

extraneous proof, might be understood to refer to the former, and to mean, that the vendor should not be responsible on his formal warranty. It would not be inconsistent with either of the writings, or with any rule of evidence, to prove that they were given at the same time; and, indeed, as that given by the appellee (the vendee) has no date, the fact of identity as to date, is far from being intrinsically improbable." (Id. 23.) Even if the date had been different, parol testimony might have been received, it seems, to show that both were executed at the same time. (See the cases post, note 973.)

In actions on promissory notes, writings connected therewith, by direct reference, or necessary implication, are admissible by way of showing it conditional, &c. (See *Davlin v. Hill*, 2 Fairf. Rep. 434. *Hunt v. Livermore*, 5 Pick. Rep. 395.) And parol evidence, consistent with the material parts of the two writings, and tending to connect them, seems allowable. (See the cases, supra. Also *Heywood v. Perrin*, 10 Pick. 228. And see further, post, note 977.)

The date and subscribing witnesses of two writings being identical, the court presumed one to be the consideration of the other, nothing appearing on their face to counteract that presumption. (*Aldridge v. Birney*, 7 Monroe, 344, 347.)

But though one writing may go to qualify, vary, and control another, in cases like those above noticed, it is not to be inferred that either the one, or the other, or both, after being connected, can be subjected to the influence of parol evidence, any farther than if they constituted, in fact, an entire instrument, and were written on the same piece of paper. (See the foregoing cases; also *Heywood v. Perrin*, 10 Pick. 228; *Wharf v. Howell*, 5 Binn. 499.) Accordingly, where a deed and separate agreement were construed to import an absolute sale; held, that parol evidence to show that a mortgage was intended, could not be received. (*Reading v. Weston*, 8 Conn. Rep. 177. S. C. 7 id. 143, 409.) See post, note 961. So, where they import a mortgage, parol evidence is inadmissible to show that an absolute sale was intended. (*Gurnsey v. Palmer*, 7 Wend. 248, stated post, note 961.)

As a general rule, all cotemporary or prior parol stipulations between the parties, are to be regarded as merged in the written contract, and cannot be given in evidence with a view of varying its import. But where there is a direct reference in the writing to a verbal agreement, the latter may be proved, even though the effect of it be to add material terms and conditions to the writing. Accordingly, in Pennsylvania, in an action of debt on a bond conditioned for the payment of money, upon which there was an endorsement referring to an agreement between the parties to it, without stating what the terms of the agreement were; held, that the defendant might give parol evidence of the agreement, in order to show that it was the understanding of the parties that the bond should not be collected. (*Commissioners v. McCalmont*, 9 Pennsylv. Rep. 122.) So if a note refer to a verbal condition agreed upon, without showing what the condition is, it may be proved by parol. (*Couch v. Meeker*, 2 Conn. Rep. 305.)

A distinction not frequently adverted to, but well founded in principle, should be observed in the application of this doctrine of reference to *words*; between such contracts and instruments as are required to be in writing, and those which may be good without writing. In respect to cases of the latter class, a reference to words is allowable. And such a reference in cases of the former class, when made merely as a mode

of describing or defining what is meant by the writing, is not, it seems, objectionable, and the words may be proved. Such appears to be the result of *Sanford v. Raikes*, stated in the text, where the reference was to an antecedent verbal order of the testator, in respect to cutting trees. Sir W. Grant expressly said, it was like a description of an estate by reference to the circumstance of occupation. (See the text, p. 546, 7.) But how would it be in case of a reference to some foreign parol expression of *intention*; such intention not being *in* the writing? Clearly, the reference would be null and void, unless the case was one not within the statute of frauds, or where the intention might legally be manifested without writing. This view is supported by *Molineux v. Molineux*, Cro. Jac. 144. There, a testator, by his will, gave to his three children, certain rents and annuities by the description, "such several annuities, or annual rents, as are expressed in several writings, signed with my hand, and sealed with my seal, according to the true meaning of said writings." In a special verdict, the jury found of what rents and annuities he had signed and sealed writings; and it was held, that they passed under the will. The court said it was a good devise in writing of the rents themselves, for it refers to the writing, whatever it is, as if it were specially limited in the will. And they said that upon this reason, in *Fairfax's* case, it was resolved by the opinion of the chief justices, and the counsel of that court, that where one makes a deed of feoffment to divers uses, and makes no livery, and after, by his will, devises the lands to such persons, and "in such manner, as he appointed by his deed of feoffment," it was a good devise of the land. *But they all held, that a will cannot refer to words only without writing.*

Where an agreement or disposition of property can only operate by writing, an instrument referring to another must describe it so clearly, that, by the description, it may be identified. For, to allow parol evidence to connect two instruments together, where there is no reference to a foreign instrument, or where the description of it is insufficient, would be to give it an effect independent of the writing, and contrary to the provisions of law which require the whole to be in writing. (See *Brodie v. St. Paul*, 1 Ves. Jun. 330. *Smart v. Prujean*, 6 Ves. 566. *Coles v. Trecothick*, 9 id. 249. *Boydell v. Drummond*, 11 East, 153. Per *Holroyd, J.*, in *Kenworthy v. Schofield*, 2 Barn. & Cress. 948. *Clinan v. Cooke*, 1 Scho. & Lef. 22. *Tawney v. Crowther*, 1 Bro. C. C. 161, 318. *Givins v. Calder*, 2 Dess. Eq. R. 198. *Parkhurst v. Van Courtlandt*, 1 John. Ch. Rep. 273. S. C. on appeal, 14 John. Rep. 15.)

But this rule is not to be so interpreted as to exclude evidence for the purpose of applying the terms of the reference; in other words, evidence tending to show what the reference means. The description must be compared with the instruments to which it may possibly refer; if the description is in some respects erroneous, the erroneous part may be rejected, agreeable to the doctrine *falsa demonstratio*, &c.; in short, the reference is to be dealt with as you deal with other descriptions, in applying them to the object or subject intended. In *Hodges v. Horsefall*, 1 Russ. & Mylne, 116, an instrument, purporting to be an agreement for a lease, contained a clause for the erection of additions, according to a plan agreed upon; it appeared that three distinct plans existed for making the additions alluded to; and an objection was made that parol evidence was inadmissible to determine what plan was meant. Lord Lyndhurst, in giving judgment, said—"I am of opinion, on the authority of all the cases, and especially the case in 1 Scho. & Lef. 22, where Lord Redesdale has considered

the subject very fully, that, as the written agreement refers specifically to a plan, if there be parol evidence clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it." See also *Saunderson v. Jackson*, 2 Bos. & Pull. 238, 239, and the observations of the Lord Chancellor in *Dillon v. Harris*, 4 Bligh, N. S. 343. In *Shortreede v. Check*, 1 Adol. & Ellis, 57, assumpsit was brought upon a guarantee, in which the consideration was stated in the following form: "You will be so good as to withdraw the promissory note; and I," &c. A promissory note, payable to the plaintiff, and made by the defendant's son, was produced on the trial, by the plaintiff, and no evidence was given of the existence of any other note. A motion was made for a new trial, on the ground that the description of the note was not sufficiently explicit to ascertain what note was meant, without the admission of parol evidence. Held, that there being no evidence of any other note to which the agreement could apply, the one produced was to be regarded as that intended, and so the agreement was held sufficient within the statute of frauds. Had it turned out that there were two notes, there might have been a difficulty, it was said, in explaining which was meant.

Where a mortgage of chattels purported on its face to have been given to secure the plaintiff for his liability on a note given to A., the date of which was specified, and the amount, but the one produced on the trial by the plaintiff, though agreeing with the description in other respects, varied from the amount specified, (the one described being for \$236, and the one produced for \$256;) held, that the plaintiff might show that the note produced was the only note he had signed as surety for the mortgagee, and so identify it as the one intended by the description. (*Johns v. Church*, 12 Pick. Rep. 557.) In Pennsylvania, where there was a reference in an assignment to a note, describing it by its date, amount, time of payment, the name of the maker, and the person in whose favor it was drawn; held, that the testimony of the assignor, showing that no note drawn in favor of the person named ever existed, but that another note, drawn by such person, and corresponding with the description in other particulars, did exist, and that this was the one intended, was admissible. (*Commercial Bank v. Clapier*, 3 Rawle's Rep. 335.) This case, however, seems to go on the equity doctrine of correcting mistakes, which power is exercised in that state by courts proceeding, in form at least, as courts of law. Hence, direct evidence of intention, as an independent fact, was perhaps proper. (See ante, note 948, p. 1387, 8.) In Vermont, ejectment was brought by one who claimed in virtue of a mortgage, purporting to have been given to secure a note of \$440. The plaintiff produced a note "agreeing with the one described," except that the sum was \$449, instead of \$440. He then proposed to prove by parol, that the "note produced was the one intended to have been described;" and that the variance was through the mistake of the scrivener. The court rejected the evidence, and directed a verdict for the defendant; and the decision was afterwards sustained on review. (*Edgill v. Stanford*, 3 Verm. Rep. 207.) The suit was in a court of law, and the evidence offered was designed obviously to show mistake, or intention as an independent fact; as such, it was irrelevant to the point of interpretation. (See ante, note 948, p. 1384, et seq.) It might have been held otherwise, perhaps, had the evidence proposed been of circumstances collateral to the question of intent, and had the reference to the note been sufficiently descriptive of the one produced, to have enabled the court to see, by the aid of such

evidence, that this was the one intended, notwithstanding the *falsa demonstratio* as to the amount. (See the cases ante, notes 840, 842.) The doctrine of inaccurate description, however, was not expressly adverted to in either of the above cases. *Johns v. Church*, supra, which seems a fair case for the application of it, proceeded apparently and principally upon the ground that the evidence adduced was intended to rebut the presumption of fraud, or of payment and discharge, which the defendant, (who was a sheriff, and had seized the chattels under an attachment against the mortgagor, in favor of a creditor,) was striving to avail himself of, to defeat the mortgage. But see as to the mortgagees right to give such evidence, on this ground, post, p. 552, 3, of the text, and note 972.

That the rule *falsa demonstratio non nocet* may be applied in such cases, if the description be sufficient after rejecting the erroneous part, take for illustration the instance of a sheriff's deed, referring to the execution under which he sold. There, though the execution be misdescribed in respect to some particulars, yet if it is true in the main, you may reject the erroneous part, when the facts shown *aliunde* require it, and give effect to the residue. (See per Walworth, Chancellor, in *Jackson, ex dem. Webb, v. Roberts' ex'rs.*, 11 Wend. 427. *Jackson, ex dem. Hill, v. Streeter*, 5 Cowen's Rep. 529. *Jackson, ex dem. Martin, v. Pratt*, 10 John. Rep. 381. *Den, ex dem. Hattan, v. Dew*, 3 Murph. Rep. 252. *Jackson, ex dem. Witherell, v. Jones*, 9 Cowen's Rep. 182. *Humbert's lessee v. The Methodist Episcopal Church*, 1 Wright's Rep. 213.) How far these recitals may be varied or contradicted by parol, see post, note 961, p. 1430.

NOTE 959—p. 547.

See ante, note 954, p. 1396, et seq.

NOTE 960—p. 548.

See ante, note 920, p. 1340, 1, and 2 R. S. p. 64, of 1st ed. and p. 8 of 2d. § 42, et seq., as to the making and revoking of wills in New-York.

We have seen ante, note 940, p. 1376, that the case of *Beaumont v. Fell*, where an intention different from the one expressed was allowed to be shown, proceeds upon an assumed distinction between a legacy and a devise. We saw in the same connection, that it had been cited and used by learned judges in total disregard of that distinction. So far, unquestionably, they were right, whether the omission to notice the distinction arose from accident or design. The text, at the page to which the present note relates, shows that such a distinction would trench directly upon the policy of the English statute of wills. (See *Milner v. Milner*, 1 Ves. 106, and other cases cited 1 Story's Eq. 191, note (2.) Also *Wigram on Extr. Ev.* 92, 3, et seq.)

The courts in this country, as well as in England, have undoubtedly been misled in a few instances by *Beaumont v. Fell*, and other kindred anomalies. In the main, however, the broad line which separates between simple *interpretation of what is in*

the instrument, and direct evidence of intention, independent of the instrument, has been quite steadily kept in view. (See ante, note 948, p. 1384, et seq.)

In respect to *wills*, perhaps enough has been already said, in the note just referred to, and various other notes under the preceding section of the present head, to show when extrinsic evidence is admissible, and when not. The latter class of instances, however, belong most appropriately to the section we are upon, and a few additional observations in respect to them may be useful.

In general, if the terms used in a will are, in respect to extrinsic circumstances, capable of being satisfied according to their plain, ordinary, and popular sense, (see ante, note 952, p. 1395,) parol evidence to prove that the testator intended to use them in either a more limited or enlarged sense, is inadmissible. (See ante, note 944, p. 1382, 3.) Thus, in *Hand v. Hoffman*, 3 Halst. Rep. 71, land devised was described as "all that part of cedar swamp, to the eastward of the aforesaid run and branch below said saw mill;" held, that extrinsic evidence tending to show that the testator called a portion of his cedar swamp eastward of the run and branch, and below the mill, his *grist mill tract*, and thus exempt it from the devise, could not be allowed. Here, the testator had a cedar swamp, corresponding with the description, i. e. lying east of the run, &c., and below the mill; and, therefore, evidence going to show that he intended to devise only a *part* of it, when he had expressly said *all*, &c., would tend to abridge the natural import of the terms used. It was not denied but that evidence of the situation and circumstances of the testator and his property, was admissible; but that disclosed no ambiguity; indeed, it only showed that there was a fair subject matter, upon which the description might take effect, without doing violence to the language used.

Where a devise was as follows, "I give, &c., *the farm I now occupy*," and the inquiry into the circumstances of the testator showed that he was in the actual possession of lands coming within the description, at the time of making the will; held, that oral evidence evincing an intent to pass lands previously leased by the testator to A., and then occupied by A., was inadmissible, for that would be not to explain, but to show mistake. (*Jackson, ex dem. Van Vechten, v. Sill*, 11 John. Rep. 201.) See *Moore v. Jackson, ex dem. Erwin*, 4 Wend. 58, 65.

Where a testator, by the terms of his will, gave his wife the use of his estate during widowhood, remainder in fee to his son; held, that parol evidence to prove the testator intended to give his wife the use of the estate, at all events, till his children should become of age, and that, by the mistake of the scrivener, it was drawn otherwise, was inadmissible. (*Avery v. Chappel*, 6 Conn. Rep. 270. *Chappel v. Avery*, id. 31.) See also *Farrar v. Ayres*, 5 Pick. 404, 409.

A recital in a will by the owner in fee of lands, that he had conveyed it to D. &c., was construed to import that he had conveyed it in fee; and held, that parol evidence going to show that the testator and D. had frequently declared, that D. was only to have a life estate in the lands, was inadmissible. (*Den, ex dem. Colden, v. Cornell*, 3 John. Cas. 174.)

A testator, having real and personal estate, devised his farm to his son, directing in terms that he should pay certain pecuniary legacies to other of his children, and then added, "also J. H. is to have \$250, also to F. H. \$100," and appointed the devisee one of his executors; held, that the direction to the devisee to pay, applied to all the

legacies and charged the land ; but not so as to exclude the aid of the personal estate ; it not appearing on the face of the will, that all the personal property had been bequeathed. And though this might be the fact, yet parol evidence could not be received to vary the construction, as it stood on the face of the will. (*Tole et ux. v. Hardy*, 6 Cow. Rep. 333.)

Where the testator bequeathed "all the rest residue, &c., of the *moneys* belonging to his estate, to," &c.; held, that there appearing to be *moneys*, in the popular sense of the term, left by the testator, (i. e. gold, silver, or bank bills,) extrinsic evidence was inadmissible to show that he intended to include promissory notes, bonds, mortgages, or other securities. (*Mann v. Mann's ex'rs.*, 1 John. Ch. Rep. 231. S. C. on appeal, 14 John. Rep. 1.) See ante, note 948, p. 1385.

And where a bequest to a daughter was of "the slaves, &c. which the testator had put into her possession;" it appearing that upon the marriage of the daughter, several years before the making of the will, the testator had given her a negro girl and boy ; held, that slaves hired by the testator to the daughter's husband could not pass, and parol evidence to show that they were intended, was inadmissible. (*Breckenridge v. Duncan*, 1 Marsh. Ken. Rep. 50.)

A testator bequeathed stock in a bank to his two daughters, but directed that the stock should stand in the name of the executor till the expiration of the bank's charter, he (the executor) to pay the daughters the dividends. Afterward the charter was renewed. Yet held, that the expiration of the *original charter*, existing at the date of the will, was meant by the testator ; and parol evidence of his declarations, showing that he expected the original charter would be renewed, with a view of bringing the renewed charter within the intent expressed, was inadmissible. (*Barrett v. Wright*, 13 Pick. 45.)

Where a devise was to the testator's "children," and it appeared he had children of his own, and also step-children ; held, that parol evidence to show that the testator meant to include his step-children along with the others, was inadmissible. (*Fouke v. Kemp's lessee*, 5 Harr. & John. 135.) *Seem*, however, that had the inquiry into the circumstances of the testator resulted in showing that he had no child of his own, or only *one*, the step-children might have taken. (See *Gill v. Shelly*, 2 Russ. & M. 336, stated ante, note 957, p. 1404, 5.)

A devise was of a house, with a reservation as follows—"Reserving, however, two of the rooms of said house, for the use, and during the life of W. I desire that W. may have the choice of those two rooms which shall the best suit her, because I desire that the said W. should be sure of a shelter during the time she may have to live." The will was in French ; but the above was conceded to be a correct translation, with the exception of the word *rooms*, which, in the original, was written "*chambres*," and, as was contended, would confine W.'s choice to two sleeping or upper rooms ; but it seems to have been interpreted by the translator, and by the court, as answering to the English word *rooms*. W., after the testator's death, was required to select the rooms, which she did, by taking possession of the two apartments on the first floor, nearly equal in value to all the rest of the house ; but instead of occupying them, she rented them out. Various collateral circumstances were admitted (without objection) respecting the situation of the house, and the manner in which it had been used by the testator ; e. g. that it was a three story house in the Diamond, on Market Square, in

which every house has a front room below occupied as a shop or office—that the house had two front doors, one of which opened directly into the front apartment—that it was so used by the testator when he made his will—that W. was his house keeper, and occupied the other apartment of the house, &c. &c. The question raised, was, whether the reservation gave W. an estate for life in the rooms, which she might dispose of, or a mere easement for her personal use. The former was held to be the fair construction; and the right of inferring from the parol evidence a different intent, was denied. “It is desirable,” said the court, “that such evidence should be avoided, that all persons may judge from the face of the instrument itself, of the extent of the devise. The modern doctrine is, that where a subject matter exists which satisfies the terms of the will, and to which they are applicable, there is no latent ambiguity. Evidence is only admitted *dehors* the will from necessity, to explain that which would otherwise have had no operation. In all the cases which have been decided, I can find none where parol evidence has been admitted on the ground of a latent ambiguity, in a case similar to the present. There is a subject matter to which the devise applies, and no necessity can be alleged for the admission of parol evidence to give effect to this part of the will.” (*Wushtoff v. Dracourt*, 3 Watts’ Rep. 249.)

NOTE 961—p. 548.

There seems to be no material distinction between wills, and deeds of conveyance, in regard to the admissibility of parol evidence to ascertain the intention. Deeds require particular words in particular cases to express a given purpose; but when that requisition is complied with, the rules of construction are, in general, the same; for the intention is to be sought for in all alike. (See *Wright v. Kemp*, 3 T. Rep. 470. *Wigram on Extr. Ev.* 58, note (b).)

Hence a court, in the exercise of the office of construction, must, in respect to deeds, as well as wills, limit itself to the enquiry—what intention do the words of the instrument express? without regard to any intention independent of the words. (See ante, note 948, p. 1384, et seq.) And the facts *aliunde* material to the above question being proved, no further evidence of that nature can be received; for, in the language of our author, “parol evidence is not admissible to contradict, or vary, or add to, the terms of a deed.” (See p. 548 of the text. Also, to the general rule, see *Gittings v. Hall*, 1 Harr. & John. 14. *King v. King*, 7 Mass. Rep. 496. *Faw v. Marsteller*, 7 Cranch 29. *South Carolina Society v. Johnson*, 1 McCord’s Rep. 41. *Barkley v. Barkley*, 3 McCord’s Rep. 269. *Hawes v. Barker*, 3 John. Rep. 506. *Richards v. Killam*, 10 Mass. Rep. 239. *Brown v. Cobb*, 10 Lou. Rep. (Curry,) 172. *O’Hara v. Hall*, 4 Dall. Rep. 340. *Clark v. McMillan*, 2 N. Car. Law Repos. 265. *United States v. Thompson*, 1 Gall. Rep. 388. *Church v. Church*, 4 Yeates’ Rep. 231. *Thompson v. White* 1 Dall. Rep. 426. *McDermot v. U. S. Ins. Co.* 3 Ser. & Rawle, 607. *Howard v. Rogers*, 4 Harr. & John. 278. *Hale v. Henrie*, 2 Watts’ R. 153. *Tymason v. Bates*, 14 Wend. 671. *Moser v. Libenguth*, 2 Rawle, 428. *Heagy v. Umberger*, 10 Ser. & Rawle, 342. *Iddings v. Iddings*, 7 Ser. & Rawle, 114. *McWilliams v. Martin*, 12 id. 269. *Pooser v. Tyler*, 1, McCord’s Ch. Rep. 18. *Holmes v. Simons*, 3 Dess.

Eq. Rep. 149. *Meads v. Lansing*, 1 Hopk. Ch. Rep. 124. *Hoffman v. Coster*, 2 Whart. Rep. 453.)

Where a deed of gift imported an absolute estate in fee in the donee, and was capable of being satisfied as such, parol evidence was held inadmissible to show that the donor intended to give a life estate only, with a limitation to the defendants. (*Pooser v. Tyler*, 1 McCord's Ch. Rep. 18.) Nor can it be shown in this way, that, by mistake, one tract was inserted in a deed, instead of another; (*Bell v. Morse*, 6 N. Hamp. Rep. 205;) one course, distance, or monument, instead of another; (*Jackson, ex dem. Putman v. Bowen*, 1 Cain. Rep. 358; *Milling v. Crankfield*, 1 McCord's Rep. 259; *Den, ex dem. Osborn, v. Coward*, 2 Murph. Rep. 77; *Hamilton's lessee v. Cawood*, 3 Harr. & McHen. 437; *Linscott v. Fernald*, 5 Greenl. 496;) or that a description of lands as lying "between A. & B." was intended to include those *termini*, or either of them; (*Revere v. Leonard*, 1 Mass. Rep. 91;) or that a straight line called for, was intended to be a curved line; (*Allen v. Kingsbury* 16 Pick. 235; *Dogan v. Seek-right*, 4 Hen. & Munf. 125; stated ante, note 942, p. 1379;) or that part of the premises described, were intended to have been excepted; (*Jackson, ex dem. Russell, v. Croy*, 12 John. Rep. 427; *Harvey v. Newton*, 7 Pick. 29; *Jackson, ex dem. Webb, v. Roberts' ex'rs*, 11 Wend. 426; *Snyder's lessee v. Snyder*, 6 Binn. Rep. 426; *Lock v. Whiting*, 10 Pick. 279;) or that a deed professing to convey *all* was intended to convey a *part* only; (*Barkley v. Barkley*, 3 McCord's Rep. 269; *Paine v. McIntyre*, 1 Mass. Rep. 69; *Child v. Wells*, 13 Pick. 116; *Gittings v. Hall*, 1 Harr. & John. 14; *Beeson v. Hutchinson*, 4 Watts' Rep. 442.) Where T. and E. by their deed conveyed to R. "all that lot or parcel of ground, situate and lying in *Baltimore town*, and distinguished on the plot of said town by the No. 25, and beginning for the same at" &c., describing the land by courses and distances, and adding—"To have and hold the same and every part thereof to the said R." &c.; it was held, that the entire lot passed, although not included within the special description by courses and distances; and parol evidence that it was the intention not to convey the whole lot, but only that included by the special description, was rejected. (*Buchanan's lessee v. Stewart*, 3 Har. & John. 329.) See the cases ante, note 942, p. 1366, et seq. Nor is such evidence admissible to show that the person described as grantee was not the one intended; (*Milling v. Crankfield*, 1 McCord's Rep. 262; see *Thompson v. Gray*, 2 Stewart & Porter 64, 5;) or that a lease reserving rent to A. for his sole use, was intended to be for the benefit of another person; (*Jackson, ex dem. Bonnel, v. Foster*, 12 John. Rep. 488;) or that a grant of a right of way *across* the grantor's lands, was intended to give the right of going partly across and then coming out at another place on the same side; (*Comstock v. Van Deusen*, 5 Pick. Rep. 163, and see this case, and others, ante, note 954, p. 1397, as to the influence of user, and circumstances collateral to the question of intent, in locating a way obscurely granted.) Where a deed has been executed to several, without designating in what proportions they are to hold—they take in equal proportions; and parol proof to give a different operation to the deed is inadmissible. (*Treadwell v. Buckley*, 4 Day's R. 395.)

A deed of a share in the stock of a manufacturing corporation, imports only a conveyance of the grantor's incorporeal right in the corporation; and parol evidence cannot be given to show that it was intended to pass his interest as a tenant in common in the reality, used by the corporation, but not a part of the corporate property.

(*Leffingwell v. Elliott*, 8 Pick. 455; See per Shaw C. J. in *Brown Thorndike*, 15 id. 400, 1, stated ante, note 957, p. as to the influence of circumstances collateral to the question of intent in such cases.)

It has been held, that parol evidence is inadmissible to contradict a sheriff's deed which states a sale under a particular execution, by showing that the execution was withdrawn after the levy and sale. (*Jackson, ex dem. Clowes v. Vanderheyden*, 17 John. Rep. 167. *Jackson, ex dem. Feeter v. Sternberg*, 20 id. 49.) Query, however, where the object is to show that there was no authority to sell in the sheriff's hands at the time; for, in general, the recital of a power, so far from being conclusive, is not even *prima facie* evidence of its existence, and may be contradicted. (See ante, note 738, p. 1081; per Edmonds and Seward, senators, in *Jackson, ex dem. Webb v. Roberts' ex'rs*, 11 Wend. 430, et seq. See also ante, note 891, p. 1289, 1290, 1, 2.) But where the existence of the power recited is shown, so that it might have been acted upon at the time, you shall not contradict the deed by parol evidence that the sale was under a different power, which would convey a different interest. Accordingly, where several executions were in a sheriff's hands under such circumstances that he might have sold under either or all of them, and the sheriff's deed stated the sale to have been made under all; held, that parol proof of the sheriff's having sold a portion of the premises under one of the executions, was inadmissible to vary the operation of the deed. (*Jackson, ex dem. Webb, v. Roberts' ex'rs*, 11 Wend. 422.) If there were in fact two executions, and the deed should state a sale under one only, you could not be allowed to vary the operation of the deed by showing that he sold under both. (Id. 427, per Walworth, Chancellor.) It may be shown, however, by proof *aliunde*, that a distinct part of the premises was sold on a satisfied execution, and thus the sale, so far, will be avoided. (Id. See *Jackson, ex dem. Saunders, v. Caldwell*, 1 Cowen's Rep. 622. *Woodcock v. Bennet*, id. 711.) And evidence *aliunde* is always admissible by way of applying a sufficient, though in some respects erroneous reference, to its proper object. (See ante, note 955, p. 1420, 1425.)

Several Massachusetts cases of some interest relate to actions upon the covenants in a deed. The defendant conveyed to the plaintiff "all that part of my land and messuage which I purchased of J. B. by deed dated October 24th, 1826, and recorded in the Plymouth registry of deeds, book 165, folio 19, 20," defining it by metes and bounds; and covenanted against all incumbrances. The deed from J. B. reserved a right of way over such land, for the purpose of taking water from a spring situated in it: held, in an action upon this covenant, that the existence of the easement was a breach; that the reference to the deed from J. B. was made to identify the land conveyed, and not for the purpose of limiting or qualifying the estate granted; and that parol evidence that the plaintiff knew, at the time of the execution of the deed, of the existence of the easement, expected it to remain, and bought subject to it, was inadmissible to control the meaning of the covenant, or in mitigation of damages. (*Harlow v. Thomas*, 15 Pick. 66.) So also in *Townsend v. Weld*, 8 Mass. Rep. 146, in an action of covenant against incumbrances; held, that the grantor could not prove the grantee's knowledge of an existing incumbrance through which he had been evicted, and agreed that the grantor should not be charged in the event of such eviction. See *Eveleth v. Crouch*, 15 id. 307. *Hovey v. Newton*, 7 Pick. 29.

In Pennsylvania, in an action against a grantor for a breach of covenant of gene-

ral warranty in a deed, it is not competent for the grantor to prove by oral testimony, that, at the time he executed the deed, he assigned to the grantee a judgment against a third person, which the grantee accepted as his sole security, and agreed never to hold the grantor liable. (*Collingwood v. Irwin*, 3 Watts' Rep. 306.)

In the above cases the grantee's knowledge of the contemporaneous facts to which the proposed evidence related, was held irrelevant, both in respect to the question as to what was intended to pass by the deed, and the point of damages. "The intention," the court said, in *Harlow v. Thomas*, *supra*, "must be ascertained from the instrument itself, and cannot be proved *aliunde*." Under certain circumstances, however, the knowledge of a party as to contemporaneous circumstances may become material, with a view to a right interpretation of the words of the deed, and then it is allowed to be shown as a fact collateral to the question of intent. (See *ante*, note 948, p. 1392; also *Venable v. McDonald*, 4 Dana, 336, and other cases stated *ante*, note 957, p. 1401, 2.) In *Leland v. Stone*, 10 Mass. Rep. 459, the action was on a covenant of *seizin*, and the state of facts existing at the time, evincing that the grantee well knew of the previous conveyance of the parcel which he complained of having lost, that he paid nothing for it, and that it was included in the deed to him by mistake, was allowed to be shown in mitigation of damages; and his declarations subsequent to the conveyance were admitted to establish the contemporaneous facts, and his knowledge of them. (*Id.* 461.) The question was not one of interpretation, but of damages; and they depended upon the consideration actually paid for the land lost; hence, assuming that the acknowledgment of consideration in the deed constituted no estoppel against showing the real facts in that respect, the evidence was pertinent. (See *ante*, note 193, p. 217; also *post*, note 964.) And see, in connection with *Leland v. Stone*, the remarks made concerning it in *Comstock v. Van Deusen*, 5 Pick. 166; also in *Harlow v. Thomas*, 15 Pick. 70, where the distinction between the covenant of warranty, and of *seizin*, in this respect, was directly adverted to.

Where a plaintiff sought to make the estate of the defendant's intestate liable, on the ground that the intestate was a joint purchaser of lands with the plaintiff; it appearing that the plaintiff, as owner of the whole tract, had, during the intestate's life, sold to the latter one half of it; held, that parol evidence of the joint purchase was inadmissible, as contradicting the plaintiff's act of sale to the defendant. (*Walsh v. Texada's Syndics*, 7 Mart. Lou. Rep. 231.)

A mortgage and master's deed on foreclosure, absolute on their face, cannot be controlled or varied in their operation by parol evidence that both were given subject to a lease. (*Sinclair v. Jackson*, *ex dem.* Field, 8 Cowen's Rep. 543.)

In ejectment by a mortgagee, or one claiming under him, held, that the mortgage being conditioned for the payment of money, parol evidence of its having been given to indemnify the mortgagee as special bail for the mortgagor, and that no damage had occurred, was inadmissible. (*Jackson, ex dem.* Dox, *v.* Jackson, 5 Cowen's Rep. 173.) Where a chattel mortgage was conditioned for the payment of \$50 and interest; held not admissible for the mortgagor to prove that the mortgage was given to indemnify the mortgagee against liability on a note of \$25, which he had signed as surety for the mortgagor. (*Patchin v. Pierce*, 12 Wend. 61.) In *Guernsey v. Palmer*, 7 Wend. 248, the payee of a note had taken from the maker a deed of lands

subject to certain incumbrances, and at the same time executed an instrument agreeing, in case the land should sell for more than enough to pay the note and satisfy the incumbrances and incidental expenses, that he would pay the surplus to the maker; held, that the deed and agreement amounted to a mortgage, and that parol evidence on the part of the maker of the note to show that an absolute sale was intended, and not a mortgage, was inadmissible. (See ante, note 958, p. 1421, 2; also *Brooks v. Maltbie*, 4 Stew. & Porter, 96.)

There are few cases, in courts of law, where, in respect to a deed of conveyance, or other instrument, it is allowable to aver or prove what the party intended, as contradistinguished from what the words of the instrument express. Some instances in which such an enquiry is admissible, were adverted to ante, note 948, p. 1389, et seq. and others will be seen in the notes occurring hereafter. It is proper to notice in this place, however, that it has been settled in New-York, contrary to the doctrine which prevails elsewhere, that a deed of lands, or a conveyance of personal property, apparently absolute, may, at law, be shown by parol evidence to have been intended as a mortgage, and treated accordingly; and this, not only as between the parties, but even in favor of one party against a stranger, provided the latter has not been drawn in to act upon the faith of the instrument being what it imports. (*Walton v. Cronly's adm'r*, 14 Wend. 63. *Gilchrist v. Cunningham*, 8 id. 641. *Roach v. Cosine*, 9 id. 227. *Ring v. Franklin*, 2 Hall's Rep. N. Y. C. P. 1. *Champlin v. Butler*, 18 John. Rep. 169.) But see per Nelson, J. in *Patchin v. Pierce*, 12 Wend. 61, 64, who appears to have thought that such proof was proper in equity only, and upon the assumption of fraud in the grantee, &c. That view is undoubtedly in accordance with the general doctrine in England, as well as a majority of the cases in this country. (See the equity cases cited infra, p. 1434, 5, of this note.) In South Carolina, the question arose whether a bill of sale of a slave, apparently absolute, could, as between the parties, be shown by parol to have been intended as a mortgage. The court held it could not, in a court of law; though, in equity, such evidence would be proper. And they said, that all the decisions in equity went on the ground of fraud; i. e., *semble*, a fraudulent application of the instrument. (*Stinson v. McKeown*, 1 Hill's Rep. 387, per O'Neill, J. delivering the opinion, and citing *O'Harra v. Hall*, 4 Dall. Rep. 340, and *Strong v. Stewart*, 4 John. Ch. Rep. 167.) In Kentucky, it has been held, in respect to a bill of sale, apparently absolute, but intended as a mortgage to secure a sum of money, that after payment of the money, the mortgagor's remedy for the property is at law, though the mortgagee still retains the bill of sale; for, under such circumstances, the rule of evidence at law and in equity is the same. (*Blanchard v. Kenton*, 4 Bibb, 441.) But where a sheriff, in virtue of an execution against A., had levied on lands, sold by A. to B. by deed absolute on its face; held, that the sheriff could not give parol evidence of the deed being intended as a mortgage, provided that the deed was given in good faith, and was not a contrivance to screen the property from creditors. (*Stanton v. The Commonwealth*, 2 Dana's Rep. 397.) "Written instruments are valueless," said the court, "if they can be thus modified by parol testimony." (Id. 398.) In Maryland, (*Bend v. The Susquehannah Bridge and Bank Co.* 6 Harr. & John. 128,) the plaintiff sued to recover the instalments due on certain shares of stock in their company, alleging the defendant to be the owner of the stock in virtue of an assignment by writing, under seal, and apparently absolute,

from one P., the original subscriber. Among other things, the defendant, on the trial, offered to prove that the assignment was intended, not as an absolute transfer, but as a mortgage to secure a debt. The court deemed it unnecessary to enquire, how far the fact, if it were established, would go to affect the defendant's liability; for, they said, the evidence was clearly inadmissible, being offered by an immediate party to a sealed instrument, to contradict and change the terms of it, for the purpose of defeating rights claimed and growing out of that very instrument alone, and with nothing to take it out of the operation of the general rule, &c. (Id. 193, 4.) In Connecticut, the general doctrine was considerably discussed between two towns, W. & R., on a question as to the settlement of certain paupers. The question seems to have been, whether the ancestor of the paupers had possessed, in her own right in fee, real estate in R. to the value of 160 dollars. This depended mainly upon the nature of the deed under which the ancestor acquired the property. The deed was apparently absolute; but at the time of its execution, another writing was entered into, binding the ancestor to deliver up the deed to the grantor, in case the latter, within three years, "brings me (the ancestor) the 800 dollars, with interest;" that being the exact amount of consideration money mentioned in the deed. The court refused to construe these two writings as a mortgage, but considered them in the light of a *defeasible purchase*, as they showed no debt to be secured. (See as to this distinction ante, note 958, p. 1421, and the cases there cited;) and the question was raised on two successive trials, (there were three in all,) how far parol evidence was admissible to show that a security, and not a sale, was intended. The first proposition of R. was, to prove the deed to have been designed to cover a usurious loan, and so that it was void. This the court held inadmissible, on the ground that *strangers* (and such was the light in which the towns were viewed) could not impeach a deed for that cause. (*Reading v. Weston*, 7 Conn. Rep. 409.) The next time the cause was tried, R. offered to show that the transaction was one of borrowing and lending, and intended as a mortgage. The court held this testimony inadmissible, on the general rule that parol evidence could not be received in a court of law, to contradict or vary a written instrument. It was urged that though this doctrine would apply as between the parties, R., a stranger, was not estopped. As to this, the court said, the exception went no further than to allow a stranger to adduce parol evidence with a view of preventing a fraudulent operation of the instrument upon his interests; and the plaintiff (R.) had not suggested that any fraud was contemplated or practiced. The court conceded, that in equity it had often been decided, that parol evidence is admissible to shew that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. "But chancery interposes," they added, "because a court of law does not afford a remedy." (*Reading v. Weston*, 8 Conn. Rep. 117, 120, 1, 2. See S. C. after first trial, 7 id. 143.) How far the doctrine in the above case may consist with the exception in respect to *strangers* as recognized in several other cases, will be seen infra. The decision, along with those noticed supra, goes to show how widely other courts have departed from the latitudinarian notion in New-York, relating to parol evidence for the purpose of changing an apparently absolute deed into a mortgage. As to the doctrine in Louisiana, see *Purdon v. Linton's ex'rs*, 9 Lou. Rep. (Curry) 565.

In Massachusetts, no trust, whether arising by implication of law, or otherwise, can be set up by parol to vary the operation of a deed, apparently absolute; and this,

even as in favor of a creditor or third person, provided no intent to defraud be made out. (*Northampton Bank v. Whiting*, 12 Mass. Rep. 104. *Jenny v. Alden*, id. 375. *Storer v. Batson*, 8 id. 431, 442. *Goodwin v. Hubbard*, 15 id. 210.) And held, there, that the tenant in a writ of entry could not be allowed to show by parol that the deed by him to the demandant, in virtue of which the latter claimed, it being apparently absolute, was intended as a mortgage, or was given upon any other trust, though the sole object of the evidence was to rebut the idea of a sale, so as to lay the foundation for proving usury. (*Flint v. Sheldon*, 13 Mass. Rep. 443; and see *Hale v. Jewell*, 7 Green. Rep. 435.) But see *Reading v. Weston*, supra, and post, note 968.

In Maine, where both parties in a court of law introduced proof to show that an unsealed bill of sale, absolute on its face, was intended as a mortgage, the court acted upon it; though, had such proof been offered by one party, and objected to by the other, it seems it would not have been received. (See *Smith v. Tilton*, 1 Fairf. Rep. 350. *Jewett v. Reed*, 5 Greenl. Rep. 96. *Hale v. Jewell*, 7 Greenl. Rep. 435. *Fales v. Reynolds*, 2 Shepl. Rep. 89.)

It would be impertinent to our purpose to enter at large upon the chancery doctrine on this subject. The difference between the rule there, and at law, arises from the different jurisdictions exercised respectively by those courts. The former has ample power to correct mistakes, relieve against frauds, &c., by which written instruments have been prevented from expressing the intent of the parties; and in order to the performance of this office, it must of course have the incidental right of enquiring in various cases—what did the parties intend? as contradistinguished from the ordinary enquiry—what intent does the instrument express? But except in those special cases where, from the broader range of equity jurisdiction, issue may be and is taken upon the question of intention as an *independent fact*; the powers of that court are neither greater or less than those of a court of law. Both are then limited to the simple office of *interpretation*, and neither can admit parol evidence to add to, or vary, the terms of an instrument. (See post, p. 567 of the text, and the cases cited in a note to that page relating to this doctrine.)

Such is the general rule. With reference, therefore, to parol evidence in equity for the purpose of changing a conveyance apparently absolute into a mortgage, it is clear that it can only be done upon some ground which will authorize an enquiry as to the real intention, independent of the one expressed in the writing. But how far can this enquiry go? It is limited to the ascertainment of what the instrument would have expressed, had it not been for some mistake of the scrivener, some fraud of the opposite party, or some other intervening circumstance, constituting in itself a sufficient ground of relief in respect to written instruments generally in that court?—or may the court conform the instrument to an intent not only unexpressed, but which the parties, trusting at the time to each other, did not mean it should express? Upon these and various other points, the cases are by no means uniform. As to the general doctrine, see 2 Story's Eq. 287. 4 Kent's Comm. 142. See as to the rule in *England*, *Maxwell v. Montacute*, 1 Prec. in Ch. 526, *Walker v. Walker*, 2 Atk. 99, *Joynes v. Statham*, 3 id. 389, *Vernon v. Bethell*, 2 Eden's Rep. 113, *Harris v. Horwell*, Gilb. Eq. Cas. 11, *Dixon v. Parker*, 2 Ves. Sen. 219; in the *United States Court*, *Hughes v. Edwards*, 9 Wheat. 439; *New-York*, *Marks v. Pell*, 1 John. Ch. Rep. 594, *Strong v. Stewart*, 4 id. 167, *James v. Johnson*, 6 id. 417, *Clark v. Henry*,

2 Cowen's Rep. 324, Whittick v. Kane, 1 Paige's Rep. 206, Slee v. Manhattan Co., id. 48, Patchin v. Pierce, 12 Wend. 64, and see the cases at law, cited *supra*; *Connecticut*, Washburn v. Merrills, 1 Day's Rep. 139, Reading v. Weston, 8 Conn. Rep. 117, 120, 1, 2, Dean v. Dean, 6 Conn. Rep. 285; *Tennessee*, Brown v. Wright, 4 Yerg. 57; *Ohio*, Miama Exporting Co. v. The United States Bank, 1 Wright's Rep. 249; in *Kentucky*, Mercer v. Blair, Litt. Sel. Cas. 412, Thompson v. Patton, 5 Litt. Rep. 74, Lewis v. Robards, 3 Monroe, 409, Murphy v. Trigg, 1 id. 72, Lindley v. Sharp, 7 id. 252, and see the cases at law stated *supra*; *South Carolina*, Irby v. Little's adm'r, 4 Dess. Eq. Rep. 422, Todd v. Rivers' ex'rs, 1 id. 155, Lloyd v. Ingles, id. 333, Fitzpatrick v. Smith, id. 345, Hatter v. Etenaud, 2 id. 570, and see Stinson v. McKeown, 1 Hill's Rep. 387, *supra*; *Virginia*, Roes v. Norvell, 1 Wash. Rep. 14, King v. Newman, 2 Munf. 40, Robertson v. Campbell, 2 Call's Rep. 241; *North Carolina*, Streater v. Jones, 3 Hawks' Rep. 423, 1 Murph. 449, Dickenson v. Dickenson, 2 id. 279, S. C. 1 N. Car. Law Repos. 262, Jackson v. Blount, 2 Dev. Eq. Rep. 555, Anonymous, 2 Hayw. Rep. 26; *Maryland*, Watkins v. Stockett's lessee, 6 Harr. & John. 435, Wesley v. Thomas, id. 24, Jones v. Sluby, 5 Harr. & John. 372; *Alabama*, Hudson v. Isbell, 5 Stew. & Porter, 67, English v. Lane, 1 Porter's Rep. 328; *Indiana*, Aborn v. Bennett, 2 Blackf. Rep. 101; *Pennsylvania*, Wharf v. Howell, 5 Binn. Rep. 499, Thompson v. White, 1 Dall. 426, 7.

It may be well to remark here, once for all, that the Pennsylvania cases on the subject of oral evidence in respect to written instruments, are not always safe guides when the enquiry is simply as to the rule *at law*. In the main they agree in their results with the decisions in equity: but to one accustomed to see the distinction between chancery and strict legal powers preserved in some way, they require to be read and used with more than ordinary caution, from the fact, that while the proceedings present all the external appearance of a suit at law, the judgment, in many instances, involves principles peculiar to a court of equity. Thus, judgment will sometimes be rendered for the plaintiff in the action of ejectment, when a chancellor would enforce a performance of an agreement for the land, or decree a conveyance. (See *Hawn v. Norris*, 4 Binn. Rep. 78. *Moody v. Van Dyke*, id. 41. *Peebles v. Reading*, 8 Ser. & Rawle, 491.) Mistakes and frauds in respect to written instruments may be shown, in actions of debt, assumpsit, &c. &c., brought upon them, and the court will relieve by acting upon them precisely as if the intent proved *aliunde* were expressed. (See *Moser v. Libenguth*, 2 Rawle, 428. *Christine v. Whitehall*, 16 Ser. & Rawle, 98. *Hultz v. Wright*, id. 345. *Richart v. Beidleman* 17 id. 42. *Jordan v. Cooper*, 3 id. 546. *Collam v. Hocker*, 1 Rawle, 108. *Thompson v. White*, 1 Dall. 426. *Mackey v. Brownfield*, 13 Ser. & Rawle, 239. *Campbell v. McClenachan*, 6 id. 171. *Christ v. Devebaugh*, 1 id. 466. *Cozzens v. Stephenson*, 5 id. 421. *Baring v. Shippen*, 2 Binn. 154. *Kelly v. Thompson*, 7 Watts' Rep. 404, 5. *Besore v. Potter*, 12 Ser. & Rawle, 154, 158. *Heilner v. Imbrie*, 6 id. 411. *Weaver v. Shyrock*, id. 262. *Shepherd v. Watson*, 1 Watts, 36. *King v. Stubbs*, 14 Ser. & Rawle, 206. *Collam v. Hocker*, 1 Rawle, 108. And see the cases cited from the Pennsylvania reports in our notes, *infra*, relating to equity evidence.) Various other peculiarities arise out of this blending of legal forms with equitable principles, which may be seen by reference to a note in the 4th American

edition of Fonblanque's Equity, p. 17, etseq. It is there said that "the jurisprudence of Pennsylvania now is, what the common law of England would have been, if accidental circumstances had not caused the elevation of the court of chancery." (Id. p. 19.) As our main object is to furnish illustrations of the rules of evidence as practiced in courts of law, we shall introduce but few cases hereafter from the reports of that state.

Before concluding this note, it may be proper to advert to a point suggested by some of the cases above noticed; viz. the right of *strangers* to give parol evidence for the purpose of varying or adding to the terms of an instrument. It is obvious, that written stipulations may be inserted in an instrument from various causes besides that of a conviction of the truth of what is expressed. So, for reasons sufficient to influence the immediate parties, the writing may be so fashioned as not to express the whole truth. While, therefore, this conventional species of evidence shall, in general, as between those who created it for their own purposes, conclude them, and others standing in the like predicament, from showing any intent contrary to or beyond what the writing expresses; those who had no agency in the matter ought not to be injuriously affected thereby. Hence, whenever it becomes material, strangers may aver and prove the *real intention*, as contradistinguished from the *intention expressed*. (See *Krider v. Lafferty*, 1 Whart. Rep. 303, 314. *Overseers of Berlin v. Overseers of Norwich*, 10 John. 229. Per Taylor J., in *Brooks v. Maltbie*, 4 Stew. & Porter, 106. *Whitbeck v. Whitbeck*, 9 Cowen's Rep. 270. Hyne's repr's v. Campbell, 6 Monroe, 292. Per Huntington, J., in *Johnson v. Blackman*, 11 Conn. Rep. 351, 2, 3.) But they must have an interest in investigating and knowing the real truth; (per cur. in *Overseers of Berlin v. Overseers of Norwich*, 10 John. Rep. 230;) in other words, the fact of the intent sought to be established must be *relevant*; or, if we adopt what was said in *Reading v. Weston*, 8 Conn. Rep. 121, the exception in favor of strangers extends only to allow them to adduce parol testimony to prevent a fraudulent operation of the instrument upon their rights. As to the application of the doctrine in that particular instance, see post, note 965, and the cases there cited.

The right of a creditor to show by parol that a conveyance executed by his debtor is in reality a mortgage, with a view of establishing that it was given to screen the property from being seized on execution, &c., has never been denied. Yet, where the intention was admitted to be *bona fide*, and no ground existed for the imputation of fraud, the fact that the conveyance was a mortgage was held immaterial, and the evidence adduced inadmissible. (*Semble*, *Stanton v. The Commonwealth*, 2 Dana's Rep. 397, stated supra. See *Reed v. Jewett*, 5 Greenl. 96. *Kelly v. Thompson*, 7 Watts' Rep. 401, 404. *New England Mar. Ins. Co. v. Chandler*, 16 Mass. 275. *Harrison v. Trustees of Phillips Academy*, 12 Mass. Rep. 456. *Jewett v. Warren*, id. 300. *Bartlett v. Williams*, 1 Pick. 295. *Badlam v. Tucker*, id. 389. *Brooks v. Powers*, 15 Mass. Rep. 247. *Haskell v. Greely*, 3 Greenl. 425.) The fact of the consideration being paid, or not, may be material by way of establishing or rebutting fraud as it respects creditors; but if it appear there was no fraud, whether the consideration expressed was in fact paid, or only agreed to be paid, is immaterial. (See *Sparrow v. Smith*, 5 Conn. Rep. 119. *Newbury v. Bulkley*, 5 Day's Rep. 384.)

On the principle that estoppels must be mutual, a party may sometimes give parol evidence to vary his own deed, when used against him by a stranger. (See 1 Phill. Ev. 387, 8, 8th Lond. ed. *Rex v. Scammonden*, 3 T. Rep. 474.) But see as to instances where it is used by himself, and resisted by a stranger as fraudulent, post, p. 552 of the text, and note 972. Where a deed, absolute on its face, was relied on as a circumstance to show that credit for certain repairs upon the premises was given to the grantee; held, that the latter might show by parol that the premises were his only in trust for a third person, who received the rents and profits, and that the party making the repairs knew this before he commenced. (*Tripp v. Hathaway*, 15 Pick. 47.) So in New-York, where the master of a ship sued A. for his wages, and on the trial, to show that the defendant was liable, gave in evidence an absolute bill of sale of the ship to the defendant, executed by M.; held, that as against the master, it was competent for the defendant to prove by parol that M. was the real owner, that the bill of sale was given as collateral security by way of mortgage, that the defendant had no interest in the voyage, and that these facts were known to the plaintiff, who contracted with M. originally as to his services. (*Champ- lin v. Butler*, 18 John. Rep. 169.)

NOTE 962—p. 549.

So where the plaintiff sued in debt on a bond, conditioned for the payment of money; held, inadmissible to aver that it was given as collateral security for the performance of a contract to clear certain lands. (*Wells v. Baldwin*, 18 John. Rep. 45. See *Jackson, ex. dem. Dox, v. Jackson*, 5 Cowen's Rep. 173. And see the New-York statute and cases explaining it, post, note 963.)

In North Carolina, held, that evidence to vary a bond by showing that the name of A. was inserted in it by mistake, instead of B., is inadmissible. (*Coleman v. Crumpler*, 2 Dev. Rep. 508.)

In Indiana it has been held, that if the condition of a bond in a domestic attachment case, recite that the plaintiff *had* sued out an attachment, &c., parol evidence is not admissible to prove that the bond was executed before the writ issued; but if the writ itself shew that it issued after the bond was executed, the recital to the contrary in the condition of the bond will be no ground for quashing the writ. The writ and the bond may be construed together, and thus the error be corrected. (*Sumner v. Glancey*, 3 Blackf. 361.) See *Hucheson v. Pope*, 2 Marsh. Ken. Rep. 349. Further, as to connecting two instruments, with a view to their construction, &c., see ante, note 958, p. 1420, et seq.

In respect to the right of impeaching the consideration of a sealed instrument on the ground of fraud, see post, notes 963, 964 and 969.

NOTE 963—p. 549.

As to the usual clause in a deed of conveyance, acknowledging the receipt of the consideration, see post, note 964.

In New-York, the distinction between sealed and unsealed instruments, so far as respects parol evidence relating to the consideration, has been abolished to a limited extent and for certain purposes. It is now provided by statute, that in every action upon a sealed instrument, and where a set off is founded upon a sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent, as if such instrument were not sealed. (2 R. S. 406, § 77, 1st ed. Id. 328, § 97, 2nd ed.) This evidence, however, cannot be given by a defendant, unless he shall have pleaded the defence, or given notice thereof at the time of pleading the general issue or some other plea denying the contract on which the action is founded. (Id. 406, § 78, 1st ed.; and p. 328, § 98, 2nd ed.)

Under these provisions it has been held, that in an action on a sealed note, a *failure* of consideration may be given in evidence. (Case v. Boughton, 11 Wend. 106.) The statute, however, is not to be understood as changing the law so as to admit parol evidence for the purpose of contradicting or varying the class of instruments to which it relates. It allows evidence to be introduced which, previous to the statute, was available only in a cross action. Accordingly, in *McCurtie v. Stevens*, 13 Wend. 527, where a suit was brought on a bond, by which the obligor bound himself absolutely to convey land by a certain day; held, that parol evidence was not admissible to show a contemporaneous agreement by which the obligation to convey was to be postponed at all events until after the obligee had paid a certain note. In an action on a charter party; held, that under the above statute, the defendant might prove false and fraudulent representations of the plaintiff made at the time as to the burthen or capacity of the vessel, in mitigation of damages. (Johnson v. Miln., 14 Wend. 195.) Case v. Boughton, and *McCurtie v. Stevens*, supra, were both instances in which the respective instruments were made before the statute went into operation. Whether such was the case with the one in *Johnson v. Miln* does not distinctly appear. The point is still open as to the right of a party to prove want or inadequacy of consideration, in a sealed instrument made prior to the statute, with a view of defeating a recovery thereon. This was discussed by Mr. Justice Bronson, in *Mann v. Eckford's ex'rs*, 15 Wend. 502, who was of the opinion that a just construction of the statute would not allow it to be done; though he conceded, that a *failure* of consideration might be shown. And it seems that the statute may be so construed as to admit a defence grounded upon allegations of which the party could not before have availed himself by cross action in a court of law, but only in equity. (Id. 520; and see per Nelson, J., in *McMurtie v. Stevens*, 13 Wend. 527.) See further as to the construction of the above statute, *Russell v. Rogers*, 15 Wend. 351.

With respect to a mere unsealed memorandum of the receipt of consideration money, whether endorsed on a deed, or contained in a separate paper, the rule is undoubtedly as stated in the text; and, so far, the English and American cases are agreed. It stands on the footing of other receipts, the doctrine in respect to which was considered ante, note 194, p. 213, et seq. We there saw, in respect to this species of instrumental evidence, that a mere receipt is not regarded as the exclusive expositor of the intent of the party, but that parol evidence might be adduced to show an intent different from what is expressed by the words. (See also ante, note 420, p. 547, 8;

and ante, note 860, p. 1211.) It is proper to add, here, such further illustrations as have since come to our observation.

The inconclusiveness of receipts, as such, was recognized and acted upon in *Goddard v. Cutts*, 2 Fairf. Rep. 440, 442. See also *S. P. Chunn v. McCarson*, 2 Dev. Eq. Rep. 73, 4. *Beers v. Broome*, 4 Conn. Rep. 467. *Lingan v. Henderson*, 1 Bland's Ch. Rep. 249. *Graves v. Key*, 3 Barn. & Adol. 318. *Fairmaner v. Budd*, 7 Bing. 574. In *Fuller v. Crittenden*, 9 Conn. Rep. 401, several of the cases on this subject were reviewed, and the result declared to be, that such circumstances as would lead a court of equity to set aside a contract, (e. g. fraud, mistake, or surprise,) may be shown at law, to destroy the effect of a receipt. But if a receipt in full is given with a knowledge of all the circumstances, and there is no mistake or surprise on one side, or fraud or imposition on the other, it will be effectual to defeat a further claim. See also *Emrie v. Gilbert*, 1 Wright's Rep. 764. *Holbrook v. Blodget*, 5 Verm. Rep. 520. *Sessions v. Gilbert*, Brayt. Rep. 75. *Carter v. Bellamy*, Kirby's Rep. 291. *Giddings v. Munson*, 4 Verm. Rep. 308.) A receipt of a certain sum in full of all demands, though not conclusive, is *prima facie* evidence of a settlement between the parties, and a payment of the balance; and it is erroneous to say that it is only evidence of the payment of the sum specified. (*Reid v. Reid*, 2 Dev. R. 247.) A receipt "in full of rent for Factory up to" a particular day, is *prima facie* evidence not merely that the last quarter's rent ending on the day specified was paid, but that all previous rent was paid. (*Patterson v. Ackerson*, 2 Edw. Ch. Rep. 427.) Where a receipt was endorsed by the agent of the plaintiff in execution, for a certain sum "in full of the within execution,;" held, that evidence might be admitted to show an error, and that the receipt was only to be in full of all the money then made on the execution. (*Singleton v. Smith*, 4 Mill. Lou. Rep. 430.)

But where a receipt is in the nature of a contract, it is, so far, within the general rule, and not liable to be varied by *parol* evidence. (See ante, note 194, p. 216. *Querry v. White*, 1 Bibb's Rep. 271. *Smith v. Brown*, 3 Hawks' Rep. 580. *Raymond v. Roberts*, 2 Aik. Rep. 204. *Stone v. Vance*, 6 Hamm. 246.) A bill of lading, for example, has a twofold aspect, viz. a receipt and a contract to carry and deliver. (See *Wood v. Perry*, 1 Wright's Rep. 240.) We have seen by the case of *Barrett v. Rogers*, 7 Mass. Rep. 297, stated ante, note 192, p. 212, that the admission in a bill of lading, of the articles being *in good order*, is not conclusive. (*S. P. Wood v. Perry*, 1 Wright's Rep. 240. *Benjamin v. Sinclair*, 1 Bail. Rep. 174.) You cannot vary or contradict the bill of lading, however, as to the course designated in it, which the vessel is to take. (See ante, note 194, p. 216.) So, a *clean bill of lading*, which imports that the goods are stowed *under deck*, cannot be varied by a contemporaneous *parol* contract, that they were to be stowed *on deck*. (*Cherry v. Holly*, 14 Wend. 26. *Barber v. Brace*, 3 Conn. Rep. 9.)

A receipt of property levied on by a sheriff, containing the usual promise to redeliver for the purpose of satisfying the execution, was held within the general principle applicable to contracts, and not liable to be varied by *parol* evidence. (*Wakefield v. Stedman*, 12 Pick. Rep. 562. *Bursley v. Hamilton*, 15 id. 40. See ante, note 192, p. 202.) And an agreement of the officer and the creditor, contemporaneous with the receipt, that they would relieve the receiptor, by taking back the property is merged in the writing. (*Curtis v. Wakefield*, 15 Pick. 497.) But a recital or state-

ment of the value of the property in such or the like receipts, will not generally conclude the party giving them, even as in favor of the other party; otherwise, however, where the party giving the receipt has wilfully refused to return the property, or has destroyed it, &c. (*Bancroft v. Parker*, 13 Pick. 192.)

Where a receipt was collateral to the instrument declared on, and used by a stranger against a party; held, that the latter might contradict or vary it by parol. (*Badger v. Jones*, 12 Pick. 371. See ante, note 961, p. 1437.)

Indeed, we have seen by the cases ante, note 192, p. 199, et seq., that in regard to mere written admissions of various kinds, they are seldom, if ever, conclusive, against the party making them, save as in favor of some one who has been drawn in to act upon the assumption of their being what they import on their face. But, even as in favor of those who have been drawn in to act, such admissions will not conclude, except for their own proper object, and while the writing evincing them continues in force. Hence, though a receiptor of property levied on by an officer, will generally be precluded from showing title in himself, as against the officer, (see *id.* 202,) yet where A. gave such a receipt, in which he admitted the property to belong to S. the defendant in the execution, and the property was afterwards redelivered to the sheriff pursuant to the terms of the writing; held, that the receiptor was not estopped by any thing in the writing, or his acts, from bringing replevin on the ground of the property being his. The writing would be a strong fact against his title, but not conclusive. (*Johns v. Church*, 12 Pick. 557.) The court liken the case to a man's taking a lease, for a year, of his own lands; during the year he shall not question the title of his landlord; but after that, he may. (*Id.* See ante, note 192, p. 201, 2.) It clearly appeared, however, in this case, that the sheriff had notice of the defendant's claim, both when the receipt was given, and when the property was delivered in pursuance of the receipt. Had there been no notice of this kind, before suit brought, it may be questionable whether the action could have been maintained. It seems that in cases like that of *Johns v. Church*, even if the property has not been delivered, and an action is brought on the receipt, the defendant may show his title, and that the sheriff had notice of it at the time of taking the receipt, in mitigation of damages; but not otherwise. (*Bursley v. Hamilton*, 15 Pick. 40.)

A receipt for the purchase money of a slave, containing a warranty of soundness, and accompanied by an order on a third person for the delivery of the slave, was held to exclude parol evidence for the purpose of showing the intention of the parties to be, that the title to the slave was not to vest in the purchaser till the slave was *actually* delivered. (*Franklin v. Long*, 7 Gill & John. 407.)

A creditor, on a compromise with his debtor, took the note of A. for an amount less than his debt, by way of payment; and endorsed on a note he held against the debtor, an acknowledgment of the receipt of A.'s note as a compromise for the full payment of the debtor's note; held, that in an action subsequently brought by the creditor against the debtor, the former could not give parol evidence that, in addition to A.'s note, a further sum was agreed to be paid him by the debtor. (*Kellogg v. Richards*, 14 Wend. 116.)

Where a receipt was of a sum for *safe-keeping*; held, that it could not be contradicted by evidence that the money was *paid*. (*Tisloe v. Graeter*, 1 Blackf. 553.) Nor

can the *legal effect* of special receipts in the nature of a contract, be varied by parol. (Stone v. Vance, 6 Hamm. Rep. 246.)

A technical release from all demands, &c. will estop the party; and its operation cannot be varied by showing that a particular demand was not intended to be included. (Pierson v. Hooker, 3 John. Rep. 68.)

NOTE 964—p. 549.

The American cases regard the ordinary clause in a deed of conveyance, acknowledging the receipt of the consideration money, as essential, in connection with its other terms, to express the intention in regard to the estate or interest granted or transferred; and hence, so far, and as between the parties or their privies, it is not open to impeachment, save in equity. But when the intention in this respect is not disputed, nor the operation of the conveyance, as such, sought to be changed, the clause in question is treated as formal merely, like the date, and may be contradicted or varied by parol. This was seen ante, note 194, p. 217, 218, where several cases were cited exhibiting the general distinction adverted to, and the freedom of extrinsic enquiry indulged in actions for the purchase money, &c. To the latter point, see the following additional cases. *McCrea v. Purmort*, 16 Wend. 460, explaining several previous cases in the same state, and apparently overruling *Schermerhorn v. Vanderheyden*, 1 John. Rep. 139, and *Maigley v. Hauer*, 7 id. 341. See also *Belden v. Seymour*, 8 Conn. Rep. 304. *Lingan v. Henderson*, 1 Bland's Ch. Rep. 249. *Watson v. Blaine*, 12 Ser. & Rawle, 131, 137, 8. *Curry v. Lyles*, 2 Hill's Rep. 404. *Garrett v. Stewart*, 1 McCord's Rep. 514, per Johnson, J. *Steele v. Worthington*, 2 Hamm. Rep. 182. *Clark v. Brown*, 1 Root's Rep. 77. *Hannah v. Wadsworth*, id. 458. *Cone v. Tracy*, id. 479. *Whitbeck v. Whitbeck*, 9 Cowen's Rep. 266, 270. *Swisher v. Swisher's adm'r*, 1 Wright's Rep. 755, 6. *Goodwin v. Gilbert*, 9 Mass. Rep. 310. *Pomroy v. Winship*, 12 id. 514. *Harvey v. Alexander*, 1 Rand. Rep. 219. *Eppes v. Randolph*, 2 Call's Rep. 103. *Duval v. Bibb*, 4 Hen. & Munf. 118. *Webb v. Peele*, 7 Pick. 247. *Bullard v. Briggs*, id. 533. *Jack v. Dougherty*, 3 Watts' Rep. 151. Otherwise, however, in North Carolina; (see ante, note 194, p. 217; *Jones v. Sasser*, 1 Dev. & Batt. 452;) and Alabama, (*See* *Brooks v. Maltbie*, 4 Stewart & Porter, 96, et seq. *Toulmin v. Austin*, 5 id. 410. See *Mead v. Steger*, 5 Porter's Rep. 505, 6.) In Louisiana the acknowledgment of consideration paid, in a notarial act of sale, is conclusive in all cases. (*Forrest v. Shores*, 11 Lou. Rep. (Curry) 416.) Maryland, as was seen ante, note 194, p. 217, 218, has decided both ways on this question; but a decision later than those there noticed adopts the general rule above stated. (*Higdon v. Thomas*, 1 Harr. & Gill, 139, 145. See *Betts v. Union Bank of Maryland*, 1 id. 175.) In Maine, *Steel v. Adams*, 1 Greenl. Rep. 1, went with great strength and confidence in favor of estopping the grantor; (and see *Emery v. Chase*, 5 id. 232;) but more recently an inclination has been manifested to hold otherwise; and it was directly adjudged that the grantor was not estopped by the clause under consideration from proving, in support of account for money had and received, that a part of the purchase money was left in the hands of the grantee, for the grantor's use; e. g. to pay a mortgage which turned out not to exist. (*Schillenger v. McCann*, 6 Greenl. 364.) This,

however, seems to have gone upon the ground of an independent, or *quasi* subsequent transaction. (Id. and see *Baker v. Dewey*, 1 Barn. & Cress. 704.) In *Garrett v. Stewart*, 1 McCord's Rep. 514, the plaintiff sued on a covenant of warranty of soundness, contained in a bill of sale of a negro. The deed expressed a money consideration; and the defendant was allowed to show the true consideration to be an exchange of negroes. In *Kipp v. Denniston*, 4 John. Rep. 23, it was decided, that where two trustees for the sale of an estate joined in a conveyance, and both acknowledged the receipt of the consideration money, but the money in fact went into the hands of one of the trustees, the other might show this fact, in an action by the cestui que trust, and thus prevent a recovery as against him.

On the principle of the general doctrine, *supra*, a defendant may, in an action on the covenant of seizin, show the real consideration to be less than that expressed, with a view to restrict the amount of damages. (See *ante*, note 194, p. 217, and the case of *Morse v. Shattuck*, there cited. See also *Leland v. Stone*, 10 Mass. Rep. 459, and other cases cited in connection with it, *ante*, note 961, p. 1431.) And the plaintiff may show the consideration to be greater than the one expressed, and recover accordingly. (*Belden v. Seymour*, 8 Conn. Rep. 304.) Quere, whether this is so in Kentucky. (See *Hyne's repr's. v. Campbell*, 6 Monroe, 290, 1, 2, in connection with *Gully v. Grubbs*, 1 J. J. Marsh. 388, 9, 390, and *Hutchinson's adm'rs v. Sinclair* 7 Monroe, 291, 293.)

But in respect to the parties or their privies, (no fraud being alleged, as in the cases *post*, note 972,) it is not allowable to enquire into the consideration, for the purpose of showing an intent different from or additional to the intent expressed by the operative words of the conveyance, or to defeat the deed, or to change its legal effect in the creation or modification of the estate. (See *ante*, note 194, p. 217, 218. *McKinstry v. Pearsall*, 3 John. Rep. 319, noticed *ante*, note 194, p. 217. Per Parker, C. J., in *Wilkinson v. Scott*, 17 Mass. Rep. 257. Per Spencer, J., in *Shephard v. Little*, 14 John. Rep. 211, 212. Per Richardson, C. J., in *Morse v. Shattuck*, 4 N. Hamp. Rep. 231, 2. Per *id.* in *Pritchard v. Brown*, 4 N. Hamp. Rep. 398, 9. *Emery v. Chase*, 5 Greenf. Rep. 332. 5 Dane's Abr. c. 160, art. 1, § 24. *Wilt v. Franklin*, 1 Binn. 502. *Brown v. Maltbie*, 4 Stew. & Porter, 96. *McCrea v. Purmort*, 16 Wend. 466, et seq. *Belden v. Seymour*, 8 Conn. Rep. 304. See also *Patchin v. Pierce*, 12 Wend. 61, stated *ante*, note 961, p. 1431, 2, in connection with *Jackson, ex dem. Dox, v. Jackson*, 5 Cowen's Rep. 173, and *Wells v. Baldwin*, 18 John. Rep. 45, stated *ante*, note 962. *Allison v. Kurtz*, 2 Watts' Rep. 185. *Hurn's lessee v. Soper*, 6 Harr. & John. 276, 281, 2. *Bottsford v. Burr*, 2 John. Ch. Rep. 415. *Miller v. Bagwell*, 3 McCord's Rep. 562, 3. *Hayden v. Mentzer*, 10 Ser. & Rawle, 329. *Jones v. Sasser*, 1 Dev. & Batt. 452. *Betts v. Union Bank of Maryland*, 1 Harr. & Gill, 175. *Mead v. Steger*, 5 Porter's Rep. 504, et seq.) In ejectment, where the plaintiff sought to recover in virtue of a lease made by the defendant, held, that the defendant was precluded from showing fraud in respect to the consideration. (*Jackson, ex dem. Church, v. Hills*, 8 Cowen's Rep. 290.)

It was said *ante*, note 194, p. 217, that an enquiry into the consideration was allowable to show a resulting trust; and *Pritchard v. Brown*, 4 N. Hamp. Rep. 397, was cited as authority. See also *Scoby v. Blanchard*, 3 *id.* 170. These cases are very unqualified in their language; but the trust alleged was in both instances set up by a *stranger*. As between the parties and privies, this enquiry, for the purpose of

varying the uses, or showing a resulting trust in the grantor, is inadmissible. (Per Daggett, J., in *Belden v. Seymour*, 8 Conn. Rep. 312. 1 Swift's Dig. 121. See also ante, note 161, p. 1433, 4.)

In New-York, where a deed on its face could neither operate as a deed of bargain and sale, or a covenant to stand seized, the sole consideration expressed being the future performance of covenants by the grantee, and the estate moreover limited to commence upon the grantee's death; held, that the deed was void, and that no proof of an additional consideration of blood or marriage could be given to maintain it as a covenant to stand seized. (*Jackson, ex Dem. Howell, v. Delancey*, 4 Cowen's Rep. 427. But see *Wallis v. Wallis*, 4 Mass. Rep. 135. *Doe, ex Dem. Kearns, v. Sherlock*, 2 Fox and Smith, 79, 86, et seq.)

Where, in order to recover back a part of the consideration money paid for lands, it was necessary to show a mistake in the operative words of the conveyance, as that less land passed than was intended, or paid for; held, that the enquiry was not allowable; the party must resort to a court of equity. (*Howes v. Barker*, 3 John. Rep. 506.) This case was not adverted to in *McCrea v. Purmort*, 16 Wend. 460, decided more recently in the court of errors of the same state, and it may be questionable how far some of the doctrines laid down there by the judges are now to be deemed law. In Connecticut similar decisions have been made. (*Northrop v. Speary*, 1 Day's Rep. 23. *Bradley v. Blodget*, Kirby's Rep. 22. But see *Belden v. Seymour*, 8 Conn. Rep. 304, and the opinion of Daggett, J. in that case.)

A deed importing a mortgage, and to have been given to secure a note, cannot be varied; in action to recover the note, by parol evidence of a different consideration, viz. the extinguishment of the note. (*Brooks v. Maltbie*, 4 Stewart & Porter, 98.) See ante, note 961, p. 1431, 2.

One point of embarrassment among the American cases seems to have been in determining what constitutes a different consideration, or a consideration which cannot stand with the deed. Sometimes, even where the effect or operation of the deed, as such, was not in question, a different consideration has been said to mean one of a different species, (e. g. a *valuable* consideration, where the deed expresses merely a *good* one, &c.,) and that proof of an *additional* consideration of the same kind was allowable. (See *Garrett v. Stewart*, 1 McCord's Rep. 514, stated supra, p. 1442.) On the other hand, in North Carolina, it has been directly held, it would seem, that a different consideration was one differing from that expressed in any particular, even in amount. (See ante, note 194, p. 217, and the North Carolina cases there cited. See also what is said on this subject in *McCrea v. Purmort*, 16 Wend. 470, 1. Per Hosmer, C. J. and Daggett, J., in *Beklen v. Seymour*, 8 Conn. Rep. 304, et seq.) In Kentucky, some accession to the needless confusion on this subject has been made by the intimation that, though it might be proper to prove an additional consideration of a different character or quality, yet a simple increase of consideration was clearly not allowable. (*Hyne's repr's v. Campbell*, 6 Monroe, 291.) We shall not attempt to reconcile the various dicta on this point; but leave it to the reader to do so if he can. It is believed, however, that he will find the task unnecessary, if not impracticable. For however important it may become with respect to another class of cases, viz. those where a deed is assailed on the ground of fraud, and an attempt is made to support it by proving either a *different* or an *additional* con-

sideration, (see post, note 972,) it is clearly otherwise in reference to the general doctrine treated in this note. Apart from the *dicta* to be met with, the *decisions* themselves are in the main agreed.

There seems to be no doubt but that where a deed expresses a consideration, and then adds, "and for divers other considerations," you may always aver and prove what those considerations really were. (See Hyne's rep. v. Campbell, 6 Monroe, 291. Maigley v. Hauer, 7 Johns. Rep. 342. Jack v. Dougherty, 3 Watts' Rep. 155, 6, 7, et seq. Benedict v. Lynch, 1 Johns. Ch. Rep. 270. Tull v. Partlett, 1 Mood. & Malk. 472. Miller v. Bagwell, 3 McCord's Rep. 568. Jones v. Sasser, 1 Dev. & Batt. 466. Mead v. Steger, 5 Porter's Rep. 506.)

So where no consideration is expressed, or the deed imports to have been made upon divers good considerations, you may prove the true one, and give it effect accordingly. (White v. Weeks, 1 Pennsylv. Rep. 486. Davenport v. Mason, 15 Mass. Rep. 85. Hartley v. M'Anulty, 4 Yeates' Rep. 25. Stevens v. Griffeth, 3 Verm. Rep. 448. Jones v. Sasser, 1 Dev. & Batt. 466.)

So where a blank is left for the consideration. (Wood v. Beach, 7 Verm. Rep. 522.)

NOTE 965—p. 551.

A more obvious ground for the decision in *Rex v. Scammonden*, cited in the text, is, that the party offering the evidence was a stranger to the deed; and as such, had a right to avail himself of the truth, independent of any conventional arrangements of the parties. In this light it has been generally viewed, both in England and in the United States. (See Gresl. Eq. Ev. 204. 2 Stark. Ev. 575, 6th Am. ed. Per Taylor, J., in *Brooks v. Maltbie*, 4 Stew. & Porter, 106. Per Huntington, J., in *Johnson v. Blackman*, 11 Conn. Rep. 351, 2, 3.) Several English cases show the inconclusiveness of these statements with respect to the consideration, in deeds produced for the purpose of fixing a settlement of the grantees in a particular parish; and they have generally gone upon the broad distinction between parties and strangers. (*Rex v. Cheadle*, 3 Barn. & Adol. 833. *Rex v. North Wingfield*, 1 Barn. & Adol. 912. *Rex v. Llangunnor*, 2 id. 616. *Rex v. Wickham*, 2 Adol. & Ellis, 517. *Rex v. Mattingley*, 2 T. Rep. 12, and *Rex v. Olney*, 1 Maule and Sel. 387, both cited in note (1) p. 552 of the text.)

The doctrine that, as between two towns contending about a question of settlement, it is competent to contradict a deed stating the consideration to have been paid, in order to repel a settlement sought to be established under it, has been directly held in New-York; and upon the distinction above suggested. (*Overseers of Berlin v. Overseers of Norwich*, 10 John Rep. 229, 230.) And on the same principle, it seems, the deed might be assailed in any other respect by the town opposing the settlement, provided the fact sought to be proved was material to the point in dispute. (See ante, note 961, p. 1436.) But in Connecticut a different rule has been laid down; and held, that the town opposing a settlement, set up in virtue of a deed to the ancestor of the pauper, the deed importing an absolute conveyance, could not be allowed to prove that a mere security or mortgage was intended. (*Reading v. Weston*,

8 Conn. Rep. 117, stated ante, note 961, p. 1436.) How far the fact sought to be shown was material, would depend upon the local law prescribing what should constitute a settlement. It seems from the case, however, that its materiality was conceded on all sides. The court put their decision on the ground, that a stranger can only adduce evidence to vary the import of a deed, in order to prevent a fraudulent operation of it upon his interests; and because the settlement had been actually or presumably beneficial to the town seeking to introduce the proof, no such fraud, they said, could be pretended, and therefore the testimony was incompetent. *Quere.*

NOTE 966—p. 551.

See ante, notes 961, 962, 3, 4.

NOTE 967—p. 551.

The rule confining the operation of parol evidence within the limits of strict exposition or interpretation, assumes that the instrument has a legal existence, and is valid. Testimony to show it to be void, is always pertinent, no matter who are the parties, or in what court the question arises. Deeds, however, cannot be avoided on all the grounds which apply to simple contracts. Hence, what might be a relevant enquiry as to the latter, would not necessarily be so in respect to the former. But in regard to *illegality* of consideration, both will usually be found to stand upon the same footing, in this particular. To the general doctrine, see per Bronson, J. in *Mann v. Eckford's ex'rs*, 15 Wend. 518. Per Spencer, C. J. in *Parker v. Parmelee*, 20 John. Rep. 134. Per Tompkins, J. in *Vrooman v. Phelps*, 2 John. Rep. 177. See also the opinions delivered in *Dale v. Roosevelt*, 9 Cowen's Rep. 307. *Paxton v. Popham*, 9 East, 408. *Doe, ex dem. Chandler, v. Ford*, 3 Adol. & Ellis, 649. *Biggs v. Lawrence*, 3 T. Rep. 454. *Waymell v. Read*, 5 id. 600. *Catlin v. Bell*, 4 Campb. Rep. 183. *Pellecat v. Angel*, 2 C. M. & R. 311.

The following examples occur. A deed may be avoided by proof that the consideration was simonical; (per Savage, C. J. in *Dale v. Roosevelt*, 9 Cowen's Rep. 310;) champertous; (*Wilhite v. Roberts*, 4 Dana's Rep. 174, 5;) or for compounding a felony; (per Savage, C. J. in *Dale v. Roosevelt*, supra; *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 375;) or for suppressing evidence on a criminal prosecution; (per Savage, C. J. in *Dale v. Roosevelt*, supra; *Collins v. Blantern*, 2 Wils. Rep. 341;) or for the sale of an office; (*Fitzgibbon*, 45; per Savage, C. J. in *Dale v. Roosevelt*, supra; *Love v. Buckner*, 4 Bibb, 506;) or for money won at play; (*Pope v. St. Leger*, 5 Mod. 3; per Savage, C. J. in *Dale v. Roosevelt*, supra; see *McCullum v. Gourlay*, 8 John. Rep. 147;) or, generally, for any thing either *mala in se*, *mala prohibita*, *contrary to public policy*, &c. &c. (See *Trustees of the Quaker Soc. v. Dickenson*, 1 Dev. Rep. 189. 1 Story's Eq. 261, et seq. *Story's Conf. of Laws*, 193, et seq. *Russell v. De Grand*, 15 Mass Rep. 35. *Kemper v Kemper*, 2 Rand. Rep. 8.)

The nature of the consideration which is to be denominated *illegal*, so far as to avoid a deed, will depend upon the law governing the contract; and this may be different in one state or country, from that of another. An able discussion of this subject in reference to various distinctions arising out of the *lex loci*, will be found in Mr. Justice Story's Commentaries on the Conflict of Laws, p. 193, et seq. To pursue it here, would be foreign to the main enquiry, as well as unnecessary.

In cases like the above, the doctrine that the real nature of the transaction may be shown, must, as it respects the parties, be understood to apply no further than to allow this to be done where the assistance of the law is sought to enforce the contract in some way, or while it remains executory. A party to an illegal transaction is not allowed, by the allegation of his own turpitude, to recover back, what, in pursuance of a forbidden bargain, he has delivered to the other party, or in any way to avoid the bargain, when once executed. To such cases, the maxim, *in pari delicto potior est conditio defendentis, et possidentis*, applies. (See *Doe, ex dem. Roberts, v. Roberts*, 2 Barn. & Ald. 369. *Montefiori v. Montefiori*, 1 Bl. Rep. 364. *Neville v. Wilkinson*, 1 Bro. Ch. C. 546. *Gale v. Lindo*, 1 Vern. 475. *Curtis v. Perry*, 6 Ves. 747. *Brackenbury v. Brackenbury*, 2 Jac. & Walker, 391. *Lord v. Wardle*, 3 Bing. N. C. 684. *McCullum v. Gourley*, 8 John. Rep. 147. *Smith v. Bromley*, Doug, 696, n. *Browning v. Morris*, 2 Cowp. 790. *Howson v. Hancock*, 9 T. Rep. 575. *Van Dyck v. Hewitt*, 1 East, 98. *Tucker v. Smith*, 4 Greenl. Rep. 415.) See post, note 969, p. 1448.

In the case of *Phelps v. Decker*, 10 Mass. Rep. 274, it was laid down broadly, that "by the common law, deeds of conveyance, or other deeds, made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void *ab initio*, and may be avoided by plea; or, on the general issue, *non est factum*, the illegality may be given in evidence." But in a later case, it was expressly held, that a deed of conveyance could not, as such, be avoided by a party, on the ground of having been made in consideration of compounding a felony. The court recognized a clear distinction between bonds and contracts sought to be enforced, and conveyances of lands or other property. The former, they admitted, might be avoided; the latter, however, are to be treated in all cases, as actual transfers, so far as the immediate parties are concerned, and governed by the same rule as the payment of money, or the delivery of a chattel. (*Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 375, 379.) The same principle has been acted upon in England, as it respects deeds of conveyance of real estate. (*Doe, ex dem. Roberts, v. Roberts*, 2 Barn. & Ald. 367.)

The doctrine on this subject, and various distinctions to be observed in its application, in respect to courts of equity as well as law, will be found ably discussed by Mr. Justice Story in his commentaries on equity jurisprudence, vol. 1, p. 295, et seq., where the reader will find most of the English, and several of the American cases.

NOTE 968—p. 551.

The case of usury is an exception to the rule, which sometimes, as we saw in the next preceding note, estops a party to an illegal transaction, from alleging the illegality in avoidance of his contract. The borrower is not regarded as a *particeps criminis*, but as, in some sort, the slave of the lender, and compelled to submit to the terms which the latter may dictate. (See *Smith v. Bromley*, Doug. Rep. 696, note. *Bosanquet v. Dashwood*, Cas. Temp. Talbot, 89. *Browning v. Morris*, Cowp. Rep. 790. *Rawdon v. Shadwell*, Ambl. Rep. 269. 1 Story's Eq. 301.)

The general doctrine seems to be, that no form which can be given to the particular instrument, will prevent the borrower from the introduction of evidence for the purpose of impeaching it on this ground. See a very full collection of the equity cases in *Fonbl. Eq. B. 1, ch. 4, § 7*, ed. of 1835. 1 Story's Eq. 300, et seq. 3 Barbour's Eq. Dig. 404, et seq. and the cases there cited; also 1 id. 656, et seq. See also the observations of the vice chancellor, in *Dowdall v. Lenox*, 2 Edw. Ch. Rep. 272, et seq.

But in Massachusetts, where a deed of conveyance, absolute on its face, was interposed; held, that it could not be shown to have been intended as a mortgage, even with a view of rebutting the idea of a sale, so as to impeach it on the ground of usury. (*Flint v. Sheldon*, 13 Mass. Rep. 443.) And the court conceded, that unless the transaction could be shown a mortgage, it would be impossible, in such cases to characterize it as usurious. The decision virtually negatives the right of impeaching a conveyance under seal, importing an absolute sale, by oral evidence of its being designed as a cloak for usury. (See id. 446, et seq.) The same doctrine has been sanctioned in Maine. (*Hale v. Jewell*, 7 Greenl. Rep. 435. See *Richardson v. Field*, 6 id. 35, 37. *Chandler v. Morton*, id. 379.) *Quere*, however; for, though the general rule, at law, forbids that a deed, apparently absolute, shall be converted into a mortgage through the instrumentality of oral evidence, (ante, note 961, p. 1431, 2, et seq.; yet, when this is necessary as the first step toward reaching the vice of usury, the case seems to constitute an exception. (See *Murphy v. Trigg*, 1 Monroe, 72, 3. *Lindley v. Sharp*, 7 id. 248, 252. *Thompson v. Potter*, 5 Litt. Rep. 74. *Skinner v. Miller*, id. 84. See also what is said in *Edrington v. Harper*, 3 J. J. Marsh. 355. *Lear v. Yarnel*, 3 Marsh. Ken. Rep. 420. *Moore v. Kay*, 1 Beat. 287. *Wilhite v. Roberts*, 4 Dana, 174, 175. *Doe, ex dem. Davidson, v. Barnard*, 1 Esp. Rep. 11, and note (1). Per Lord Mansfield, in *Jestons v. Brooke*, Cowp. Rep. 796. *Fenwick v. Ratliff's rep.*, 6 Monroe, 154, 5. *Atkinson v. Scott*, 1 Bay's Rep. 303.) In Connecticut, a doctrine directly the reverse of that which seems to prevail in Maine and Massachusetts, has been laid down, and *Flint v. Sheldon* was directly disapproved. (*Mitchell v. Preston*, 5 Day's Rep. 100. Per Hosmer, C. J. in *Reading v. Weston*, 7 Conn. Rep. 412, 413.) But in the latter case, held, that the right of avoiding a conveyance of land for usury, was matter of personal privilege to the party, and that a stranger could not avail himself of it. (S. C. 8 Conn. Rep. 120.) See as to this point, *De Wolf v. Johnson*, 10 Wheat. 367, 393, in connection with *Lloyd v. Scott*, 4 Peters' Rep. 206, 223, 9. Also *French v. Shotwell*, 5 John. Ch. Rep. 555, 565, 6. *Bearce v. Barstow*, 9 Mass. Rep. 45, 48. *Trumbo v. Blizzard*, 6 Gill & John. 18, 23, 4.

The rule in Massachusetts and Maine, above stated, has, of course, been repudiated in New-York; for, in the latter state, we have seen, that parol evidence is always admissible, at law, and in equity, to convert a deed importing an absolute sale, into a mortgage. (See ante, note 961, p. 1432.)

NOTE 969—p. 551.

This is clearly the rule, even at law, as in favor of the rights of strangers; for they are not concluded from enquiring freely into the transaction to which the deed relates. And the observation applies not only to the consideration clause in the deed, but to every other part of it. Hence, creditors assailing a deed on the ground of fraud, may show any secret parol trust, or agreement, however inconsistent with the face of the instrument. (*New England Marine Ins. Co. v. Chandler*, 16 Mass. Rep. 275. *Macarty v. Bond's adm'r*, 9 Lou. Rep. (Curry) 351. *Hills v. Elliot*, 12 Mass. Rep. 26. *Goodwin v. Hubbard*, 15 id. 210. *Bridge v. Elliston*, 14 id. 245. *Alexander v. Gould*, 1 id. 165. See ante, note 481, p. 650, et seq. *Hoye v. Penn*, 1 Bland's Ch. Rep. 32. *Duvall v. Waters*, id. 587. *Strike's case*, id. 57. *Jackson, ex dem. Titus, v. Myers*, 11 Wend. 533. *Stanton v. The Commonwealth*, 2 Dana, 397. *Webb v. Peele*, 7 Pick. 247. *Bullard v. Briggs*, id. 533. *Wilt v. Franklin*, 5 Binn. Rep. 502. *Steele v. Worthington*, 2 Hamm. Rep. 182. *Brooks v. Maltbie*, 4 Stew. & Porter, 105. *Harvey v. Alexander*, 1 Rand. Rep. 219. *Jack v. Dougherty*, 3 Watts' Rep. 151. *Duval v. Bibb*, 4 Hen. & Munf. 113. *Eppes v. Randolph*, 2 Call's Rep. 103. *Warren v. Hall*, 6 Dana, 450.) See further ante, note 961, p. 1436; and ante, note 965, p. 1444, 5.

Parties and privies, however, shall not be heard to allege their own fraud, whether intended to affect creditors, or others, as a ground for avoiding or varying a deed, or indeed, any instrument, not executory in its character. This is upon the principle adverted to ante, note 967, p. 1445, 6. (*Stewart v. Igglehart*, 7 Gill & John. 132. *Osborne v. Moss*, 7 John. Rep. 161. *Hawes v. Leader*, Cro. Jac. 270. *S. C. Yelv.* 196, *Brownlow*, 348. *Orlabar v. Harrison*, Comb. 348. *Philips v. Biron*, 1 Strange, 509. *Smith v. Boucher*, 2 id. 993. *Starke's ex'rs v. Littlepage*, 4 Rand. 368. *Potter v. Yale College*, 8 Conn. Rep. 52. Said, per *Bronson, J.* in *Mann v. Eckford's ex'rs*, 15 Wend. 341. *Jones v. Yeates*, 9 Barn. & Cress. 532. *Randall v. Phillips*, 3 Mason's Rep. 379, 388. *Hoye v. Penn*, 1 Bland's Ch. Rep. 32. *Duvall v. Waters*, id. 587. *McTeer's adm'r v. Sheppard*, 1 Bay's Rep. 461.)

Upon a different principle, applicable peculiarly to sealed instruments, parties and privies are estopped, at law, from alleging, in avoidance of the deed, or for the purpose of varying its operation, that the other party defrauded them by false representations in respect to the subject matter to which it relates. Hence, in an action for the purchase money, on an agreement under seal to sell lands, a fraudulent misrepresentation of the quality or situation of the land, was held not admissible by way of defence. (*Franchot v. Leach*, 5 Cowen's Rep. 506. See *S. P. Champion v. White*, id. 509. *Parker v. Parmelee*, 20 John. Rep. 130, 134. *Dale v. Rosevelt*, 9 Cowen's Rep. 307.) In an action of debt on bond, given for the purchase money of a patent right;

held, that the defendant could not give in evidence, a failure of consideration, or that he was induced to give the bond through a fraudulent representation as to the value of the consideration which was in fact of no value. (*Dorr v. Munsell*, 13 John. Rep. 430. See *S. P. Vrooman v. Phelps*, 2 John. Rep. 177. *Dorian v. Sammis*, id. 179, note. *Mead v. Steger*, 5 Porter's Rep. 505.)

The above cases were determined upon common law grounds. The qualifications with which the doctrines advanced in them must now be received in New-York, will be seen ante, note 963, p. 1438. In South Carolina, independent, it seems, of any statutory provision like that of New-York, misrepresentations in respect to the consideration of sealed instruments, may be given in evidence, for the purpose of defeating, in whole, or in part, actions brought upon them; and this, whether the misrepresentations were founded in fraud or mistake. (See per Johnson, J. in *Means v. Brickell*, 2 Hill's Rep. 659, et seq. *Gray v. Handkinson*, 1 Bay's Rep. 278. *Adams v. Wylie*, 1 Nott & McCord, 78. *Tunno v. Flood*, 1 McCord's Rep. 122. But see *Stinson v. McKeown*, 1 Hill's R. 388, 9.) And a single bill may there be shown, it seems, by parol to have been given through mistake for a larger amount than was really due. (*Hunter v. Graham*, 1 Hill's Rep. 370.)

This doctrine, however, seems entirely anomalous. With respect to other states, it may be laid down as a general rule, and we believe will be found sustained by all the cases, that, independent of any statutory provision, no fraud whatever can be set up, in a court of law, to affect the operation of a sealed instrument, save such as relates to the execution. (See *Franchot v. Leach*, 5 Cowen's Rep. 506. *Champion v. White*, id. 509. *Parker v. Parmelee*, 20 John. Rep. 130, 134. *Dale v. Roosevelt*, 9 Cowen's Rep. 307. *Dorr v. Munsell*, 13 John. Rep. 430. *Vrooman v. Phelps*, 2 John Rep. 177. *Johnson v. Miln*, 14 Wend. 198. *Van Volkenburgh v. Rouk*, 12 John. Rep. 337. *Taylor v. King*, 6 Munf. Rep. 358. *Garrett v. Stewart*, 1 McCord's Rep. 514. *Wyche v. Macklin*, 2 Rand. Rep. 426. *Belden v. Davis*, 2 Hall's Rep. N. Y. C. P. 433. *Peddycord v. Hill*, 4 Monroe, 374. *Tribble v. Oldham*, 5 J. J. Marsh. 141, 2, 3.)

But circumstances which go to show that the deed was never duly executed by the party, may always be proved. Thus, the party may give evidence tending to establish that the deed was mis-read, or mis-expounded to him, or that one instrument was substituted for another, and thus his signature was fraudulently obtained. This will be found put as an illustration of what is meant by "fraud in the execution," in several of the cases already cited. (See 5 Cowen, 508, per Savage, C. J.; per Dayan, senator, 9 Cowen's Rep. 311, 312; per Spencer, C. J. 13 John. Rep. 431; per Savage, C. J. 14 Wend. 198; per Roane, J. 6 Munf. Rep. 366. *Owen's case*, 1 Bland's Ch. 391. *Peddycord v. Hill*, 4 Monroe, 374, 5. *Swisher's lessee v. Williams' heirs*, 1 Wright's Rep. 754. *Van Volkenburgh v. Rouk*, 12 John. Rep. 337, 8, 9.) So it may be shown, that, in reading the instrument, some material part of it was fraudulently suppressed, and, therefore, that it is not such an instrument as the party designed to execute. (Per Savage, C. J. in *Franchot v. Leach*, 5 Cowen's Rep. 508; *Morton v. Chandler*, 8 Greenl. Rep. 10, 11; S. C. 7 id. 44; per Nelson, J. in *Creery v. Holly*, 14 Wend. 26, 30, 1. *Tribble v. Oldham*, 5 J. J. Marsh. 141, 2, 3.)

On the like principle, facts which relate to the party's capacity to execute, may be proved, in order to negate the idea of its being his deed; (see per Woodworth, J. in *Champion v. White*, 5 Cowen's Rep. 510; see ante, note 888, p. 1282;) as, that he

was at the time of execution, a lunatic; (per Dayan, senator, in *Dale v. Roosevelt*, 9 Cowen's Rep. 310; per Savage, C. J. in *Johnson v. Miln*, 14 Wend. 198; *Millinson v. Howell*, Cam. & Norw. 499; see *Webster v. Woodford*, 3 Day's Rep. 90; *Grant v. Thompson*, 4 Conn. Rep. 203; *Mitchell v. Kingman*, 5 Pick. Rep. 431; *Rice v. Peat*, 15 John. Rep. 503; *Den v. Clark*, 5 Halst. Rep. 217; 2 Kent's Comm. 450, et seq.; *Jackson, ex dem. Caldwell, v. King*, 4 Cowen's Rep. 207; *Owing's Case*, 1 Bland's Ch. Rep. 370;) or, that he was made to sign it when so drunk as not to know what he did; especially, if that drunkenness was procured by the other party; (per Dayan, senator, in *Dale v. Roosevelt*, 9 Cowen's Rep. 310, 311; per Savage, C. J. in *Johnson v. Miln*, 14 Wend. 198; 3 P. Wms. 130, 1, note. See *Prentice v. Achorn*, 2 Paige's Rep. 31; *Barrett v. Buxton*, 2 Aik. Rep. 167; *Lee's adm'rs v. Ware*, 1 Hill's Rep. 316; *Seymour v. Delancey*, 3 Cowen's Rep. 518; *Burroughs v. Richman*, 1 Green's Rep. 233; 1 Story's Eq. 235, and note (2.); *Wigglesworth v. Steers*, 1 Hen. & Munf. 70.) So it may be shown that the deed was extorted by duress; (2 Ins. 482; Com. Dig. Pleader, 2 W. 18; 2 Stark. Ev. 274, 6th Am. ed.; *Inhabitants of Worcester v. Eaton*, 13 Mass. Rep. 371; see *Watkins v. Baird*, 6 id. 511; *Stouffer v. Latshaw*, 2 Watts' Rep. 165; *Richardson v. Duncan*, 3 N. Hamp. Rep. 503; *Thompson v. Lockwood*, 15 John. Rep. 256; *Jackson, ex dem. Titus, v. Myers*, 11 Wend. 536;) by threats of life, member, mayhem, or imprisonment; (2 Stark. Ev. 274, 6th Am. ed.; *Edwards v. Handley*, *Hardin's Rep.* 602;) or that the party executing, was a feme covert, and, therefore, incapable of giving a deed; (per Dayan, senator, in *Dale v. Roosevelt*, 9 Cowen's Rep. 311; per Spencer, C. J. in *Van Valkenburgh v. Rouk*, 12 John. Rep. 338. 12 Mod. 609;) or an infant; (per Spencer, C. J. in *Van Valkenburgh v. Rouk*, 12 John. Rep. 338.)

It may also be shown that the deed was never duly delivered; or was delivered merely as an escrow; or to take effect only on a contingency which has not happened; or that the grantee obtained it fraudulently, or in an improper manner, &c. This species of evidence has never been considered, as coming within the rule which rejects parol proof, when offered to contradict a deed. (Per Savage, C. J. in *Roberts ad. Jackson*, 1 Wend. 484. *Jackson, ex dem. Titus, v. Myers*, 11 id. 536. *Clark v. Gifford*, 10 id. 310.) See also ante, note 888, p. 1291, et seq.; ante, note 948, p. 1388, and post, note 973, p. 1453.) In Massachusetts, if a deed, with the regular evidence of complete and unqualified execution on its face, has been signed, sealed, and delivered to the party; parol evidence of a contemporaneous agreement or understanding that it should not take effect until a certain event, is inadmissible, as going to vary the terms of the deed, and make that conditional which appeared to be absolute. (*Seible, Ward v. Lewis*, 4 Pick. 518, 520. *Dix v. Otis*, 5 id. 38.) It is not competent to establish, under pretence of delivery as an escrow, conditions in the contract itself, different from its face, and repugnant to it. (*The State v. Perry*, 1 Wright's Rep. 662, 667.)

A surety, in a joint and several bond, it has been held, may, when sued, show that he signed it on condition that others, beside those whose names are to it, would execute it, and that their signatures were not procured. (*United States v. Leffler*, 11 Peters' Rep. 86.) The principal was entrusted to procure the signatures, in this case; and it does not appear that the obligees were in any manner apprized of the conditional delivery. In Louisiana, a similar point arose, and the court held, that as there was

nothing on the face of the bond showing that other signatures were intended, the surety could not avail himself of the breach of trust on the part of the principal, to defeat a recovery by the obligees. (*Police jury v. Haw*, 1 Mill. Lou. Rep. 41.) See further in relation to delivery, post, note 973, p. 1453, 4.)

NOTE 970—p. 552.

Rex v. Mattingley, and *Rex v. Olney*, cited in the text, are assignable to the principle of the cases ante, note 965, p. 1444, allowing strangers to show the real nature of the transaction, in order to resist an injurious operation of the deed upon their interests.

NOTE 971—p. 552.

The case of *Small v. Allen*, stated in the text, is one of those where direct proof of intention, as an independent fact, may be given, agreeable to the doctrine stated ante, note 948, p. 1387, 8. As to the qualifications under which declarations of the party, indicative of the real intention, are admitted in such instances, see ante, note 481, p. 646, 7. Also *Doe v. Hardy*, 1 Mann. & Ryl. 525. In respect to various circumstances, proper to be proved and considered in these cases, see *Davis v. Calvert*, 5 Gill & John. 269. The case of *Filmer v. Gott*, stated at p. 551 of the text, was a case in chancery, of the same general character with *Small v. Allen*. In both, the fraud complained of related to the execution.

NOTE 972—p. 553.

We saw ante, note 964, p. 1442, that as between the parties, and for the object of maintaining the character of the deed, as imported by its operative words, the consideration clause is conclusive. If the execution of the deed is admitted, they shall not be allowed to vary the uses and purposes therein expressed. (See *Tribble v. Oldham*, 5 J. J. Marsh. 144.) Fraud in the execution, however, may be set up by a party; (ante, note 969, p. 1449;) and as that issue raises the question of intention as an independent fact, the consideration clause is of course open to enquiry. So it is open as to strangers in various instances, who may be interested in probing the real nature of the transaction, with a view of establishing that the deed was made to defraud creditors, &c. In these and the like cases, it seems, the rule propounded in the text applies; and the party setting up the assailed deed, shall not be allowed to support it by showing a *different* consideration. *Clarkson v. Hanaway*, cited in the text, is an instance where fraud in the execution was alleged as between the parties. The consideration expressed was adjudged entirely inadequate, and the defendants thereupon sought to maintain the deed as having been given mainly upon a consideration of *another species*, viz. a consideration of blood; but this the court held, could not be done. *Watt v. Grove*, 2 Scho. & Lef.

492, contains various *dicta* to the same effect, "It would be extremely dangerous," said the Lord Chancellor in that case, "to allow an impeached deed to be supported by evidence of considerations wholly different from those alleged in it." (Id. 500, 1.) In *Bridgman v. Green*, 2 Ves. sen. 628, the question arose whether a deed importing a money consideration, could, when assailed by the grantor for fraud, and the money consideration disproved, be supported as a deed of gift:—And held, that it could not. *Doe, dem. Roberts, v. Hannaway*, cited in the text, seems referrible directly to the principle of the cases, ante, note 967, p. 1446, which hold, that a party to an executed agreement shall not avoid it by alleging his own turpitude or illegal act.

The English *decisions* therefore, whatever may be said of their *dicta*, do not appear to have gone beyond the point of disallowing proof to show a consideration of a different species, so as thereby to change the nature of the deed. For instance, where a deed, under such circumstances, imports a bargain and sale merely, and the consideration mentioned is disproved, or turns out so entirely inadequate as to raise the presumption of fraud, it shall not be supported by proof that it was intended to operate as a voluntary conveyance, &c.

The question, how far extrinsic enquiry in support of a deed thus assailed may go, has been considerably discussed in the American courts. In *Hinde's lessee v. Longworth*, 11 Wheat. 199, a deed importing a *voluntary conveyance* from a father to his son, was assailed by a creditor of the father on the ground of its having been given to screen the property from being made liable for the father's debts. The party claiming under the deed, in order to repel the fraud, offered to show, among other things, that the father was indebted to the son in an amount equal to the value of the property conveyed. The court held the evidence admissible, on the ground that it might conduce to rebut the idea of *fraud in fact, or the intention to defraud*. The father, they said, might have "sold the land to his son, or a stranger, for a valuable consideration, and given a good title for the same, although his debts might have been double in amount to the value of his property, unless his creditors had acquired a lien upon it. It would have been no fraud in judgment of law against his creditors, for him to have paid *one*, and left the others unpaid. Had the evidence been offered for the purpose of showing that the deed was given for a *valuable consideration*, and in satisfaction of a debt due from the father to the son, and not for the consideration of *love and affection*, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable* for a *good* consideration, and a violation of the well settled rule of law, that parol evidence is inadmissible to annul, or substantially vary, a written agreement." They then observed, that such was not the object of the evidence—that the adverse party having gone into proof of circumstances out of the deed, which were insisted upon as evidence of a fraudulent intention, the evidence of the father's indebtedness to his son, was to meet the presumption thus raised. The evidence to show the fraud, they added, and that which was offered to repel it, "related to *collateral* and independent facts, unconnected with the deed, and could not, therefore, in any manner, vary or alter its terms." (Id. 214, 215.) It is difficult to perceive the relevancy of the enquiry above allowed, unless for the purpose of showing that the property conveyed, went, in some shape, to cancel the son's indebtedness, and thus to relieve the residue of the father's estate, *quoad hoc*; and in that view, it certainly requires a very subtle discrimination to discern the dis-

tion upon which the court proceeded. In Maryland, a deed assailed on the ground of fraud against creditors, expressed a money consideration which had never passed; and the party claiming under it sought to support it by proof that the true consideration was marriage; but held, that this could not be done, though both considerations were *valuable*. (*Betts v. The Union Bank of Maryland*, 1 Harr. & Gill. 175.) *Quere*, whether an additional money consideration could be shown. (*Id.*) In Massachusetts, the rule seems to be different; and any consideration of the same general species may, it seems, be proved, to sustain the deed under such circumstances. Accordingly, where a deed expressing a consideration of money was attacked by creditors; held, that parol evidence was admissible to show the real consideration to have been the release of a right of dower. (*Bullard v. Briggs*, 7 Pick. Rep. 533. See *Johns v. Church*, 12 id. 557, 561.) The same doctrine prevails in Pennsylvania. (*Jack v. Dougherty*, 3 Watts' Rep. 151.) In Virginia, where a deed purporting on its face to have been made in consideration of "natural love and affection," and also of "one dollar," was assailed on the ground of fraud as against creditors; held, that parol proof of other *valuable* considerations, besides the nominal one expressed, was admissible to sustain it. (*Harvey v. Alexander*, 1 Rand. Rep. 219.) *Quere*, however, if the consideration sought to be proved had been of a different *species* from the one expressed. (*Id.* See *Eppes v. Randolph*, 2 Call's Rep. 103. *Duval v. Bibb*, 4 Hen. & Munf. 113.) So in Ohio. (*Steele v. Worthington*, 2 Hamm. Rep. 182, 185.) In New-York, a deed expressing a money consideration was assailed by creditors, and it turning out that the consideration mentioned was inadequate; held, that it could not be supported by proof of its having been intended as a gift or voluntary conveyance. (*Hildreth v. Sands*, 2 John. Ch. Rep. 35.) As to the doctrine on this subject in Vermont, see *Brackett v. Wait*, 6 Verm. Rep. 426, 7. See also as to the doctrine in Alabama, *Brooks v. Maltbie*, 4 Stew. & Porter, 96 et seq., and *Mead v. Stéger*, 5 Porter's R. 498, et seq.

NOTE 973—p. 553.

The date is regarded as one of the formal parts of a deed. It is no more than *prima facie* evidence of the actual time of delivery, and may be contradicted. (*Lee v. Massachusetts Fire Ins. Co.*, 6 Mass. Rep. 203. *Harrison v. Trustees of Phillips' Academy*, 12 id. 456. *Maynard v. Maynard*, 10 id. 456. *Fairbanks v. Metcalf*, 8 id. 230. *Hatch v. Hatch*, 9 id. 307. *Penniman v. Barrimore*, 6 Mart. Lou. Rep. 494. *Solomon v. Evans*, 3 McCord's Rep. 274. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 2 John. Rep. 230. *Barrymore v. Jay*, 2 McCord's Rep. 38. *Fox v. Palmer*, 2 Dall. Rep. 214. *Thompson v. Gray*, 2 Stew. & Porter, 64, 65. *Perrin v. Broadwell*, 3 Dana's Rep. 596, 7. *Churchill v. Bailey*, 1 Shepley's Rep. 64. *Hall v. Benner*, 1 Pennslv. R. 402. *Green's trustees v. Robinson*, 1 Wright's R. 436. *Allen v. Rhodebaugh's adm'r*, id. 322. *Higdon's heirs v. Higdon's devisees*, 6 J. J. Marsh. 51.) Indeed, all facts relating to the point of execution, whether tending to show the time of delivery merely, or that the delivery was in the nature of an escrow, or to disprove it altogether, may in general be shown, notwithstanding any thing appearing on the face of the deed. (See ante, note 948, p. 1388; also ante, note 969, p. 1450.) So as

to the *place* of execution, if that becomes material. (*Keys v. Powell*, 9 Lou. Rep. (Curry) 572.)

This freedom of enquiry is involved in most of the cases ante, note 888, p. 1281, where we considered various ingredients in the constitution of complete delivery. We saw by several cases at pp. 1283, 4, 5, 6, of that note, that the fact of a deed being acknowledged and recorded, is not conclusive evidence of delivery. See to S. P., Jackson, ex dem. Hopkins, v. Leek, 12 Wend. 105. Jackson, ex dem. Ten Eyck, v. Perkins, 2 id. 308. Powers, v. Russell, 13 Pick. 69.

We saw too, in the same note, that the question of delivery was one involving the consideration of both acts and motives; in other words, "both overt and mental acts;" (per Shaw, C. J., 13 Pick. 75;) and that the intention of the grantee as well as grantor was requisite. (*Owings v. Grubb's adm'r*, 6 J. J. Marsh. 32, 3.) In Vermont, it has been laid down, that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from her husband can be of no consequence. (*Brackett v. Wait*, 6 Verm. Rep. 411, 424.)

If there is no date to a will, you may show the true time of execution; and where there is a date, you may show that a mistake was made in it. (*Deakins v. Hollis*, 7 Gill & John. 311.)

NOTE 974—p. 554.

The doctrine of annexing customary incidents to a lease, the lease itself being silent in respect to them, was very clearly recognized in *Dorsey v. Eagle*, 7 Harr. & Gill, 321, a case very similar to the one put in the text. And though the lease there, contained a general reference to the regulations of the manor, yet it was conceded on all sides, and expressly affirmed by the court, that without such reference, parol evidence would have been admissible of the manorial custom for the tenant to remove the away-going crop. (Id. 331.) So also in *Stultz v. Dickey*, 5 Binn. Rep. 285; and see *Dieffendorf v. Jones*, stated per Yeates, J., id. 289, and in *Carson v. Blazer*, 2 id. 487. Independent of any such custom, it seems clear, that where the termination of the lease is certain, as was the case in the above instances, the tenant would have no such right. (*Whitmarsh v. Cutting*, 10 John. Rep. 360.)

In Pennsylvania, a custom of a particular place for a landlord to enter for breach of a condition in a manner different from that authorized by the common law, or the terms of the deed, is inadmissible. (*Stoevers v. Whitman*, 6 Binn. Rep. 416.)

The tenant's right to the away-going crop, as founded upon custom, was recognized by the supreme court of the United States in *Van Ness v. Pacard*, 2 Peters' Rep. 137. And there it was held, that a local custom in the city of Washington, for tenants to remove certain buildings erected by them, might be proved. (Id. 148. See *Woodfall's Landlord and Tenant*, 218. Bull. N. P. 34. See further, *Story's Conf. of Laws*, 226.)

The doctrine in the text has been recognized and acted upon in various English cases, beside those noticed by our author. The principal difficulty in its application has been to determine, when these incidents may be regarded as excluded by the terms of the lease. The general rule seems to be, that the custom is admissible un-

less inconsistent with the written instrument. It need not, however, exclude it in express language, as seems to have been erroneously assumed in *Senior v. Armytage*. (See *Hutton v. Warren*, 1 M. & W. 4.) In *Senior v. Armytage*, (1 Holt's N. P. R. 197,) evidence was admitted of a customary right to compensation for an away-going crop, though the instrument of demise contained an express stipulation, that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude, by implication, the tenant's right to receive a compensation for seed and labor. (Per Curiam, in *Hutton v. Warren*, supra.) In *Webb v. Plummer*, cited in the text, there was a claim of a customary allowance for foldage, (a mode of manuring the ground,) but there being an express provision for some payment on quitting, for the things covenanted to be done, and an omission of foldage; held, that the customary obligation to pay for the latter, was excluded. (2 Barn. & Ald. 746.) In *Holding v. Piggott*, 7 Bing. 465, a lease contained stipulations limiting the quantity of grain that should be grown on the farm, and directing that the land should be summer-fallowed, and that the tenant should spend all the fodder, hay, straw, turnips, &c. on the premises; and held, that the custom of the country, which would give the tenant a right to the away-going crop of wheat after a crop of turnips, was not excluded, though such crop had been grown in violation of the covenant to leave the land summer-fallowed. The court said, these were stipulations as to the terms of holding, not as to the terms of quitting. In *Roberts v. Barker*, 1 Crompt. & Meason, 803, the tenant claimed compensation for manure left on the farm, under a custom which bound the away-going tenant to leave the manure, and under which he was entitled to be paid for it by the landlord, or the incoming tenant. The lease contained a condition, that the manure should not be sold or taken away, but should be left to be expended on the land, by the landlord or incoming tenant. Lord Lyndhurst, in delivering the judgment of the court that the custom of the country was excluded, said—"if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." *Hutton v. Warren*, supra, was a case in which the plaintiff held under a lease of the glebe land and tithes of a parish; the lease contained a stipulation, that the plaintiff should spend and consume three parts in four of the manure arising from the tithes, as well as from the glebe land, on the glebe, and leave on the land all the manure not spread or bestowed on the premises, for the use of the landlord, he paying a reasonable price for the same; and held, that the custom of the country, giving an away-going allowance for seed and labor, was not excluded. Parke B. giving the judgment of the court, said—"the question is, whether, from the terms of the lease, it can be collected that the parties intended to exclude the customary obligation for seed and labor." The court considered the stipulation, obliging the tenant to lay out the manure arising from the tithes, as imposing a new obligation on the tenant, *dehors* the custom, and as qualifying the obligation, by an engagement on the landlord's part to give a remuneration, by re-purchasing a part of the produce in a particular way. "It is by no means," said the court, "to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting.

If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid, on quitting, for the ploughing; or to plough, sow, and manure, he being paid for the manuring; the principle of *expressum facit cessare tacitum*, which governed the decision of *Webb v. Plummer*, would have applied; but this is not the case here. The custom of the country, as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing, in the last year of the term, is in no way varied. The only alteration made in the custom, is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been paid for that which the custom required him to spend." (1 M. & W. 466.)

This doctrine of annexing customary incidents has been applied to other transactions of life, in which known usages have been established. It constitutes an exception to the general rule, that an instrument, complete on its face in all its parts, and importing to be the exclusive expositor of the sense of the parties, shall not receive additions from parol evidence. The cases go on the principle of a presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to make a contract in reference to these known usages. (Per Parke B. delivering the judgment of the court, in *Hutton v. Warren*, 1 M. & W. 466. See also per Savage, C. J. in *Boorman v. Johnston*, 12 Wend. 574.) The cases cited ante, note 957, p. 1408, et seq., will, many of them, be seen to be cases in which, on the principle above mentioned, incidents were annexed to contracts of various kinds, commercial, and otherwise. And though the admissibility of usage for this purpose has sometimes been regretted in England, (see p. 556, 7, of the text,) yet, it is sanctioned, both there and in this country, by a current of authority which it would be now presumptuous to question. Indeed, if the subject were *res integra*, it would be difficult to show why this evidence should be excluded on principle. In almost every country, certain customs have grown up and incorporated themselves with the general law, which not merely add incidents to contracts, respecting which the latter are silent, but often supply a meaning apparently in direct contradiction of the terms used. For example, a note is drawn, payable on its face in sixty days; yet, a law, founded in commercial usage and convenience, steps in and construes the note as payable in sixty three days. The parties are supposed to contract in reference to the law, as it exists at the time; and the only difference between taking that general law, and a custom, in connexion with the writing, is, that the latter is a binding law on particular persons, places or things; and though there are some exceptions, yet, in many cases, the maxim *expressum facit cessare tacitum*, applies as well to an incident sought to be annexed to a contract by the general law, as by a special local custom. See *Davies' Rep.* 87. Per *Savage, C. J.* in *Boorman v. Johnston*, 12 Wend. 566, 574. Per *id.* in *Wilcox v. Wood*, 9 Wend. 349. *Story's Confl. of Laws*, 225, 6, 7. Per *Parris, J.* in *Heald v. Cooper*, 8 Greenl. Rep. 32, 35. See *Doe, dem. Daggett, v. Snowden*, 2 Black. Rep. 1225. *Williams v. Gilman*, 3 Greenl. Rep. 35. *Lawrence v. McGregor*, 1 *Wright's Rep.* 192. *Cherry v. Holly*, 14 Wend. Rep. 26. *Barber v. Brace*, 3 Conn. Rep. 9. Ante, note 957, p. 1413, et seq.

NOTE 975—p. 554.

It is still doubtful, notwithstanding the observations in the text, whether the English courts would exclude evidence of the custom and usage of the country, for the purpose of showing that Michaelmas or Lady Day, in a demise, even though it were by deed, meant Old Michaelmas, or Old Lady Day. At all events, no *decision* has as yet gone that length. In *Doe, dem. Spicer, v. Lea*, cited in note (3) of the text, the evidence was not of this character, but of intention as an independent fact; and, therefore, was of course inadmissible. (See *ante*, note 948.) The subsequent case of *Doe, dem. Hall, v. Benson*, cited in note (4) of the text, shows that the statutory alteration of the style, has not given a conclusively arbitrary signification to the words designating different periods of the year. Indeed, the very ground of decision in the latter, was, that the term Lady Day was ambiguous, and therefore explainable by usage. See also *S. P. in Farley, ex dem. Mayor, &c. v. Wood*, 1 Esp. Rep. 198. The *dicta* in *Doe, dem. Hall, v. Benson*, by which the judges, in order to get round the determination in *Doe, dem. Spicer, v. Lea*, attempted to distinguish between a leasing by deed and by parol, must certainly be taken with very material qualifications. For we have seen various cases *ante*, note 957, p. 1408, et seq., where evidence of usage was held admissible to explain deeds, as well as other writings. (And see the cases in the next preceding note.) Nor is it easy to discern upon what principle such words as Michaelmas, Lady Day, &c., shall be regarded as of flexible import, when spoken merely, while, if the same words are written, and the writing authenticated by a seal, they are to be treated as having lost their ambiguous character, and become absolutely fixed and uncontrollable in their meaning. The cases *ante*, note 952, p. 1395, showing how words used in written instruments of all kinds are to be understood, seem practically, if not expressly, at variance with such a notion. It is true, where the leasing is by parol, whatever passed between the parties connected with their negotiation, may be proved, by way of ascertaining their real intention; otherwise, however, where the leasing has been by writing; for then the range of extrinsic enquiry is limited to an ascertainment of the meaning of the writing. Considering, therefore, the nature of the evidence offered in *Doe, dem. Spicer, v. Lea*—that it was foreign to the purposes of interpretation—designed to show the intent of the parties, independent of the deed, instead of explaining the meaning of the words in it—it is highly questionable if the court would have decided in the same way, had the evidence been of circumstances collateral to the question of intent, as custom or usage, &c.

Den, dem. Peters, v. Hopkinson, 3 Dowl. & Ry. 507, seems entirely anomalous. There the court are reported to have held, that the demise being by writing not under seal, parol evidence was admissible to prove "that the real understanding between the parties was, that the tenancy should commence at Old Lady Day," though the expression in the demise was general, "from Lady Day." The decision looks very much like authorizing proof of what the parties intended, as contradistinguished from an ascertainment of the intent expressed by the writing. It has been suggested, however, that the case is mis-reported, and that the evidence offered was probably of a usage

or custom. (2 Phill. Ev. 754, 5, note (3,) 8th Lond. ed.) See *Doe, dem. Dagget, v. Snowden*, 2 Black. Rep. 1224.

In New-York, parol evidence of a local custom, in the city of Albany, that a lease, which in its terms defines the time of holding to commence *from the first day of May* in one year, and to continue *to the first day of May* in the succeeding year, expires at noon of the last day, is admissible. The lease was in writing; but whether sealed or unsealed, does not distinctly appear. The opinion of the court, however, proceeds, it seems, in disregard of any such distinction. (*Wilcox v. Wood*, 9 Wend. 346.) See *Mary Lace's case*, 4 City-Hall Rec. 158.

NOTE 976—p. 555.

The maker of a promissory note, notwithstanding the usual expression of consideration, such as "for value received," &c., may show, as against the payee or other person standing in the same situation, that the note was given without consideration; or that the consideration has failed; or that a fraud in respect to it was practised upon him by the other party; or, (under the limitations adverted to ante, note 967, p. 1446,) that the consideration was illegal. The apparent diversities among the cases, as to the right of setting up defences of this sort, in actions brought to recover upon notes, need not be here noticed. They are referrible, not to any principle connected with the doctrine of parol evidence to vary written instruments, but to the peculiar policy of different courts on the subject of trying both matters in the same suit. The following are among the numerous American cases relating to the above general doctrine. *Goddard v. Cutts*, 2 Fairf. Rep. 440. *Means v. Brickell*, 2 Hill's Rep. 657. *Schoonmaker v. Roosa*, 17 John. Rep. 301. *Pearson v. Pearson*, 7 id. 26. *Ten Eyck v. Vanderpoel*, 8 id. 120. *The People v. Howell*, 4 John. Rep. 296. *Fink v. Cox*, 18 id. 145. *Mattocks v. Owen*, 5 Verm. Rep. 42. *Vincent v. Groom*, 1 Yerg. Rep. 430. *Baker v. Matlack*, 1 Ashm. Rep. 68. *Plumer v. Smith*, 5 N. Hamp. Rep. 553. *The People v. Niagara C. P.* 12 Wend. 246. *Spalding v. Vandercook*, 2 id. 431. *Burton v. Stewart*, 3 id. 238. *Reab v. McAllister*, 8 id. 109. *City Bank v. Barnard*, 1 Hall's Rep. N. Y. C. P. 70. *Tallman v. Gibson*, id. 308. *Fulton Bank v. Phoenix Bank*, id. 562. *Vallett v. Parker*, 6 Wend. 615. *Stevens v. McIntire*, 2 Shepl. Rep. 14. *Smith v. Hiscock*, id. 449. *Fulsom v. Mussey*, 8 Greenl. 401. *Petrie v. Christy*, 19 John. Rep. 53, 4. *Rosa v. Brotherson*, 10 Wend. 85. *Trustees of Amherst Academy v. Cows*, 6 Pick. 427. *Loffland v. Russell*, 1 Wright's Rep. 438. *Holme v. Carpser*, 5 Binn. Rep. 469. *Jackson v. Heath*, 1 Bail. Rep. 355. *Mims v. Whiddon*, 2 id. 451. *Smith v. Van Loan*, 16 Wend. 659. *Johnston v. Dickson*, 1 Blackf. Rep. 256. *Bridge v. Hubbard*, 15 Mass. Rep. 96. *Bacon v. Norton*, 5 Day's Rep. 128. *Payne v. Trezevant*, 2 Bay's Rep. 23. *Ayer v. Hutchins*, 4 Mass. Rep. 370, 1, 2. *Thurston v. McKown*, 6 id. 428. *Lee's adm'r v. Ware*, 1 Hill's Rep. 315. *Bowers v. Hurd*, 10 Mass. Rep. 427. *Greenleaf v. Cook*, 2 Wheat. 13. *Smith v. Sinclair*, 15 Mass. Rep. 171. *Lloyd v. Jewell*, 1 Greenl. Rep. 352. *Frisby v. Hoffnagle*, 11 John. Rep. 50.

Young v. Grundy, 7 Cranch, 548. Bliss v. Negus, 8 Mass. Rep. 46. Still v. Rood, 15 John. Rep. 230. Hawley v. Beeman, 2 Tyl. Rep. 238. Paine v. Cutler, 13 Wend. 605. Morton v. Rogers, 14 id. 575. Dennison v. Brown, 3 Verm. Rep. 170. Shepherd v. Temple, 3 N. Hamp. Rep. 455. Perkins' adm'r v. Bumford, 3 N. Hamp. 522. Bailey v. Foster, 9 Pick. Rep. 139. Evans v. Gray, 12 Mart. Lou. Rep. 478. Grew v. Burditt, 9 Pick. Rep. 265. Barnum v. Barnum, 8 Conn. Rep. 469. Washburn v. Picot, 3 Dev. Rep. 390. Booker Lastrayes, 2 Miller's Lou. Rep. 52. Russell v. De Grand, 15 Mass. Rep. 35. Northampton Bank v. Allen, 10 id. 284. Atwood v. Whittlesey, 2 Root's Rep. 37. Hammond v. Hopping, 13 Wend. 505. Bacon v. Norton, 5 Day's Rep. 128. Motte v. Dorrell, 1 McCord's Rep. 350. Mitchell v. Preston, 5 Day's Rep. 100. Morton v. Legrand, 2 Litt. Rep. 326. Hovey v. Shumway, 1 Root's Rep. 70. Surlott v. Pratt, 3 Marsh. Ken. Rep. 174. Lear v. Yarnel, id. 419. Fields v. Gorham, 4 Day's Rep. 251. Churchill v. Suter, 4 Mass. Rep. 156. Tucker v. Smith, 4 Greenl. Rep. 415. Jones v. Hake, 2 John. Cas. 60. Scott v. Lewis, 2 Conn. Rep. 132. Lloyd v. Keach, id. 175. Harlan v. Reid, 3 Hamm. Rep. 285. Hill v. Buckminster, 5 Pick. 391. Gates v. Winslow, 1 Mass. Rep. 65. Lattin v. Vail, 17 Wend. 188. Thatcher v. Dinsmore, 5 Mass. R. 302. Burroughs v. Nettles, 7 Lou. Rep. (Curry) 113. Hightower v. Joy, 2 Porter's Rep. 312. Boutelle v. Codwin, 9 Mass. R. 254. Hebert v. Landry, 3 Mill. Lou. Rep. 303. Roll v. Raquet, 4 Hamm. Rep. 400. Sylvester v. Crapo, 15 Pick. 92. Jones v. Caswell, 3 John Rep. 29. Irwin v. Potter, 2 Watts' Rep. 271. Payne v. Eden, 3 Cain. Rep. 213. Waite v. Harper, 2 John. Rep. 386. Yeomans v. Chatterton, 9 id. 295. Loomis v. Pulver, 9 id. 254. Wiggen v. Bush, 12 John. Rep. 306. Little v. O'Brian, 9 Mass. Rep. 423. Swayzé v. Hull, 3 Halst. Rep. 54. Strong v. Tompkins, 8 John. Rep. 76. Reed v. Pruyn, 7 id. 425. Love v. Palmer, id. 159. Singleton v. Bremar, 1 Harp. Rep. 201. Rugley v. Davidson, 2 Rep. Const. Ct. So. Car. 40. Gase v. Gerrish, 15 Pick. 49. Dexter v. Clemans, 17 id. 175. Arceaux v. Jourdan, 8 Lou. Rep. (Curry) 310.

"It may be shown that an instrument, though it has the form of a promissory note, was never given, or taken and received as such—that it was put into the hands of a third person, to be delivered upon a contingency, which has not taken place;" (per Weston J. in *Goddard v. Cutts*, 2 Fairf. Rep. 442; see *Vallett v. Parker*, 6 Wend. 615; *Woodhull v. Holmes*, 10 John. Rep. 231; 1 *Strange*, 674; *Couch v. Meeker*, 2 Conn. Rep. 202; *Bradley v. Bradley*, 8 Verm. Rep. 246;) or, "that it was taken from the maker without his consent." (Per Weston, J. in *Goddard v. Cutts*, supra.)

"In these cases it would appear, that the parties had never come to any agreement which would give to their contracts a subsisting character. The consent of the parties necessary to their validity would be disproved." (Per Weston, J. in *Goddard v. Cutts*, supra.)

And upon the same principle, it may be shown that the party was incapable of contracting, or that the note is void on some of the grounds stated ante, note 969, p. 1445, 50, with respect to deeds; as drunkenness, lunacy, duress, infancy, &c. (*Lee's adm'r v. Ware*, 1 Hill's Rep. 316. *Burroughs v. Richman*, 1 Green's Rep. 233. *Rice v. Peet*, 15 John. Rep. 503. *Baxter v. Earl of Portsmouth*, 5 Barn. & Cress. 170, S. C. 7 Dowl. & Ryl. 614. *Grant v. Thompson*, 4 Conn. Rep. 203. *Barrett*

v. Buxton, 2 Aik. Rep. 167. Stouffer v. Latshaw, 2 Watts' Rep. 165. Swasey v. Van Derheyden's adm'r, 10 John's Rep. 34. Wailing v. Toll, 9 id. 141, n. (a) Fenton v. White, 1 South. Rep. 100. Smith v. Mayo, 9 Mass. Rep. 62. Martin v. Mayo, 10 id. 147. Van Winkle v. Ketchum, 3 Cain. Rep. 322. Hussey v. Jewett, 9 Mass. Rep. 100.)

But when once a note "has been made, executed and delivered, as such, it is not admissible by law to look for any of its terms *aliunde*. They can be proved only by the instrument itself." (Per Weston, J. in *Goddard v. Cutts*, supra. See *Alsop v. Goodwin*, 1 Root's Rep. 196. *Harris v. Caston*, 2 Bail. 343.) Hence, a note payable "on demand," or on a specified day, cannot be varied in its operation by parol evidence of a contemporaneous agreement that the principal should not be called for, so long as the interest was punctually paid; (*Trustees, &c. v. Stetson*, 5 Pick. 506;) or, that it should be paid at another time, or in any other mode than is imported on its face. (*Woodbridge v. Spooner*, 1 Chitty's Rep. 661. *Cunningham v. Wardwell*, 3 Fairf. 466. *Dow v. Tuttle*, 4 Mass. Rep. 414. *Fitzhugh v. Runyon*, 8 John. Rep. 375. *Mosely v. Hanford*, 10 Barn. & Cress. 729. *Foster v. Jolly*, 1 C. M. & R. 703. *Adams v. Wordley*, 1 M. & W. 378. *Bradley v. Anderson*, 5 Verm. Rep. 152.) Nor is it admissible to show that a mistake was made in drawing it, in respect to the time or manner of payment. (*Fitzhugh v. Runyon*, 8 John. Rep. 375. *Bradley v. Anderson*, 5 Verm. Rep. 152. See *Brown v. Beebe*, 1 D. Chip. Rep. 228. Per Putnam, J. in *Crossman v. Fuller*, 17 Pick. 174.) Nor can the sum in which it is made payable be varied by parol, except upon the principle of showing want, failure, or fraud, as to the consideration. (*Downs v. Webster*, Brayt. Rep. 79.) The same rule prevails where no time of payment whatever is specified, in which case the law adjudges it payable immediately; and you shall not give evidence of any contemporaneous or anterior parol stipulation between the parties varying its legal effect. (*Thompson v. Ketcham*, 8 John. Rep. 189.) So you shall not control the legal effect of an accepted bill, by showing a contemporaneous verbal agreement that it was to be paid out of a particular fund. (*Campbell v. Hodgson*, Gow, 74.) In England it has been held, that where a note expresses a specific consideration, it is not admissible to show a consideration inconsistent with the one expressed. (See *Woodbridge v. Spooner*, 1 Chitt. Rep. 661. *Ridout v. Bristow*, 1 Tyr. 84. S. C. 1 C. & J. 231.) The defendant gave the plaintiff a note for \$80, which expressly stated that the same was "for the hire of his negro man A.;" and held, that it was not competent for the plaintiff to aver and prove a contemporaneous verbal promise by the defendant to pay an additional sum if cotton should bear a certain price. (*Gazaway v. Moore*, 1 Harp. Rep. 401.) So an agreement of the maker, made at the time the note was signed, that an account which the maker had against the payee should be deducted from the note, is not admissible. (*Eaves v. Henderson*, 17 Wend. 190.) A note payable to two cannot be varied by parol evidence that the money was due to another along with them. (*Cotton v. Lane*, 1 Alab. Rep. 320.)

It has been said, that although the note was suffered to go into the hands of the payee, it may be shown that by a contemporaneous agreement it was to have no validity until after the happening of a certain event. (Per Weston, J. in *Goddard v. Cutts*, 2 Fairf. Rep. 440, 442.) The *dictum* proceeds upon the ground that it is always open to enquire whether an instrument was actually delivered as such. (Id.)

A distinction was recognized, however, in the case, between a mere passing of a note into the hands of the payee on a condition that it should not take effect as a fairly executed and delivered instrument till after the happening of a future event, and an absolute delivery of the note, as such, under an agreement that it should be void if the event did not take place. The case was as follows—the plaintiff withdrew a suit on certain notes, and wrote a discharge of the notes on copies thereof, the defendant at the same time giving a new note; and the old notes not being at hand, it was agreed that the plaintiff should procure them to be sent to the defendant in two weeks; held, that this agreement was not to be regarded as a condition precedent to the operation of the new note, but a condition subsequent, and therefore parol evidence of it was inadmissible to defeat or vary the new note. And the court granted a new trial on the ground of the admission of the testimony, though it was received without objection. (Id.) It has been held in several other cases that parol evidence to show that the note was given on condition that it should be void upon the happening of a contingency is inadmissible. (Erwin v. Saunders, 1 Cowen's Rep. 249. See S. P., Rose v. Larned, 14 Mass. Rep. 154. Dale v. Pope, 4 Litt. Rep. 166. See Farnham v. Ingham, 5 Verm. Rep. 514. Daniel v. Ray, 1 Hill's Rep. 32.)

So, also, if one adds at the bottom of a promissory, signed by another, that he acknowledges himself to be bound as surety for its payment, he is considered as an original promisor; and parol evidence that he was to be holden for payment, only on condition that the other promisor could not pay, is inadmissible. (Hunt v. Adams, 7 Mass. Rep. 518. 6 id. 519, S. C.)

In Hagood v. Swords, 2 Bail. Rep. 305, in an action by the payee against the maker, the latter was allowed to give in evidence a verbal agreement, entered into when the note was given, that it should be delivered up to him, on his procuring a purchaser for certain lands of the payee, at a specified price, which condition had been performed. The decision was put upon the ground that the performance of the condition operated as payment of the note; and the court deny that such evidence tends to alter the note, as such, either in its terms or legal effect. The distinction between cases of that impression, and those where effect is sought to be given to a prior or contemporaneous verbal contract, unexecuted, is most broad and palpable. In the former, it is the *subsequent execution*, and not the parol agreement, which operates the variation; and the whole comes in like an accord and satisfaction. (Per Collamer, J. in Bradley v. Bentley, 8 Verm. Rep. 243. Crosman v. Fuller, 17 Pick. 171, 174. And see Low v. Treadwell, 3 Fairf. R. 444, 5.) If the agreement has not been executed, it cannot be proved; even though the party may have tendered performance, which was refused. (Bradley v. Bentley, and Crosman v. Fuller, supra. But see Farnham v. Ingham, 5 Verm. Rep. 514.)

A parol agreement, upon a sufficient consideration, made *subsequent* to the giving of the note, may be given in evidence, to vary its legal effect. (See Erwin v. Saunders, 1 Cowen's Rep. 249. Ward v. Winship, 12 Mass. Rep. 481. Per Lord Ellenborough, in Hoare v. Graham, 3 Camp. Rep. 57. Eaves v. Henderson, 17 Wend. 190. Gardiner v. Callender, 12 Pick. 374. McClelland v. Quarles, 3 Blackf. 459. Harris v. Caston, 2 Bail. Rep. 342. See also post, note 985.)

So, a contemporaneous written agreement, connected with the note by direct reference, or necessary implication, may be resorted to for the purpose of varying its legal

effect and import. Thus, the plaintiff gave a bond to convey land to the defendant, and the defendant gave a note, payable on demand, not negotiable, for the agreed consideration, but took from the plaintiff a receipt, stating that if the bargain was afterward rescinded, the note should be given up on the defendant's surrendering the bond. All the writings bore the same date; and held, that these papers constituted one contract, and that no action would lie on the note without a previous tender of a deed of the land. (*Hunt v. Livermore*, 5 Pick 395. See also *Davlin v. Hill*, 2 Fairf. 434.) At the bottom of a promissory note, payable on demand, was a memorandum, thus—"one half payable in 12 months, the balance in 24 months." Held, that either party might enquire when, by whom, and the circumstances under which, it was put there; and if it turned out to have been affixed to the note before delivery to the promisee, it should be treated as a part of the note, controlling the time of payment; and that oral evidence to show that the stipulation for a term of credit was provisional, namely, if the promisor should remain solvent, was inadmissible. (*Heywood v. Perrin*, 10 Pick. 228.) So, if a note expressly refer to a verbal condition *aliunde*, without showing what the condition is, you may prove the condition, and in this way annex it to the note. (*Couch v. Meeker*, 2 Conn. Rep. 305.)

NOTE 977—p. 556.

See ante, note 957, p. 1410, 11, 12.

NOTE 978—p. 556.

S. P. Veacock v. McCall, 1 Gilp. 329. See also *Bogert v. Cauman*, Anth. N. P. 70, 71. It seems that an incidental right to additional privilege or compensation, cannot be made out by usage, in such cases. This, in England, may rest on the phraseology of the statute, which not only requires the contract to be in writing, under a penalty upon the master, but expressly declares, that the contract, when signed, "shall be conclusive and binding on all parties, any usage or custom to the contrary notwithstanding." (See *The Isabella*, 2 Rob. Adm. Rep. 241, where the English statute is recited.) Our statute is not in the same language, but it enjoins the master, under a penalty, to make an agreement in writing or in print with the seamen, "declaring the voyage or voyages, term or terms of time," &c.; (2 L. U. S. 115, *Bioren & Duane*;) and perhaps its policy is equally comprehensive with that of the English statute. (See *Bogert v. Cauman*, Anth. N. P. 70, 72, and note (a) at the latter page.)

NOTE 979—p. 557.

See the observations ante, note 974, p. 1456.

NOTE 980—p. 558.

Parol evidence is inadmissible to prove a usage varying the application of *plain* terms in a policy, when there is no sort of ambiguity; (see *Mumford v. Hallett*, 1 John. Rep. 439, per Livingston, J.;) or to add conditions or limitations which the terms used plainly exclude. (*Rankin v. The American Ins. Co.* 1 Hall's Rep. N. Y. C. P. 619. See also ante, note 957, p. 1415, et seq.)

Nor is any other parol evidence admissible, in such cases, to change the effect of the policy; (*Vandervoort v. Columbian Ins. Co.* 2 Cain. Rep. 155;) as, to shew a mistake; (*Cherriot v. Barker*, 2 John. Rep. 346;) or to prove a cotemporaneous agreement, evincing a different intent from what is expressed. (*New-York Ins. Co. v. Thomas*, 3 John. Cas. 1. See also *Pitkin v. Brainerd*, 5 Conn. Rep. 541.) If in a policy of insurance of a vessel, the vessel be warranted neutral, parol evidence will not be admitted to prove that such warranty was not intended. (*Lewis v. Thatcher*, 15 Mass. Rep. 431.) In an action on a valued policy of insurance, it is not competent for the under-writers to give parol evidence that the value of the subject insured is different from that stated in the policy. (*Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206.) In an action upon a policy of insurance, drawn in the usual form, except that at the bottom was a memorandum in these words, "*This risk is against a total loss only*, warranted safe 12 April last, in lat. 29° long. 65° 10';" it was proposed to show, on the part of the defendant, that it was expressly agreed at the time of subscribing the policy, that the same should be considered as insuring against a total loss in the natural sense of the words only, so that if any part of the property insured should be saved, the under-writers should not be liable:—But the evidence was held inadmissible. (*Murray v. Hatch*, 6 Mass. Rep. 465.)

NOTE 981—p. 560.

See further, *Bradshaw v. Bennett*, 5 Carr. & Payne, 48. *Shelton v. Livius*, 2 C. & J. 416. *Wright's lessee v. Deklyne*, 1 Peters' C. C. Rep. 199. *Wainwright v. Read*, 1 Dess. Eq. Rep. 573. *Pew v. Lividais*, 3 Mill. Lou. Rep. 459.

NOTE 982—p. 561.

The cases of *Warren v. Stagg*, and *Cuff v. Penn*, stated in the text, have been doubted in England, by more recent decisions. Parke, J. in *Goss v. Lord Nugent*, 5 Barn. & Adol. 58, said, he never could understand the principle on which these and the like cases proceeded, for the new contract to deliver within the extended time must then be proved partly by written, and partly by oral evidence. Denman, C. J. who delivered the opinion of the court, also adverted to these cases, but deemed it unnecessary to say whether they were rightly decided or not. The learned author of *Sugd. on Vendors*, has stated the result of the English authorities to be, that, at law,

a parol variation of a contract, required by the statute of frauds to be in writing, cannot be given in evidence. (1 Sugd. on Vend. 180, 1 Am. ed. of 1836, from 9th Lond. ed.; but see Chitty on Contr. 27; *Low v. Treadwell*, 3 Fairf. R. 444, 5, 6.)

It seems, from the tenor of the recent English adjudications, that the policy of the statutes requiring certain contracts to be reduced to writing, demands that they should be proved entirely by writing, and that all oral evidence in relation to them, should be excluded. In *Goss v. Lord Nugent*, *supra*, it was decided on this principle, that when a contract had been entered into concerning land, required by the statute of frauds to be in writing, parol evidence was inadmissible to show that some of the terms had been altered, or dispensed with, by a subsequent parol agreement. The case was this—by an agreement in writing, the plaintiff contracted to sell to the defendant several lots of land for the sum of £450, and to make a good title to them; and £90 was paid to him as a deposit. It was afterwards discovered, that, as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot, and the plaintiff accordingly delivered possession of the whole of the lots to the defendant, which the latter accepted, but refused to pay the remainder of the purchase money, relying upon the objection to the title. The court, after taking time to consider, delivered an elaborate judgment, that the defendant was not bound by the parol evidence of a waiver of one of the terms of the written contract. They said—"We think the object of the statute was to exclude all oral evidence as to contracts for the sale of lands, and that any contract, which is sought to be enforced must be proved by writing only. But in the present case, the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing." (See also *Falmouth v. Thomys*, 1 Cr. & M. 89. S. C. 3 Tyrwh. 26.) In the case of *Harvey v. Grabham*, 5 Adol. & Ellis, 61, it was decided, that the same principle applies to a case in which oral evidence is offered to shew a variation of a part of a contract relating to an interest in lands, though that part might have been good of itself without writing. (See *Reed's heirs v. Chambers*, 6 Harr. & John. 490, as to the equity doctrine in Maryland.)

NOTE 983—p. 561.

In *Stackpole v. Arnold*, 11 Mass. Rep. 27, the action was upon promissory notes signed by Z. Cook; and as there was nothing in the notes themselves importing that he signed them as agent, the court held that parol evidence to establish that fact was inadmissible. See also *Shankland v. The Corporation of Washington*, 5 Peters' Rep. 390, 394, S. P., *semble*, as to lottery tickets.

Where a check had been drawn by the cashier of a bank, he signing his name thereto without any addition of his official title, held, in an action against the bank, that it being doubtful, on the face of the check, whether the act was an official or private one, parol evidence to show it the former was admissible. (*Mechanics Bank of*

Alexandria v. The Bank of Columbia, 5 Wheat 326.) So where the defendants had signed a promissory note, adding to their signature the words—"Trustees of the First Baptist Society of the village of Brockport;" held, that though *prima facie*, they were personally liable, yet they might aver and prove that the note was given by them as agents of the corporation indicated by their signature, for a debt due to the payee from the corporation; and that these facts being known to the payee, at the time he took the note, would constitute a defence to a suit brought by him seeking to charge the defendants as personally responsible. (*Brockway v. Allen*, 17 Wend. 40. See *Randall v. Van Vechten*, 19 John. Rep. 60. *Taft v. Brewster*, 9 id. 334. *White v. Skinner*, 13 id. 307. *Pentz v. Stanton*, 10 Wend. 275. *New England Ins. Co. v. De Wolf*, 8 Pick. 56, 61, 62. *Stackpole v. Arnold*, supra. *Arfridson v. Ladd*, 12 Mass. Rep. 173.) And even if the addition to the signature does not set out the true title of the corporation, yet being substantially right, and the payee not misled, the defendants may show the facts as if they had given the title accurately. (*Brockway v. Allen*, supra.) See further on this subject *Hills v. Bannister*, 8 Cowen's Rep. 31. *Ballow v. Talbot*, 16 Mass. Rep. 461. *Long v. Colburn*, 11 id. 97. *Providence Hat Manufacturing Co. ads. v. Emerson*, 12 id. 244. *McClure v. Bennett*, 1 Blackf. 189. *Redhead v. Cator*, 1 Starkie's Rep. 14.

The rule seems to have been held more rigid in respect to deeds, than simple contracts. The former, when executed by an agent or attorney, should be expressly in the name of the principal. (See *Spencer v. Field*, 10 Wend. 87. *Copeland v. Mercantile Ins. Co.* 6 Pick. Rep. 198. *New England Marine Ins. Co. v. De Wolfe*, 8 Pick. 56, 61, 62; but see *Magill v. Hinsdale*, 6 Conn. Rep. 464, 469.) In *Owings v. Grubb's adm'r*, 6 J. J. Marsh. 31, the plaintiff sued on a writing, treated by the court as a deed, and which was as follows:

"Due Richard H. Owens, seventy-seven dollars and two cents, for value received, as witness my hand,

"For Thomas D. Owings,

"James Grubb."

The plaintiff contended that this was to be deemed conclusively the deed of Grubb; but the court held otherwise, deciding, that though *prima facie* it was the deed of Grubb, yet if he was in truth the agent of Thomas D. Owings, and the circumstances attending the delivery showed that he intended to, and did in fact, deliver it as the deed of his principal, the plaintiff could not recover. (See *Wright v. Weakley*, 2 Watts' Rep. 89, stated *infra*; and *Campbell v. Baker*, id. 83.) See *Hatch's lessee v. Barr*, 1 Hamm. Rep. 390, 394, stated *ante*, note 889, p. 1287, in respect to a deed signed by an officer of a corporation in his own name, with the addition of his official title. See also as to various deeds executed under powers of a public nature, and how far the fact of their having been thus executed should be shown on their face, *ante*, note 891, p. 1291, 2.

In many cases involving the rights and obligations of sureties, parol evidence is admissible to show that they signed the writing in question in that character, though there is nothing indicating it on the face of the instrument. In *Hunt v. United States*, 1 Gall. Rep. 33, it was deemed questionable, whether a person signing a joint and several bond with another, could, at law, and as against the obligee, aver and prove himself a surety, where his character as such does not appear in the bond.

(See *The People v. Jansen*, 7 John. Rep. 332. *Grafton Bank v. Kent*, 4 N. Hamp. R. 221. *Orme v. Young*, 1 Holt's Rep. 84. *Rees v. Berrington*, 2 Ves. Jr. 540.) It is clear, that in a court of equity, such proof is always admissible. (See the above cases; also *Smith v. Tunno*, 1 McCord's Ch. Rep. 451, 2.) And where questions arise between co-sureties, as to contribution, or between principal and surety, on account of payments made by the latter, the true relation between the parties may always be shown even at law. (See *Taylor v. Savage*, 12 Mass. Rep. 102. *Harris v. Warner*, 13 Wend. 400. *Anderson v. Pearson*, 2 Bail. Rep. 107.) In New Hampshire, it has been directly adjudged, that in an action on a joint and several promissory note, one of the makers might show that he signed the note as surety for the other, though the note indicated no such thing; and if the plaintiff knew the fact, and had dealt with the principal so as to entitle the surety to be discharged, the latter might defend himself on this ground, at law, as well as in equity. (*Grafton Bank v. Kent*, 4 N. Hamp. Rep. 221.) See *Paine v. Packard*, 13 John. Rep. 174. *Townsend v. Riddle*, 2 N. Hamp. Rep. 452.

The English decisions are in conflict on this subject. The balance of authority there, however, would seem to be against the doctrine of the above New Hampshire case. (See *Fentum v. Pococke*, 5 Taunt. Rep. 192. *Price v. Edmunds*, 10 Barn. & Cress. 578. *Garrett v. Jull*, 2 Wheat. Selw. 294. But see *Hall v. Wilcox*, 1 Moo. & Rob. 58.)

Where the defendant, William Weakley, had signed a single bill, importing a joint and several promise, thus:—

“Witness our hands and seals this 23d of October, 1837.

“For Israel Downing, (L. S.)

“William Weakley. (L. S.)”

Held, that the form of the execution indicated the relation of principal and surety between the makers, and parol evidence to show that the defendant made it as his own deed, and not as surety, was inadmissible. (*Wright v. Weakley*, 2 Watts' Rep. 89. See *Owings v. Grubb's adm'r.* 6 J. J. Marsh. 31.) And where there is a discrepancy between the general obligatory terms in the body of the writing, and the form of execution; held, that the latter should govern. (*Id.* *Campbell v. Baker*, *id.* 83.)

NOTE 984—p. 562.

In *Smith v. Williams*, 1 Murph. Rep. 426, Mr. Justice Taylor explains the reason of the rule, forbidding the admission of parol evidence to add to or enlarge the terms of a written contract, as follows—“The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligation as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to their contract, and thus have given them a clearness, a force, and a direction, which they would not have by being trusted to the memory of a witness.” (S. C. 1 N. Car. Law Repos. 263.)

"The various conceptions of different minds on the same subject, the liability of all persons to forgetfulness, the influence of passion, prejudice, and interest, renders unwritten contracts, at all times, uncertain. But, *littera scripta manet*. It cannot change with times or circumstances; and when a contract is reduced to writing, the law presumes that the writing contains the whole agreement." (Per Nott, J. in *McDowall v. Beckley*, 2 Rep. Const. Ct. So. Car. 267, 8.)

So far, therefore, as the rule operates to exclude prior or contemporaneous stipulations or conversations, it obviously applies as well to cases where a written instrument is not required by law, as to those where it is required; and to simple contracts in writing, no less than to deeds. Hence, we find it either conceded or asserted in almost every case which speaks on this subject, that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it; and that the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to *explain and apply* the writing, but not to add to it, or vary its terms. This general doctrine has been recognized almost universally. (See *Bayton v. Towles*, 5 Mart. Lou. Rep. 1. *Cozens v. Whitaker*, 3 Stewart & Porter, 322. *Stackpole v. Arnold*, 11 Mass. Rep. 27. *McFarlane v. Moore*, 1 Tenn. Rep. (Overt.) 174. *Washburn v. Cordis*, 15 Pick. 53. *Johnson v. Miln*, 14 Wend. Rep. 199, per *Savage, C. J.* *Brewster v. Countryman*, 12 Wend. 446. *Goss v. Lord Nugent*, 5 Barn. & Adol. 64. *Veacock v. McCall*, 1 Gilp. 329. *Condict v. Stevens*, 1 Monroe, 74. *Harvey v. Grabham*, 5 Adol. & Ellis, 61. *Dean v. Mason*, 4 Conn. Rep. 428. *McKenna v. Henderson*, 1 Pennsylv. Rep. 417. *Vandervoort v. Smith*, 2 Cain. Rep. 161. *Parkhurst v. Van Cortlandt*, 1 John. Ch. Rep. 282. *Stevens v. Cooper*, id. 425, 429. *Gilpins v. Consequa*, 1 Peters' C. C. Rep. 85. *Randall v. Phillips*, 1 Mason's Rep. 378, 383. *Hovey v. Newton*, 7 Pick. Rep. 29. *Brigham v. Rogers*, 17 Mass. Rep. 573, 4. *Small v. Quincy*, 4 Greenl. Rep. 497. *Rosevelt v. Stackhouse*, 1 Cowen's Rep. 122. *Dunham v. Baker*, 2 Day's Rep. 137. *Bennett v. Hubbard*, 1 Alab. Rep. 270. *Tribble v. Oldham*, 5 J. J. Marsh. 141. *Perrine v. Cheeseman*, 6 Halst. Rep. 174. *Boorman v. Johnston*, 12 Wend. 566. *Austin v. Sawyer*, 9 Cowen's Rep. 39. *Falconer v. Garrison*, 1 McCord's Rep. 209. *Johnson v. Blackman*, 11 Conn. Rep. 350, 1, 2, 3. *Cox v. Bennet*, 1 Green's Rep. 170. *State v. Collins*, 6 Hamm. 142. *Gazaway v. Moore*, 1 Harp. Rep. 401, 2, 3. *New-York Gas Light Co. v. The Mechanics Fire Ins. Co.* 2 Hall's Rep. N. Y. C. P. 108. *McDowall v. Beckley*, 2 Rep. Const. Ct. So. Car. 265. *Bradley v. Bentley*, 8 Verm. Rep. 243. *Franklin v. Long*, 7 Gill & John. 407. *Bertsch v. The Lehigh Coal & Nav. Co.* 4 Rawle, 130. *Boyce v. Foster*, 1 Bail. Rep. 540. *The State v. Perry*, 1 Wright's Rep. 662. *Edwards v. Richards*, id. 597. *Barringer v. Sneed*, 3 Stewart's Rep. 201. *Sommerville v. Stephenson*, 3 Stew. & Port. 275. *Brooks v. Maltbie*, 4 id. 96. *Hightower v. Ivy*, 2 Porter's Rep. 311, 312. *Mead v. Steger*, 5 id. 504. *Reed v. Wood*, 9 Verm. Rep. 285.) Even where the written contract could not operate so as to effect the object designed by it, on account of the absence of a seal, (e. g., a paper intended as a deed of partition,) yet held, that the question being as to what was the agreement of the parties at the time, the writing must be regarded as the best evidence, and prior, as well as contemporaneous parol negotiations, could not be resorted to. (*Gardner Manu-*

facturing Co. v. Heald, 5 Greenl. Rep. 381.) There being a written lease, it was held, that parol evidence to prove that the lessor, in consideration of the rent reserved, promised, at the time, or prior to the execution of the lease, to make other repairs beside those which the writings mentioned, was not admissible. (*Brigham v. Rogers*, 17 Mass. Rep. 571.) A parol agreement, reserving growing wheat on lands sold, is merged in the conveyance; but subsequent acknowledgments of the grantee, were regarded as evidence that he had sold the wheat to the grantor after the conveyance. (*Austin v. Sawyer*, 9 Cowen's Rep. 39.) A promise in writing, to deliver *twelve cows, with twelve calves which should come of them, &c.*, cannot be varied by parol evidence that the promisee, at the time, agreed to accept "either twelve cows with calf, or with calves by their sides." (*Spencer v. Tilden*, 5 Cowen's Rep. 144.) An assignment of property by a debtor, in trust to pay such of his creditors as should become parties to the indenture of assignment, and which purported to release all their demands, was held not open to be varied, by parol evidence of the circumstances under which it was executed, so as to show that a particular demand of one of the creditors who had become a party to the instrument, was intended to be excepted from the operation of the release. (*West Boylston Manufac. Co. v. Searle*, 15 Pick. 225.) See also *Kellogg v. Richards*, 14 Wend. 116, stated ante, note 963, p. 1440. A., by deed, assigned property to B. C. & D., for the benefit of his creditors; the debts due to the assignees first to be paid; held, that a debt due to a firm of which either of the assignees was a member, was entitled to the same preference as a debt due to the assignee alone; and that parol evidence of what passed between the parties when the assignment was executed, was inadmissible in aid of the instrument, either to explain or extend its import. (*Wilson v. Hanson*, 3 Fairf. 58.) Where two agreed in writing, the one to deliver, and the other to receive, at Philadelphia, "from one to three thousand bushels of potatoes;" parol evidence to prove that it was also agreed, at the time of making the contract, that the quantity intended to be delivered should be designated and made known to the buyer, as soon as the cargo was shipped, was rejected. (*Small v. Quincy*, 4 Greenl. Rep. 497.) Accordingly, too, where a written agreement was payable in money, held, that parol evidence to show a contemporaneous stipulation to cancel the agreement, if the promisor delivered a certain quantity of cotton within a given time, was inadmissible. (*Wesson v. Carroll*, 1 Alab. Rep. 251.) A schoolmaster prosecuted for his wages, and produced, as the evidence of his claim, a subscription paper, signed by the defendant with others by which it was stipulated that the school should continue three months, and twelve more, if the parties wished; parol evidence of the plaintiff having promised, at the time of defendant's signing, that the school should continue twelve months, absolutely, was held inadmissible. (*Phillips v. Keener*, 1 Litt. Rep. 329. See also *George v. Harris*, 4 N. Hamp. Rep. 533.) In debt on bond, conditioned for the payment of an indent for £1200, evidence of a parol agreement between the parties, when the bond was made, that if the indent was not returned on the day specified in the condition, that then it should be converted into a special debt, was held inadmissible. (*Atkinson v. Scott*, 1 Bay, 307.) Where a slave has been pledged, by a sealed contract, as security for a sum advanced, evidence of a parol agreement made at the time, that the slave should be held until certain other sums, afterwards advanced, should be paid, is not admissible. (*Hamilton v. Wagner*, 2 Marsh. Ken. Rep. 331.)

In *Bond v. Haas*, 2 Dall. 133, a contract was for the payment of £250, *current money of Pennsylvania*, and was dated in August, 1777, payable in one year. At the date of the contract, continental money, (which was a lawful tender by statute,) was depreciated, and stood at three for one. The plaintiff insisted that the whole sum should be paid in specie, and offered parol proof that such was the understanding of the parties. The court rejected it, on the ground that it would be, in effect, altering the contract. (See also *Lee v. Biddis*, 1 Dall. 175. *Pleasants v. Pemberton*, 2 Dall. Rep. 196. *Norton v. Wells*, 1 Tyl. Rep. 381. *McMeen v. Owen*, 1 Yeates' Rep. 135. *Morris v. Edwards*, 1 Hamm. Rep. 189. *Smith v. Goddard*, id. 178.)

Where, in a policy of insurance, a vessel was, by plain construction of the terms of the policy, warranted Spanish; held, that it was not competent for the assured to show that the under-writers were informed, at the time of their subscription, that the vessel was in truth *American*, but was to be ostensibly *Spanish*, to avoid capture by the enemy. (*Atherton v. Brown*, 14 Mass. Rep. 152.) See ante, note 947, p. 1392.

Where a bill of sale of a slave contained a warranty of title, held, that the vendee could not allege and recover upon a parol warranty of soundness, made at the same time. (*Smith v. Williams*, 1 Murph. Rep. 426. *Wren v. Wardlaw*, 1 Alab. Rep. 363. *Hitchcock v. Harris*, 1 Miller's Lou. Rep. 311. *Read v. Duncan*, 2 McCord's Rep. 167. *Duff v. Ivy*, 4 Stewart's Rep. 140. *Pender v. Fobes*, 1 Dev. & Batt. 250.) So as to a bill of sale of a moiety of a ship, containing a covenant to defend the moiety sold against all persons; held, that the vendee could not set up a parol warranty, made on the sale, that the ship was copper fastened. (*Mumford v. McPherson*, 1 John. Rep. 414.) And it seems it would be the same, if the bill of sale contained no warranty, but a simple transfer of the title. For, it must be presumed that the writing contains the entire contract. (Per cur. in *Van Ostrand v. Reed*, 1 Wend. 424, 432.) This was distinctly held as to an assignment of a patent right, though it did not import any contract beyond the bare conveyance of title. (Id. See *Reed v. Wood*, 9 Verm. Rep. 285. *Dean v. Mason*, 4 Conn. Rep. 428. *Mumford v. McPherson*, 1 John. Rep. 414, 418. Per Kent, C. J. in *Bayard v. Malcolm*, 1 John. Rep. 467.)

In a suit by the assignee of a bond, to recover on a guarantee of payment, the assignment being in general terms, and containing no such guarantee, parol testimony to prove one, was held inadmissible. (*O'Harra v. Hall*, 4 Dall. Rep. 340.) So, where the defendant gave the plaintiff an instrument in writing, acknowledging that he had sold the plaintiff a note, for which he had received part payment, and stating that the balance was to be paid when the money was collected; held, that the plaintiff could not set up a parol promise of the defendant, made at the time, that the latter would sue the maker of the note within a specified period. (*Clark v. McMillan*, 1 N. Car. Law Repos. 265. See further, *Sommerville v. Stephenson*, 3 Stewart's Rep. 271. *Dupuy v. Gray*, 1 Alab. Rep. 357. *Wesson v. Carroll*, id. 251. *Odam v. Beard*, 1 Blackf. 191. *Butler v. Suddeth*, 6 Monroe, 541.) But in New Jersey, in a suit by the assignee of a sealed bill, to recover back the money paid upon the assignment, the assignment being in general terms, it was held, that the defendant might prove a promise by the plaintiff, made at the time of the assignment, to take the bill at his own risk. (*Mehelm v. Barnet*, 1 Coxe's Rep. 86.) It seems

to have been assumed in the case, that the general law of that state, operating upon the assignment in question, would have rendered the assignor liable. Kinsey, C. J. put the admissibility of the testimony upon the ground, that the law constituted no part of the contract, and, therefore, the parol proof did not contradict or vary the writing. It does not appear what view was taken by the other judges. (See *id.* 90, 1.)

The general rule, however, is against the doctrine advanced by the chief justice in *Mehelm v. Barnet*, *supra*. Where a written contract appears on its face to be complete, you can no more add to, or contradict its legal effect, by parol stipulations preceding or accompanying its execution, than you can alter it, through the same means, in any other respect. The law controlling the operation of a written contract becomes a part of it, and through usage, in certain cases, has been allowed to supersede the law, yet the courts have rarely gone so far as to apply the same doctrine to mere verbal stipulations of the parties. (See *ante*, note 974, p. 1456.) Accordingly, a *clean bill of lading* was held not liable to be varied by a contemporaneous parol agreement that the goods might be stowed *on deck*. The bill was silent as to the manner of stowing the goods, but the law operating upon and construing it required the goods to be stowed *under deck*. And Nelson, J., who delivered the opinion of the court, expressly said—"If such is the judgment of law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract." (*Creery v. Holly*, 14 Wend. 30. *Barber v. Brace*, 3 Conn. Rep. 9, S. P.) This was directly held, where parol evidence was offered to show, in respect to a promissory note mentioning no time of payment, that, by an agreement between the parties at the time it was executed, it was not to be payable as the law adjudged; i. e. immediately. (*Thompson v. Ketcham*, 8 John. Rep. 189. See also *Hunt v. Adams*, 7 Mass. Rep. 518. 6 *id.* 519, S. C. *Pattison v. Hull*, 9 Cowen's Rep. 747.) So where there was a contract specifying no place for the delivery of portable articles; held, that the law fixed the place; and that evidence of contemporaneous stipulations to vary the instrument in this respect, was inadmissible. "Where the legal construction and effect of an instrument are well settled, it is," said the court, "varying the instrument to show that the parties intended something else, as much as it would be to prove that the terms were not in accordance with the previous agreement." (*La Farge v. Rickert*, 5 Wend. Rep. 187.) Where an act is contracted to be done, but the writing is silent as to the time, the law implies that it is to be done in a reasonable time; and evidence of a contemporaneous parol agreement as to the time is inadmissible to vary the construction. (*Barringer v. Sneed*, 3 Stewart's Rep. 201. See *Simpson v. Henderson*, 1 Mood. & Malk. 300.) In *Barringer v. Sneed*, the contemporaneous agreement seems to have been admitted at the trial in, order to enable the jury to ascertain what the parties considered a reasonable time; and it does not appear whether the court finally sanctioned the evidence, for this object, or not. *Simpson v. Henderson*, *supra*, appears to deny that such evidence is proper. But see *Ely v. Adams*, 19 John. Rep. 313; and *ante*, note 948, p. 1393. Where the defendants had covenanted to indemnify the plaintiffs against all actions, suits and demands, which might afterwards be instituted against the estate of Lt. Gov. McGill, and whereby the plaintiffs might be liable for the payment, by reason of their being sureties for said McGill's executor; it was held, that the covenant was without ambigui-

ty, including, in legal effect, all suits instituted by any party, and therefore that no averment of an intention, different from that expressed in the covenant, and limiting its effect to suits commenced by particular persons, could be admitted. (*Watson v. Boylston*, 5 Mass. Rep. 411.) Further, that parol evidence of contemporaneous stipulations is inadmissible, to control or vary the legal effect of a written instrument, see *Sommerville v. Stephenson*, 3 Stewart's Rep. 271, 273, 4. *Dupuy v. Gray*, 1 Alab. Rep. 357. *Wesson v. Carroll*, id. 251. *Hightower v. Ivy*, 2 Porters' Rep. 308, 311, 312. *Odam v. Beard*, 1 Blackf. 191. *Wright v. Weakley*, 2 Watts' Rep. 89.

A written submission to arbitrators, cannot be enlarged by a parol agreement made contemporaneously; as the writing will be presumed to comprise the whole intention of the parties. (*Palmer v. Green*, 6 Conn. Rep. 14. See also *De Long v. Stanton*, 9 John. Rep. 38. *Sessions v. Barfield*, 2 Bay's Rep. 94.) Nor can the submission or award be varied, in a court of law, on the ground of mistake. (See *Elner v. Shaw*, 2 Wend. 567. And see ante, notes 591, 695, 6, 7, 8.)

A writing, signed by the obligor in a mortgage bond, stating the object for which an endorsement is made, cannot be varied by a contemporaneous parol agreement between parties. (*Rosevelt v. Stackhouse*, 1 Cowen's Rep. 122.)

A parol agreement, made at the time of a sale and conveyance of land, (the seller taking the purchaser's note for the same,) that if the land, on admeasurement, should exceed a certain estimated quantity, the purchaser should pay the seller an additional price therefor, cannot be proved. And the court, in giving their opinion on a case presenting the above facts, said—"The contract stated in the declaration is one entire contract, made at the time of the sale and conveyance of the land, the whole of which is to be considered as included in the deed and note." (*Northrop v. Speary*, 1 Day's Rep. 23. See *Howes v. Barker*, 3 John. Rep. 506. *Bradley v. Blodgett*, Kirby's Rep. 22. *Brooks v. Maltbie*, 4 Stew. & Porter, 96.) A written agreement to sell lands, is merged in the deed for the lands, and the note for the purchase money afterwards given, these importing complete execution of it. (*Falconer v. Garrison*, 1 McCord's Rep. 209.) So a written executory contract of any kind, contemplating execution by written evidence, is merged in the latter, provided it import a full execution. (*Gibson v. Watts*, 1 McCord's Ch. Rep. 490.)

Some *dicta* are occasionally found, intimating that where the whole contract has not been reduced to writing, parol evidence may be received to prove the part omitted. (See *Hunt v. Adams*, 6 Mass. Rep. 519, 524, per Parsons, C. J. *Barker v. Prentiss*, id. 434. See also per Washington, C. J., in *McCulloch v. Girard*, 4 Wash. C. C. Rep. 292, 3.) This is not true, it seems, of writings importing on their face a complete expression of what the parties agreed upon. To such cases the general rule above considered has usually been applied with inflexible rigour. (See the cases supra; also *Mead v. Steger*, 5 Porter's Rep. 505, per Collyer, C. J.) Exceptions, however, do undoubtedly exist. "Where a writing evidently appears to express only some parts of an agreement entered into between the parties, parol evidence, it seems, would be admissible to prove the other parts of the agreement on which it is silent." (2 Phill. Ev. 772, 8th Lond. ed.) We saw some cases ante, note 958, p. 1422, in which an instrument expressly referred to some previous parol arrangement between the parties, without specifying its terms, thus precluding the presump-

tion that the parties did not intend to bind themselves to terms not reduced to writing. *Commissioners v. McCalmont*, 3 Pennsylv. Rep. 122, stated in the note and at the page above mentioned, furnishes a very striking illustration of the doctrine; and there Kennedy, J., who delivered the opinion of the court, observed in respect to it as follows:—"Why is it that parol evidence shall not be received to alter, add to, diminish, vary or contradict a written agreement? Is it not for this reason, that where the parties to an agreement have had it committed to writing, it must be presumed that it was done for the greater certainty, as well in showing what the agreement was, as in preserving the evidence of it, and that these objects can only be attained by putting fully and explicitly into the writing every thing that was agreed on? This I consider the foundation of the rule that excludes parol evidence in such cases. But if it appear in the written agreement itself, that all and every thing which has been agreed on between the parties, was not put into it; and that instead of inserting it, a reference is made to it, as in this case, the reason of the rule does not exist; and of course it ought not to be applied." (See also *Sharp v. Lipsey*, 2 Bail. Rep. 113.)

But it is not necessary, in order to exempt the case from the operation of the general rule, that the writing should expressly and directly rebut the presumption of completeness. In *Jeffrey v. Walton*, 1 Stark. Rep. 267, referred to in note (1) at p. 562 of the text, an action was brought for not taking proper care of a horse which the defendant had hired of the plaintiff. At the time of the hiring the following memorandum was made:—"Six weeks at two guineas—*William Walton, junr.*" Lord Ellenborough seems to have treated it as a contract incomplete on its face, and conclusive as far as it went; for, in admitting evidence that the defendant, at the time of hiring, agreed to be responsible for all accidents, he said—"The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion that it is competent for the plaintiff to give in evidence suppletory matter as part of the agreement." In the case of *Knapp v. Harden*, 1 Gale 47, Exch. H. T. 1835, in an action for goods sold and delivered, the defence was that the credit had not expired; it appeared in evidence that the plaintiff had written a letter to the defendant, specifying the price to be charged; it was sent to the defendant's surveyor, who communicated it to him; the defendant wrote to the plaintiff, that he consented to the terms proposed, if the payment should be made at a period he mentioned; the plaintiff consented, and the defendant then signed the first letter. It was objected that the first letter alone constituted the agreement, and that the evidence of the second letter, and of what passed in relation to it, was inadmissible. The objection having been overruled, the defendant had a verdict, and on a motion for a new trial, the court of exchequer refused a rule, and Parke, B. said—"It is quite clear, that the letter did not in itself constitute an agreement, it was not meant to be so by the parties." (See 2 Phill. Ev. 772, 3, 8th Lond. ed.) In *Reay v. Richardson*, 2 Cr. M. & R. 427, on an application to a creditor to enter into a composition, he was requested to write down what he was willing to do; he afterwards wrote—"I hereby agree, on payment of 10s. in the pound, to give a full and complete discharge: held, that evidence of a contemporaneous conversation with the creditor was admissible to show the purpose for which the writing was given, and thereby make a valid agreement, by

showing it was intended to be submitted to the creditors. (2 Phill. Ev. 733, note (4) 8th Lond. ed.) See ante, note 957, p. 1406. "If there were a written order to make a chattel, parol evidence would be admissible of the acceptance of the order, (no statute interfering,) and of the price at which the party agreed to make it." (Ingram v. Lea, 2 Campb. Rep. 521. 2 Phill. Ev. 772, 8th Lond. ed.) Where an executory agreement, not within the statute of frauds, expresses no consideration, you may show what the consideration actually was. (Hall v. Mott, Brayt. Rep. 81.) See further, Tisdale v. Harris, 20 Pick. 12.

Upon a like principle, a blank endorsement of a note or bill of exchange, does not, as between the immediate parties, preclude evidence of contemporaneous parol stipulations showing that a restricted operation was intended to be given to the signature, or that the transfer was upon trust and not absolute, &c.; "for in these cases the written engagement is left incomplete by the parties." (Per Parker, J., delivering the opinion of the court in Stackpole v. Arnold, 11 Mass. Rep. 32. See *Susquehanna Bridge and Bank Co. v. Evans*, 4 Wash. C. C. Rep. 480. *Brock v. Thompson*, 1 Bail. Rep. 322. *Wright v. Latham*, 3 Murph. Rep. 298. *Hill v. Ely*, 5 Ser. & Rawle, 363. *Pike v. Street*, 1 Mood. & Malk. 226, 7, and note. *Goupy v. Harden*, 7 Taunt. Rep. 163. *Butler v. Suddeth*, 6 Monroe, 541. *Daniel v. McRae*, 2 Hawks' Rep. 590. *Perkins v. Catlin*, 11 Conn. Rep. 213. *Barker v. Prentiss*, 6 Mass. Rep. 430, 433, 4. *Smith v. Barber*, 1 Root's Rep. 207. *Lonsdale v. Brown*, 3 Wash. C. C. Rep. 404. *Dean v. Hall*, 17 Wend. 214, 215, et seq. *Brent's ex'rs v. Metropolis Bank*, 1 Peters' Rep. 89. *Fuller v. McDonald*, 8 Greenl. 213. *Barrows v. Lane*, 5 Verm. Rep. 161. But see *Barry v. Morse*, 3 N. Hamp. Rep. 132. *Hightower v. Joy*, 2 Porter's Rep. 308. *Bank of United States v. Dunn*, 6 Peter's Rep. 51, 58, and cases there cited.)

So, in various cases of a somewhat similar nature, where a writing has been executed by way of part performance merely of a parol contract. A familiar illustration is where a chattel has been sold with warranty, not in writing, and a note given for the purchase money. Clearly the note, in such instances, would not merge the parol contract. (See *Shepherd v. Temple*, 3 N. Hamp. R. 455. *Reab v. McAllister*, 8 Wend. 116, 117.) In *McCulloch v. Girard*, 4 Wash. C. C. Rep. 289, a parol agreement between the parties was entered into, relating to the transfer of certain shares of stock in a bank not then completely organized. At the conclusion of the agreement, the defendant signed a paper, promising, in a general way, to transfer the shares, as soon as the books for that purpose should be opened by the bank. The defendant contended that this instrument should be treated as evincing the entire agreement, and that no parol evidence could be received of stipulations not contained in it. The court, however, deemed it a question of fact for the jury whether the instrument was given in full execution of the parol contract, or in part merely; and *Washington, J.* who delivered the opinion, said—"that if it should turn out that it formed part of the agreement that such a paper should be given, or that a paper of that description was, in the ordinary course of the defendant's business, in respect to transactions of this nature, given by him; evidence of the parol contract will be proper, and will not violate any of the rules of evidence." (Id. 290, 291. See id. p. 292, 3, et seq.) In an action brought to recover a sum of money, for which the defendants had signed a writing whereby they acknowledged its receipt of the plaintiff "by the hands of B.

to be accounted for;" parol evidence on the part of the defendants to show, that before the writing was signed, the plaintiff being indebted to L. and L. to the defendants, it was agreed that this money should be paid to the defendants in part payment of their claim against L., and in part satisfaction of L.'s claim against the plaintiff, was held admissible. The court said the instrument was not a mere receipt, and therefore liable as such to be varied; nor was it one of those writings which are to be regarded as merging all previous negotiations: they viewed it as given merely in part execution of the parol contract, and therefore the latter might be proved. (*Gerrish v. Washburn*, 9 Pick. Rep. 338.) M. filed his bill in chancery, claiming a lien on lands sold to him by J., for an unpaid balance of the purchase money. The bill charged that at the time of the purchase the number of acres in the tract sold was not ascertained; but it was agreed to estimate the quantity at 300 acres, with the understanding that a survey should subsequently be made, and if the tract should turn out to contain more land, the excess should be paid for at the same rate per acre as the three hundred acres, the supposed number; that with this understanding a bond of conveyance was executed by M., on the 17th of May, 1826, and a bond for the purchase money, according to the estimate above mentioned, by J. on the day following; that a survey of the land was afterward made, and it was found to contain a surplus of 230 acres over the estimated quantity; and for the price of the latter, the complainant proceeded, he having previously assigned the bond for the other part of the purchase money to one B. This bond was not produced, and the court declined deciding as to the existence of the lien until the contents of the bond should be proved in some way. But they said, that unless there was "something in the structure of the bond which negatives the lien, it would have to be enforced," &c. In respect to the parol proof relied on, they added—"On the supposition that the bond is a mere obligation for the payment of money, without reciting the contract of sale, there could be no possible legal objection to the admissibility of the evidence in relation to the excess of land above three hundred acres. It is in this light we have supposed it to exist. In that view, the introduction of the parol evidence would not affect in any manner the contract, as evidenced by the bond of conveyance, and bond for the purchase money, but being evidence of a substantive independent contract, its admissibility could not be met by any legal objection." (*Hall v. Maccubin*, 6 Gill & John. 107, 110.) See *Supra*, p. 1471. On the same principle, where there is a writing importing a sale of personal property, or any other like instrument of transfer, it will not preclude the vendee from proving an agreement between him and the vendor, contemporaneous with the instrument, and consistent with its terms, that the value of the property should be applied to the payment of the defendant's debts. (*Semle, McCreary v. McCreary*, 5 Gill and John. 147, 157.) See *supra*, p. 1469. The last case, like the one preceding it, goes on the proposition of our author at p. 562, 3 of the text, that parol evidence is admissible, in cases of written instruments, to prove collateral and independent facts, about which the writing is silent. (*Id.* 156, 7.) Kelsey and Dickson being partners in a mill which they had built, entered into a written agreement stating *inter alia* that Dickson had bought Kelsey's interest in the mill for 500 dollars, to be paid in certain instalments. Kelsey, in an action against Dickson for the purchase money, was permitted to show, by parol evidence, that the sum of 500 dollars which Dickson

was to pay Kelsey for his interest in the mill, was exclusive of the expenses that had been incurred in building it; and that those expenses were to be paid by Dickson. (*Kelsey v. Dickson*, 2 Blackf. 236. S. C. on appeal, 3 id. 189.)

A plain and well established exception to the general doctrine which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists, where one party sues the other, alleging, as the gravamen of the action, some fraud of the latter, by which the former was induced to enter into the contract. It has been laid down in broad terms, that "the rule which prefers written to unwritten evidence, does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained, and thereby, to avoid the contract evidenced by it, or secure indemnity to the party injured." (Per Saffold, J. in *Cozzens v. Whitaker*, 3 Stewart & Porter, 329. See *Becker v. Vrooman*, 13 John Rep. 301. *Johnson v. Miln*, 14 Wend. 195. Per Marshall, C. J. in *Tayloe v. Riggs*, 1 Peters' Rep. 591. Per Kent, C. J. in *Mumford v. McPherson*, 1 John. Rep. 44. *The State v. Perry*, 1 Wright's Rep. 662.) In an action on the case for deceit in the sale of a slave, though there was a written bill of sale, containing a warranty of soundness in "body, mind and title," yet held, that parol evidence going to prove other representations made by the vendor at the time, such as that the slave was industrious, and free from vice, whereas he knew the contrary to be the fact, was admissible. (*Cozzens v. Whitaker*, 3 Stewart & Porter, 322. S. P. *McFarlane v. Moore*, 1 Tenn. Rep. (Overt.) 174. See *Johnson v. Brockelbank*, 2 Hill's Rep. 353. *Smith v. Williams*, 1 Murph. Rep. 426. *Wren v. Wardlaw*, 1 Alab. Rep. 363. *Mumford v. McPherson*, 1 John. Rep. 418. *Fleming v. Slocum*, 18 John. Rep. 403.) So, where the bill of sale of a slave contained a warranty of soundness, but expressly excepted the "phthisic;" held, that the vendee might nevertheless prove, in an action for deceit, that the vendor represented the slave as having the phthisic only slightly, whereas he knew her to be in the last stage of that disease. (*Hanks v. McKee*, 2 Litt. Rep. 227.) But in Louisiana, in an action on a note given for the price of a slave, the defendant set up that the slave was in the habit of running away, and that the plaintiff knew this to be the case when he sold him. The bill of sale was under seal, and expressly stated the slave to be a "runaway, and a drunkard." The defendant introduced evidence to show that the plaintiff falsely represented this as a qualified vice. The court, however, held him concluded by the deed. (*Bayon v. Towles*, 5 Mart. Lou. Rep. 1, N. S.) Where a person was induced to purchase land, by a fraudulent representation that a certain privilege was connected with the land, which the vendor knew was not included in the deed; held, that the vendee might recover. (*Monell v. Colden*, 13 John. Rep. 395.) See also *Russell v. Rogers*, 15 Wend. 351, 7. *Johnson v. Miln*, 14 id. 199, 200. And in Louisiana, fraud in the sale, in such case, was allowed to be proved by way of defence to an action for the purchase money. (*Broussard v. Sudrigue*, 4 Mill. Lou. Rep. 347.) So in South Carolina; and even representations founded simply in *mistake*, are there admissible as a defence, either to the whole action, or *pro tanto*, as the case may be. (*Means v. Brickell*, 2 Hill's Rep. 657.)

An exception is also allowed, where the writing is one of that character which the law does not regard as the best evidence of the transaction to which it relates. Such are general receipts, and other instruments of the like nature, adverted to ante, note

860, p. 1211. (See also ante, note 194, p. 213, et seq.; note 420, p. 547, 8; and note 963, p. 1438, et seq. *Baugh v. Brassfield*, 5 J. J. Marsh. 97.) Though when these assume the form of a contract, they are to be treated, so far, as the exclusive medium of proving what the parties agreed to. (See the notes referred to supra.) Bills of parcels fall within the range of the exception. (See *Harris v. Johnson*, 3 Cranch, 311, stated ante, note 195, p. 218.) In *Wallace v. Rogers*, 2 N. Hamp. Rep. 506, it appeared that A. sold B. a quantity of hops, and gave a bill of parcels, stating the number of bags, weight, price, &c., with a clause added as follows—"these hops are warranted to be of the first quality." In an action by B. against A. for a breach of the warranty, it was held, that A. was not precluded by the bill of parcels from proving that the hops were warranted only in case they were carried to a particular place. Quere, however; for the bill seems to have been in the nature of a special contract. A letter of credit, or an acceptance of a bill of exchange, absolute on its face, has been held open to be varied by parol evidence, so far as to annex to it a condition or restriction communicated and agreed upon at the time, provided the party endeavoring to avail himself of the instrument is chargeable with knowledge of the facts. (*Storer v. Logan*, 9 Mass. Rep. 55.) But a letter of credit, addressed to John and Joseph, will not admit of explanation so as to render it operative in favor of John and Jeremiah. (*Grant v. Naylor*, 4 Cranch, 224. *Allison v. Rutledge*, 5 Yerg. 193.)

Again, as we have already seen, when a question arises as to the execution of the instrument, parol evidence of what passed between the parties, prior to, and contemporaneous with the alleged execution, is, in many cases, admissible. (See ante, note 948, p. 1388; note 969, p. 1449, 50; note 973, p. 1453; and note 976, p. 1459, et seq.) So if the character of the instrument be ambiguous, as whether a deed or a will. (See ante, note 948, p. 1388. *Herrington v. Bradford's ex'x*, *Walker's Rep.* 520.) Accordingly, too, it may be shown, that when the minds of the contracting parties had met on the terms of their bargain, it was agreed that each should execute to the other a writing, containing the stipulations to which they respectively bound themselves; and that after one had executed his part, the other neglected or refused, and so the agreement never was consummated. (*Perrine v. Cheeseman*, 6 Halst. Rep. 174, 177. See *Petry v. Christy*, 19 John. Rep. 53.)

So in many cases where illegality of consideration is set up, in avoidance of the written contract. In an action on a note, the defendant may show a distinct parol agreement, made at the time the note was given, to pay usury upon the demand secured by the note, and thus avoid it. (*Atwood v. Whittlesey*, 2 Root's Rep. 37. *Hammond v. Hopping*, 13 Wend. 510, 511. *Lear v. Yarnel*, 3 Marsh. Ken. Rep. 420.) See *Wilhite v. Roberts*, 4 Dana's Rep. 175, S. P. in respect to a champertous bond. No written contract, it has been said, can have the effect of merging the parol contract in these cases; "for it is only in virtue of its superior obligation, that a written contract has the effect of extinguishing the verbal contract upon which it is founded; and of course, when it has no obligation, it can have no such effect." (*Lear v. Yarnel*, 3 Marsh. Ken. Rep. 421.) See also *Allen v. Hawks*, 13 Pick. 79, and the cases cited ante, note 967, p. 1445, 6.

NOTE 985—p. 562.

We have seen by many cases in the next preceding note, that all parol negotiations between the parties to a written contract, anterior to, or contemporaneous with, the execution of the instrument, are, in general, to be regarded as merged in it. Of course, stipulations and agreements *subsequent* to the execution are not within the rule. Hence, the time of performance of a simple contract in writing may be extended by a subsequent parol agreement between the parties. (Keating v. Price, 1 John. Cas. 22. See Frost v. Everett, 5 Cowen's Rep. 497. Erwin v. Saunders, 1 id. 249. Dearborn v. Cross, 7 Cowen's Rep. 50. Neil v. Cheves, 1 Bail. Rep. 537. Franklin v. Long, 7 Gill & John. 407. Robinson v. Batchelder, 4 N. Hamp. Rep. 45.) Where there was a contract in writing to deliver chattels at a particular place; held, that the promisor, on being sued, might show a subsequent parol agreement fixing a different place for the delivery, and that a tender at the latter place would constitute a defence. "The place, as well as time of performance, may be varied by a subsequent parol agreement. At all events, it will amount to a waiver of a tender at the place" specified in the written contract. (Robinson v. Batchelder, 4 N. Hamp. Rep. 40, 45, 6. See Neil v. Cheves, 1 Bail. Rep. 537.) The parties may, by a subsequent parol agreement, upon a sufficient consideration, change the mode of payment, or other terms of their written contract; or they may discharge it altogether; (Low v. Treadwell, 3 Fairf. Rep. 441; Bailey v. Johnson, 9 Cowen's Rep. 115, 118; per cur. in Erwin v. Saunders, 1 id. 250; Trumbo v. Curtright, 1 Marsh. Ken. Rep. 582; Mossy v. Mead, 2 Mill. Lou. Rep. 157; Benson v. Smith, id. 103; Perrine v. Cheeseman, 6 Halst. 174;) and substitute another it its stead. (Bailey v. Johnson, supra. See also Brock v. Sturdivant, 3 Fairf. Rep. 81, 83, 4, et seq. Commander v. Russell, 5 Mart. Lou. Rep. N. S. 456, 459, 460. Ante, note 976, p. 1461.) A written submission to arbitrators may be varied by a subsequent parol agreement, so as to allow the arbitrators to call in an umpire not provided for in the writing. (Sharp v. Lipsey, 2 Bail. Rep. 113.)

But where a party contracted in writing to do work at stipulated prices, and after completing the work, sued for his pay; held, that he could not set up a parol agreement, made subsequent to the completion of the work, that the first contract should be abandoned, and other and higher prices paid, unless the last contract was founded on some new and valid consideration. (Randolph v. Perry, 2 Porter's Rep. 376.) Otherwise, *semble*, if the abandonment had been requested by the other party; or if the parol agreement had been entered into before the completion of the work. (Id. And see Perrine v. Cheeseman, 6 Halst. Rep. 177. Cox v. Bennett, 1 Green's Rep. 171.)

As to the effect of a subsequent parol agreement varying the terms of a note, see ante, note 976, p. 1461, and the cases there cited.

It matters not, it appears, how soon after the execution of the written contract the parol one was made. If it was, in fact, *subsequent*, and is otherwise unobjectionable, it may be proved and enforced. Accordingly, where the parties entered into a contract in writing respecting the sale of personal property, and immediately after it was signed, the vendee said he wanted a written indemnity against all claims on a

portion of it, to which the vendor replied, he would not give him a written indemnity, but that he had sold him the whole, and would *see him out in it*; held, that this was a valid promise of indemnity, and having been made after the written contract, it might be sued upon and a recovery had. (*Brewster v. Countryman*, 12 Wend. 446. See *Richardson v. Hooper*, 13 Pick. 446.) But if the parol agreement was contemporaneous with the written one, though repeated immediately afterward, it will not be regarded as subsequent. (*Frost v. Everett*, 5 Cowen's Rep. 497. See *Cox v. Bennet*, 1 Green's Rep. 168.) The fact of the agreement being subsequent, must clearly appear; and it seems, if the point be left in doubt, the presumption will be that the matter resting in parol was merged. Accordingly, where a party entered into a written contract, promising to deliver portable articles of property on or before a certain day, and no place was specified for the delivery; held, that, by legal construction, the residence of the party to whom delivery was to be made was the place of delivery; and that the testimony of a witness, who swore, that "at the time, or immediately before or after" the writing was signed, a different place was agreed on, could not be received. (*La Farge v. Rickett*, 5 Wend. 187.)

NOTE 986—p. 562.

Our author repeats here a remark made by him in several places, that an ambiguity appearing on the face of a writing is not explainable by extrinsic evidence. This, we have seen ante, note 938, p. 1358, et seq., is only true in a qualified sense.

The instances in which you may resort to collateral and cotemporaneous circumstances, with a view of explaining various ambiguities, were considered ante, note 957, p. 1399, et seq. (See also *Fowle v. Bigelow*, 10 Mass. Rep. 379, 381, 2, 384. *Stone v. Bradbury*, 2 Shepl. Rep. 185, 192.) It is presumed, however, that the general observation of our author was not designed to embrace cases precisely of that character. The illustration given is *Rex v. Laindon*, which, instead of being referred to the principle stated in the text, ought, it seems, to be classed along with *Rex v. Scammonden*, 3 T. Rep. 474; for the instrument in question was, as respected the two contending parishes, *res inter alios acta*. (See ante, note 965, p. 1444.) The question might have been very different, had it arisen between the immediate parties to the writing; as, for instance, on a dispute between them respecting the nature of the service which the master had a right to exact by virtue of the agreement. If in that case the apprentice had insisted upon the cotemporaneous parol agreement to limit the master's rights, or to vary the relation evinced by the written contract, it might have been insisted, we think, with unanswerable force, that the parol stipulation was merged in the instrument, and was therefore not to be regarded. (See 2 Stark. Ev. 575, 6.)

Several cases which we have considered as illustrating the doctrine applicable to writings not importing a complete expression of the entire contract, or as having been given only in part performance of the parol contract between the parties, seem to have gone on the general proposition in the text. (See ante, note 984, p. 1473, et seq., particularly *Hall v. Maccubbin*, *McCreary v. McCreary*, and *Kelsey v. Dickson*, stated id. p. 1474.) Where the question arose, whether a bequest in a will to a creditor of the testatrix was a satisfaction or not, parol evidence was admitted, as being entirely consistent with the will, and going to prove independent facts about which

the will was silent. (*Williams v. Crary*, 8 Cowen's Rep. 246. S. C. 4 Wend. 448.) In an action by a son, against the representatives of his father, for use and occupation of premises by the father; held, that the agreement between the father and son, contemporaneous with the deed, and showing that the father was to occupy rent free, might be given in evidence. "It is not inconsistent with the deed, but independent of it." (Per Collett, C. J. in *Swisher v. Swisher's adm'r*, 1 Wright's Rep. 755, 6.) In an action against the endorsee by the holder of a promissory note, parol evidence to show, that a judgment confessed by the maker to the endorser was intended as security to the latter for his responsibility, is admissible. (*South Carolina Bank v. Myers*, 1 Bail. Rep. 412.)

NOTE 987—p. 563.

The maxim in the text, it has been said, like most other maxims, has received various qualifications, and indeed never was true to the letter; for at all times, a bond, covenant, or other sealed instrument, might be defeated, by parol evidence of payment, accord and satisfaction, &c. (Per cur. in *Munroe v. Perkins*, 9 Pick. Rep. 298, 303. *Reynolds v. Scott*, Brayt. Rep. 75.)

There are various cases where a specialty has been deemed entirely abandoned and discharged by a subsequent executed parol agreement. (See *Le Fevre v. Le Fevre*, 4 Ser. & Rawle, 241. *Cringum v. Nicholson's ex'rs*, 1 Hen. & Munf. 435.) In *Munroe v. Perkins*, 9 Pick. 298, where the action was assumpsit, for work, materials, &c. done and furnished by the plaintiff for the defendant, the defence set up was that the whole took place pursuant to a special contract under seal, which was produced; the plaintiff showed that being unable to go on under the special contract without material loss, he refused to proceed after having performed in part, but upon a parol promise by the defendant that he should be paid for his labor, &c., and should not suffer, he afterwards went on and completed the work; held, that he was entitled to recover. *Lattimore v. Harsen*, 14 John. Rep. 330, was very similar to *Munroe v. Perkins*, *supra*, and decided in the same way.

Fleming v. Gilbert, 3 John. Rep. 528, was an action on a bond, conditioned that the defendant, by a given day, should procure and deliver to the plaintiff a certain bond and mortgage, and discharge the same of record. The defendant did procure the bond and mortgage, and offered them to the plaintiff, proposing to do whatever else he required to discharge the mortgage of record; but the plaintiff, not knowing what was necessary, agreed by parol to waive a literal performance in this respect, if the defendant would do another thing, which he afterwards did: held, that evidence of the parol waiver, &c. was admissible, and amounted to a defence. The court went upon the ground, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Where the condition of a bond was to raise a mill, the obligor came to the obligee and told him every thing was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it, and discharged him entirely of erecting the mill, and that was held sufficient to excuse him from the per-

formance. (*Fleming v. Gilbert*, *supra*, per Thompson, J., citing 1 Roll. Abr. 453, pl. 5, Year Book, 2 Hen. 6, 37.) In *Ratcliff v. Pemberton*, 1 Esp. Rep. 35, Lord Kenyon decided, that to an action of covenant on a charter party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. (See also *Thresh v. Rake*, *id.* 53.) So where the plaintiff sued on a breach of covenant for not giving a deed; held a good plea, that the defendant would have given a deed at the time stipulated, but the plaintiff objected, and said when he wished the deed he would apply for it. (*Baker v. Whiteside*, 1 Breese's Rep. 132.)

¶ In *Dearborn v. Cross*, 7 Cowen's Rep. 48, the action was on notes, payable in specific articles. It appeared that the consideration of the notes was a bond of the plaintiff, by which the latter obligated himself to convey certain premises to the former; that by a subsequent parol agreement, the parties had stipulated to rescind the contract of sale; and that the plaintiff, pursuant to this arrangement, had re-entered upon the premises, and finally sold them to another individual. The court held, that though the bond was not cancelled or given up, or any of the papers changed, yet, by the parol agreement, and the acts of the parties under it, the bond was discharged, and, therefore, no action would lie on the notes. In *Suydam v. Jones*, 10 Wend. 180, the subject was incidentally considered, and the court held the following language—"A covenant under seal cannot be discharged by a parol agreement before breach, *Kay v. Waghorne*, 1 Taunt. 427. The discharge must be by matter of as high nature as that which creates the debt or duty, *Preston v. Christmas*, 2 Wils. 86. This is universally true, where the action is founded on, or grows exclusively out of the deed or covenant, *Blake's Case*, 6 Coke, 43. *Allen v. Blague*, Cro. Jac. 99. In covenant, therefore, award with satisfaction before breach, is bad, because the plea goes to the covenant itself; though after breach, it may be good, for then it goes only in discharge of the damages, and not of the deed. *Snow v. Frankleyn*, Lutwyche, 108, ed. of 1708." (*Id.* 184.) In *Barnard v. Darling*, 11 Wend. 27, the defendants being sued on a bond given by them as sureties of a deputy sheriff, set up by way of plea, a parol agreement of the sheriff that he would release them. No consideration was alleged for the agreement, and this the court, on demurrer, adjudged fatal to the plea. They, however, intimated an opinion, that a parol agreement, executory in its character, could not discharge a covenant. (*Id.* 30.) A landlord leased a store, and in the lease, covenanted to make certain alterations and improvements; afterward the landlord, by reason of the decay of the building, changed his plan, took down the old building, and put up a new one, in which he fitted up a store for the tenant; to which change the tenant assented at the time, but after the new store was completed, refused to occupy it; held, in an action by the tenant against the landlord, for the non-performance of the covenant for repairs, that the evidence of the tenant's assent was inadmissible. (*Delacroix v. Bulkley*, 13 Wend. 71.) In this case, *Savage, C. J.* after reviewing the New-York decisions, declared the result to be, "that a sealed executory contract, cannot be released or rescinded by a parol executory contract; but that after breach of a sealed contract, a right of action may be waived or released by a new parol contract, in relation to the same subject matter, or by any valid parol executed contract." (*Id.* 75.)

In detinue by the mortgagor of a slave, redeemable by the terms of the deed at a certain day, the mortgagor was allowed to show a subsequent verbal agreement to extend the period of redemption; and an offer to discharge the mortgage pursuant to such extension. (*Deshazo v. Lewis*, 5 Stew. & Port. 91.) Further, as to the general doctrine in the text, see *Reed v. McGrew*, 5 Hamm. 375, 381, 384.

Where no place is mentioned for the delivery of the deed, in articles under seal for the sale of land, though the legal effect would be that the vendor is bound to seek the vendee, and tender the deed, yet the parties may, by parol, agree on a place of performance, after the execution of the articles, or the vendee may appoint a place; and if the vendor tender at the place, it is well. (*Franchot v. Leach*, 5 Cowen's Rep. 506. See *Wyman v. Winslow*, 2 Fairf. Rep. 506. *Robinson v. Bachelder*, 4 N. Hamp. Rep. 45, 6.) The agreement or appointment, as to the place, should clearly appear to have been made subsequent to the writing. (*Semble*, *La Farge v. Rickett*, 5 Wend. Rep. 187. See S. C. and others, stated ante, note 935, p. 1477, 8.)

Various cases beside those above noticed, recognize the doctrine that a parol enlargement of the time for performing a sealed contract, may avail as an excuse for non-performance at the day. (*Neil v. Tillman*, 1 Bail. Rep. 538, note (a.) See also *Cox v. Bennet*, 1 Green's Rep. 165.) But where the action is directly upon the specialty, the plaintiff cannot show an extension of time, or other parol variation, by way of maintaining his suit. If this is requisite, the action should be grounded on the subsequent agreement. It is settled, that in these, and the like instances, the specialty may be considered as incorporated with the subsequent verbal arrangement, and the whole treated as one entire parol contract, on which assumpsit will lie, and the remedy upon which may be barred after six years, by the statute of limitations. (See per Gibson, C. J. in *Vicary v. Moore*, 2 Watts' Rep. 451, 456, 7. *Merrill v. The Ithaca and Owego Rail Road Co.* 16 Wend. 586. *Mead v. De Golyer*, id. 632. *Jewell v. Schroepel*, 4 Cowen's Rep. 564. *Baird v. Blairgrove*, 1 Wash. Rep. 170. *Langworthy v. Smith*, 2 Wend. 587. *Marks v. Robinson*, 1 Bail. Rep. 89. *Sinard v. Patterson*, 3 Blackf. 353. *Watchman v. Crook*, 5 Gill & John. 239. *Ford v. Campfield*, 6 Halst. Rep. 327. *Luciani v. American Fire Ins. Co.* 2 Whart. Rep. 167. *Evans v. Thompson*, 5 East's Rep. 119. *Creig v. Talbot*, 2 Barn. & Cress. 179. *Brown v. Goodman*, 3 T. Rep. 592. See further, ante, note 410, p. 534, and the authorities there cited.) In such instances, a parol consent to a waiver or alteration of some portion of the written contract, may frequently be inferred from the acts of the parties; such as their going on after the day fixed for complete performance, &c. &c. But in the absence of any express stipulation, it is not to be presumed that they agreed to vary from the terms originally fixed upon, further than their conduct necessarily imports. (See *Merrill v. Ithaca and Owego Rail Road Co.* 16 Wend. 586. *Mead v. De Golyer*, id. 632. *Cox v. Bennet*, 1 Green's Rep. 165.)

NOTE 988—p. 565.

The court of King's Bench, in *Goss v. Lord Nugent*, 5 Barn. & Adol. 58, in reference to the doctrine advanced by our author, said, "It is to be observed that the statute does not say in distinct terms, that all contracts or agreements concerning the

sale of lands, shall be in writing; all that it enacts is, that no action shall be brought, unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it would rather seem that a written contract, concerning the sale of lands, may still be waived and abandoned by a new agreement, not in writing, so as to prevent either party from recovering on the contract which was in writing." See 1 Sudg. on Vend. 175, Am. ed. of 1836, from 9th Lond. ed. In *Ballard v. Walker*, 3 John. Cas. 60, the court presumed that a contract for the sale of land had been rescinded, simply from the fact that the vendee had given no notice to the vendor, that he should insist upon the agreement, until some years after it was to be executed; the vendor having previous to that time, and within a year after the contract was made, conveyed the premises to another. The court said, that under such circumstances, equity would presume the contract had been rescinded by the consent of the parties, or discharged by some composition between them; and they thought a court of law might do the same. See also *Dearborn v. Cross*, 7 Cowen's Rep. 48. *Botsford v. Burr*, 2 John. Ch. Rep. 405, 416. *Hasbrouck v. Tappen*, 15 John. Rep. 200. *Crigan v. Nicholson*, 1 Hen. & Munf. 429. *Reed v. McGrew*, 5 Hamm. Rep. 381 to 385.

NOTE 989—p. 565.

See *S. P. Stevens v. Cooper*, 2 John. Ch. Rep. 429.

NOTE 990—p. 565.

See *Low v. Treadwell*, 3 Fairf. Rep. 441, 444, 5, 6.

NOTE 991—p. 567.

The attempt which we have thus far made to introduce practical illustrations of the mode in which the rules of evidence have been applied by the various courts of law, both English and American, has already extended our notes to the present volume of the text beyond what was originally foreseen. To follow out the same line of annotation under this head, by discussing the doctrine of admitting parol evidence in respect to written instruments, as held by the numerous equity jurisdictions in the United States, some of them possessing all the powers of the English chancery, and others exercising powers of a similar character, but restricted in different degrees according to the local legislation, would, of itself, require a volume. Such a labor seems hardly necessary. The able Commentaries on Equity Jurisprudence by Mr. Justice Story, which, it is presumed, are in the hands of every American chancery practitioner, together with an English work, devoted exclusively to the subject of evidence in courts of equity, by Mr. Gresley, recently published at Philadelphia, furnish a fund of learning on the subjects glanced at by our author, to which little that would be gene-

rally serviceable, can be added. Mr Rand's edition of Mathews on Presumptive Evidence, will likewise be found eminently useful.

NOTE 992—p. 567.

See 2 Story's Eq. 746. 1 Fonbl. Eq. 161, Am. ed. of 1835. 1 Sug. on Vend. 161, and n. (84) Am. ed. of 1836, from 9th Lond. ed. Wesley v. Thomas, 6 Harr. & John. 24. Anderson v. Hutchinson, 4 Litt. Rep. 296. Dale v. Pope, id. 166. Dwight v. Pomroy, 17 Mass. Rep. 303. Bradbury v. White, 4 Greenl. 394. Stevens v. Cooper, 1 John. Ch. Rep. 429. Church's lessee v. Church, 4 Yeates' Rep. 290. Harrison v. Talbot, 2 Dana, 258, 9. Steere v. Steere, 5 John. Ch. Rep. 1. Timberlake v. Parish's ex'rs, 5 Dana, 350, 1, 2. Wilkinson v. Wilkinson, 2 Dev. Eq. Rep. 376. Brown v. Haven, 3 Fairf. 179. Elder v. Elder, 1 id. 179. Howell v. Hooks, 2 Dev. Eq. 258. Moore v. Edwards' ex'rs, 1 Bail. Rep. 23, 4. Reed v. Clarke, 4 Monroe, 18, 20. Baugh v. Ramsey, id. 157. Wells v. Hodge, 4 J. J. Marsh. 121. Morris v. Morris, 2 Bibb, 311. Fishback v. Woodford, 1 J. J. Marsh. 84, 86, 7. Blanchard v. Kenton, 4 Bibb, 451, 2. Ratcliffe v. Allison, 3 Rand. 537. McMahon v. Spangler, 4 id. 51. Meads v. Lansing, 1 Hop. Ch. Rep. 124. Lemaster v. Buckhart, 2 Bibb, 28.

NOTE 993—p. 568.

See post, note 997. The following decisions may be looked into as serving to show in what cases, and how, equity will relieve against mistakes generally. Washburn v. Merrills, 1 Day's Rep. 139. Ross v. Norvell, 1 Wash. Rep. 14. Barrett v. Barrett, 4 Dess. Eq. Rep. 447. Machir v. McDowell, 4 Bibb. 473. Ratcliffe v. Allison, 3 Rand. 537. Christ v. Diefenbach, 1 Ser. & Rawle, 464. Chapman v. Allen, Kirby's Rep. 899. De Reimer v. Cantillon, 4 John. Ch. Rep. 85. Willings v. Consequa, 1 Peters' C. C. Rep. 301. Joy v. Wartz, 2 Wash. C. C. Rep. 266. McFerran v. Taylor, 3 Cranch, 270. Morris v. Edwards, 1 Hamm. Rep. 189. Pattison v. Hull, 9 Cowen's Rep. 755. Wesley v. Thomas, 6 Harr. & John. 24. Bowman v. Bittenbender, 4 Watts' Rep. 290. Stoughton v. Lynch, 2 John. Ch. Rep. 209. Stebbins v. Eddy, 4 Mason's Rep. 414. Slocum v. Marshall, 2 Wash. C. C. Rep. 397. Quesnel v. Woodlief, 6 Call's Rep. 218, S. G. 2 Hen. & Munf. 173, note. King v. Stubbs, 14 Ser. & Rawle, 206. See also 1 Story's Eq. 121, et seq. Inskoe v. Proctor, 6 Monroe, 311. Abbe v. Goodwin, 7 Conn. Rep. 377. Gibson v. Watts, 1 McCord's Ch. Rep. 490. Glassell v. Thomas, 3 Leigh, 113. Keyton's adm'x v. Brawford's ex'rs, 5 Leigh, 39. Bumgardner v. Allen, 6 Munf. 439. Mead v. Lansing, 1 Hopk. Ch. Rep. 124. Allen v. McMasters, 3 Watts' Rep. 181. And see the cases post, note 1000, as to mistakes made by the draftsman, in the frame of the writing.

In respect to mistakes of law, as contradistinguished from mistakes of fact, see Wheaton v. Wheaton, 9 Conn. Rep. 96. Lowndes v. Chisholm, 2 McCord's Ch. 455. Hopkins' ex'rs v. Mazyck, 1 Hill's Ch. Rep. 251. Fitzgerald v. Peck, 4 Litt. Rep.

125. *Champlin v. Laytin*, 1 Edw. Ch. Rep. 467. S. C.; 6 Paige, 180, 17 Wend. 407. *Hunt v. Rousmaniere's adm'r*, 1 Peters' Rep. 15, S. C. 8 Wheat. 174, 3 Mason, 294. *Sims v. Lyle*, 4 Wash. C. C. Rep. 301, 320. *Heilner v. Imbrie*, 6 Ser. & Rawle, 411. *Lyon v. Richmond*, 2 John. Ch. Rep. 51. S. C. 14 John. Rep. 501. *Williams v. Hodgson*, 2 Harr. & John. 474. *Lammat v. Browby*, 6 id. 24. *Rawstone v. Parr*, 3 Russ. 424. S. C. id. 539. *Clark v. Dutcher*, 9 Cowen's Rep. 674. *Lawrence v. Beaubin*, 2 Bail. Rep. 623. *Moser v. Liebenguth*, 2 Rawle, 428. *Haven v. Foster*, 9 Pick. 112. *Shotwell v. Murray*, 1 John. Ch. Rep. 512. *Storrs v. Barker*, 6 John. Ch. Rep. 166. *Naylor v. Wench*, 1 Sim. & Stu. 561. *Jones v. Watkins*, 1 Stewart's Rep. 81. *Ward v. Tucker*, 7 Mass. Rep. 449. *Hubbard v. Martin*, 8 Yerg. 498. *Dickins v. Jones*, 6 id. 483. *Besore v. Potter*, 12 Ser. & Rawle, 158, 9.

As to the right of showing a mistake made in a will, see ante, note 957, p. 1334, 5, and the cases there cited.

NOTE 994—p. 568.

1 Sug. on Vend. 164, et seq. and the notes, Am. ed. 1836, from 9th Lond. ed. 2 Story's Eq. 53, 4, et seq.

NOTE 995—p. 569.

2 Story's Eq. 79, 80, &c.

NOTE 996—p. 569.

See 2 Story's Eq. 21, et seq. *Ratcliff v. Allison*, 3 Rand. Rep. 537. *Bradbury v. White*, 4 Greenl. Rep. 391. *Young v. Craig*, 2 Bibb, 270. *Fisher v. May's heirs*, 2 id. 451. *Smith v. Smith*, 4 id. 81. *Harrison v. Talbot*, 2 Dana's Rep. 258, 267, 8. *Gower v. Sterner*, 2 Whart. Rep. 75, 79. *Moliere v. The Pennsylvania Ins. Co.*, 5 Rawle's Rep. 342. *Wheatley v. Slade*, 4 Sim. Rep. 126. *Cathcart v. Robinson*, 5 Peters' Rep. 264. *Watts v. Waddle*, 6 id. 389. See also the cases cited in 1 Barb. Dig. 112 to 127. *Hutcheson v. McNutt's heirs*, 1 Hamm. Rep. 14. *Askew v. Poyas*, 2 Dess. Eq. Rep. 145. *Meads v. Lansing*, 1 Hopk. Ch. Rep. 124.

NOTE 997—p. 572.

As to the admissibility of parol evidence in courts of equity, for the purpose of obtaining relief against fraud, and what constitutes that species of fraud upon which those courts will interfere, see 1 Story's Eq. 166 to 168; also id. 194, et seq. *Gresl. Eq. Ev.* 206, 7. *Wilkinson v. Wilkinson*, 2 Dev. Eq. Rep. 378. *Flagler v. Pleiss*,

3 Rawle, 345. Rice's heirs v. Spotswood's heirs, 6 Monroe, 40. Boyce's ex'rs v. Grundy, 3 Peters' Rep. 210. Stinson v. McKeown, 1 Hill's Rep. 387, stated ante, note 961, p. 1432; and see that note at p. 1434.

NOTE 998—p. 575.

It is clear, that a party may, as plaintiff, have relief against a written contract, by having the same set aside and cancelled, or modified, whenever it is founded in mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it. (See *Ball v. Storie*, 1 Sim. & Stu. 210.) And this, although the party seeking the relief drew the instrument himself. (Id. *Gibson v. Watts*, 1 McCord's Ch. Rep. 494, 5.) See further as to the general doctrine, *Chase v. Manhardt*, 1 Bland's Ch. Rep. 333. 1 Story's Eq. 164, et seq. *Fishback v. Woodford*, 1 J. J. Marsh. 84. *Bierne v. Erskine*, 5 Leigh's Rep. 59. *M'Mahon v. Spangler*, 4 Rand. 51. *Anderson's ex'r v. Bacon*, 1 Marsh. Ken. Rep. 48. *Love v. Cofer*, 1 J. J. Marsh. 327. *Bodley v. McChord*, 4 J. J. Marsh. 475. *Huston v. Noble*, 4 J. J. Marsh. 130. *Rice's heirs v. Spotswood's heirs*, 6 Monroe, 40. *Inskoe v. Proctor*, 6 Monroe, 311. *Allen v. Hammond*, 11 Peters' Rep. 63.

But, in England, it seems from the cases cited in the text, that it is not admissible for a plaintiff to allege a mistake, with a view of correcting the contract, and, at the same time, seek a specific performance of it in its rectified state. (See *Gresl. Eq. Ev.* 206, 7.) Most of the English cases on this subject will be found collected in the notes to 1 Story's Eq. 174, 5. The learned author remarks, in respect to this doctrine, that "it is certainly of a very artificial character, and difficult to be reconciled with the general principles of courts of equity. It is, 'in effect,' he says, 'a declaration, that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of the plaintiff, seeking a specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant, insisting upon, and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground, why equity should interfere at the instance of the party, as plaintiff, and cancel it; and if the mistake is partial only, why at his instance it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party. Mr. Chancellor Kent has forcibly observed, 'that it cannot make any difference in the reasonableness and justice of the remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy,

and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. *Res accedent lumina rebus.* It may be added, that, if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the statute of frauds, if not more intelligible, it would at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defence of this sort, against a plaintiff seeking the specific performance of a contract, and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See Comyns' Digest, Chancery, 2 C. 4 ; 2 X 3 ; 4 L. 2." (1 Story's Eq. 175, note (1.))

The doctrine of Woollam v. Hearn, cited in the text, and of other English cases proceeding on like views, has been distinctly repudiated in New-York, and seems indeed not to have been sanctioned by any of the courts of equity in this country. (See Keisselbrack v. Livingston, 4 John. Ch. Rep. 144. Gillespie v. Moon, 2 id. 585. Also The Hiram, 1 Wheat. Rep. 444. Hunt v. Rousmanier, 8 Wheat. Rep. 211. 1 Peters' Rep. 13. Hogan v. Delaware Ins. Co. 1 Wash. C. C. Rep. 422. Rosevelt v. Fulton, 2 Cowen's Rep. 129. Pattison v. Hull, id. 747. Wesley v. Thomas, 6 Harr. & John. 24. Newsom v. Bufferlow, 1 Dev. Eq. 379. Gower v. Sterner, 2 Whart. Rep. 75, 79. Abbe v. Goodwin, 7 Conn. Rep. 377. But see Westbrook v. Harbeson, 2 McCord's Ch. Rep. 112. Elder v. Elder, 1 Fairf. 80. Dwight v. Pomroy, 17 Mass. Rep. 303. Bradbury v. White, 4 Greenl. Rep. 391. Harrison v. Talbot, 2 Dana's Rep. 250, 268.)

NOTE 999—p. 576.

As to the admissibility of parol evidence in the instance adverted to in the text, and what shall constitute part performance, see 1 Story's Eq. 21, et seq. See also German v. Machin, 6 Paige, 288, 292, 3. Wetmore v. White, 2 Cain. Cas. in Er. 87. Hall v. Hall, 2 McCord's Ch. 269. See also 1 Barb. Eq. Dig. 139 to 142. 1 Fonb. Eq. Am. ed. 1835, p. 143, et seq. to 152. Id. 159. Sug. on Vend. 125 to 155, and the notes, Am. ed. of 1836, from 9th Lond. ed. Miller v. Hower, 2 Rawle, 53. Low v. Treadwell, 3 Fairf. Rep. 441. Brooks v. Wheelock, 11 Pick. Rep. 439. Monahan v. Colgin, 4 Watt's Rep. 436. Ellis v. Ellis, 1 Dev. Eq. Rep. 341. Hutcherson v. McNutt's heirs, 1 Ham. Rep. 14.

NOTE 1000—p. 576.

See on this subject, 1 Story's Eq. 164, et seq. McMahon v. Spangler, 4 Rand. 51, 53, 4, 5, 6. Also Cook v. Preston, 2 Root's Rep. 78. Elmore v. Austin, id. 415.

Parsons v. Hosmer, id. 1. Sanford v. Washburne, id. 499. Chapman v. Allen, Kirby's Rep. 399, Lemaster v. Buckhart, 2 Bibb's Rep. 29. Coyer's ex'rs v. McGee, id. 321. McCurdy v. Breathitt, 5 Monroe, 534. Love v. Cofer, 1 J. J. Marsh. 327. Moser v. Libenguth, 2 Rawle, 428. Inskoe v. Proctor, 6 Monroe, 316. Parcels v. Gohagan, 2 J. J. Marsh. 133. Hunt v. Rousmaniere's adm'r, 1 Peters' Rep. 1, 13. S. C. 8 Wheat. 174, 3 Mason, 294. Burdett v. Simms, 3 J. J. Marsh. 190. Harrison v. Jameson, id. 232. Hunt v. Freeman, 1 Hamm. 501. Mayfield v. Seawell, Cook's Rep. 437. Phoenix Ins. Co. v. Gurnee, 1 Paige, 278. Rosevelt v. Fulton, 2 Cowen's Rep. 129. Chamberlain v. Thompson, 10 Conn. Rep. 243. Gillespie v. Moon, 2 John. Ch. Rep. 585. Wheaton v. Wheaton, 9 Conn. Rep. 96. Young v. Craig, 2 Bibb's Rep. 270. Smith v. Smith, 4 id. 81. Newsom v. Bufferlow, 1 Dev. Eq. Rep. 379. Gower v. Sterner, 2 Whart. Rep. 75, 79. Tilghman v. Tilghman's ex'rs, 1 Bald. Rep. 490. Dalzell v. Timrod, 1 Dess. Eq. Rep. 339. Holmes v. Simmons, 3 Dess. Eq. Rep. 149. See also the cases ante, note 933.

NOTE 1001—p. 577.

See 1 Story's Eq. 169, et seq. Also Elder v. Elder, 1 Fairf. 80, 88, 9. Hodgson v. Hancock, 1 Young & Jer. 317. United States v. Monroe, 5 Mason, 572. Phoenix Ins. Comp. v. Gurnee, 1 Paige, 278. Watkins v. Stockett's adm'r, 6 Harr. & John. 435. Graves v. The Boston Marine Ins. Co. 2 Cranch, 419. Dupree v. McDonald, 4 Dess. Eq. Rep. 209. Lyman v. The United Ins. Co. 2 John. Ch. Rep. 630. Gillespie v. Moon, id. 585. Harris v. Dinkins, 4 Dess. Eq. Rep. 60. Abbe v. Goodwin, 7 Conn. Rep. 377. Rosevelt v. Fulton, 2 Cowen's Rep. 129. Getman's ex'rs v. Beardsley, 2 John. Ch. Rep. 274. M'Mahan v. Spangler, 4 Rand. Rep. 51. Gresl. Eq. Ev. 205, 6. Harrison v. McMenomy, 2 Edw. Ch. Rep. 251. Inskoe v. Proctor, 6 Monroe, 311, 312, et seq. Besore v. Potter, 12 Ser. & Rawle, 159, 160.

NOTE 1002—p. 577.

1 Story's Eq. 258, 9, 260. 2 id. 90, 1, 2. Gresl. Eq. Ev. 208, 9. Hall v. Hall, 2 McCord's Ch. Rep. 269. Hoge v. Hoge, 1 Watts' Rep. 163. Reeves v. Reeves, 1 Dev. Eq. 386. See ante, note 957, p. 1384, and the cases there cited as to the doctrine on the subject of showing mistakes in wills.

NOTE 1003—p. 578.

Some observations may properly be added here, by way of indicating still further the difference which exists between courts of law and equity, in respect to the doc-

trine of parol evidence to add to, vary or contradict, the apparent import of written instruments.

1. As to purchases in the name of third persons, the rule is, that whether the subject matter of the purchase be freehold, copyhold, leasehold, or personal property, merely; and whether the conveyance or transfer be taken in the names of the purchaser and others jointly, or in the name of others, without that of the purchaser,—whether in one name or several,—whether jointly or *successive*;—the trust or beneficial ownership appertains to him who advanced the purchase money, or if there be more than one, then to the several persons so having advanced it, according to their respective proportions; and in equity, such beneficial owner or owners may prove the facts, and enforce their rights. The authorities, (with the single exception of what Lord Hardwicke said, in *Cross v. Norton*, 2 Atk. 74, denying the application of the rule to a joint advance by two persons, on a purchase completed in the name of only one of them, but which was overruled in *Wray v. Steele*, 2 Ves. & Bea. 384,) all go uniformly and clearly, to establish the above results; and this, in England, notwithstanding the statute of frauds; for it excepts trusts of this nature. (2 Story's Eq. 443, et seq. and the notes. Mathews on Pres. Ev. 55, et seq. See per Spencer, C. J. in *Jackson, ex dem. Selye, v. Morse*, 16 John. Rep. 199. *German's lessee v. Gabbald*, 3 Binn. 302, 305. *Wallace v. Duffield*, 2 Ser. & Rawle, 521. *Bottsford v. Burr*, 2 John. Ch. Rep. 409. *Livingston v. Livingston*, 2 id. 540. *Perry v. Head*, 1 Marsh. Ken. Rep. 47. *Stephenson v. Stephenson*, 3 Bibb, 15. *Hart v. Hawkins*, id. 506. *Redwood v. Riddick*, 4 Munf. 222. *Methodist Episcopal Church v. Jaques*, 1 John. Ch. Rep. 450. *Scoby v. Blanchard*, 3 N. Hamp. Rep. 170. *Pritchard v. Brown*, 4 id. 397. *Foote v. Colvin*, 3 John. Rep. 216. *Denton v. McKenzie*, 1 Dess. Eq. Rep. 289. *Dealty's heirs v. Murphy*, 3 Marsh. Ken. Rep. 477. *Stark v. Cannady*, 3 Litt. Rep. 399. *Phillips v. Crammond*, 2 Wash. C. C. Rep. 441. *Malin v. Malin*, 1 Wend. 625. *Boyd v. McLean*, 1 John. Ch. Rep. 582. *McGuire v. McGowen*, 4 Dess. Eq. Rep. 491. *Letcher v. Armstrong*, 2 Blackf. Rep. 198. *Jennison v. Graves*, id. 140. *Doyle v. Sleeper*, 1 Dana, 536. *Owings v. Owings*, 1 Gill & John. 484. *Dean v. Dean*, 6 Conn. Rep. 288. *Rogers v. Murray*, 3 Paige, 390. *White v. Carpenter*, 2 id. 217. *Steere v. Steere*, 5 John. Ch. Rep. 1. *Fisher's ex'rs v. Tucker's ex'rs*, 1 McCord's Ch. Rep. 169, 176. *Tripler v. Olcott*, 3 John. Ch. Rep. 473. *Powell v. The Monson and Brimfield Man. Co.* 3 Mason, 347. *Snelling v. Utterback*, 1 Bibb, 609. *Hagthorp v. Hook's adm'rs*, 1 Gill & John. 271. *Starr v. Starr*, 1 Hamm. Rep. 323. *Fowke v. Haughtier*, 3 Marsh. Ken. Rep. 57. *Shaver v. Radley*, 4 John. Ch. Rep. 316. *Pugh's heirs v. Bell's heirs*, 1 J. J. Marsh. 403. *Lees v. Nuttall*, 1 Russ. & Myl. 53. *S. C. Tam* 382, 1 Mylne & Keene, 819. *Fawcett v. Whitehouse*, 1 Russ. & Myl. 132. *Hubbard v. Goodwin*, 3 Leigh, 492. *Squire v. Harder*, 1 Paige, 494. *Brown v. McDonald*, 1 Hill's Ch. Rep. 306. *Benbow v. Townsend*, 1 Myl. & Keene, 506. *Leggett v. Dubois*, 5 Paige, 114. *Jackson, ex dem. Benson, v. Matsdorf*, 11 John. Rep. 91. *Jackson, ex dem. Whitlocke, v. Mills*, 13 id. 463. See also 2 Sug. on Vend. 152, et seq. and the notes, Am. ed. of 1836, from 9th Lond. ed. *Farmer v. Samuel*, 4 Litt. Rep. 187. *Jackson, ex dem. Williams, v. Miller*, 1 Wend. 228. *Goodwin v. Hubbard*, 15 Mass. Rep. 218. *Runey v. Edmands*, 15 id. 294. *Sterret v. Sleeve*, 5 John. Ch. Rep. 1. *Hall v. Sprigg*, 7 Martin's

Lou. Rep. 243. Hoxie v. Carr, 1 Sumn. Rep. 173. Gardiner Bank v. Wheaton, 6 Greenl. 373. Buck v. Pike, 2 Fairf. 9. Pritchard v. Brown, 4 N. Hamp. Rep. 397.) In respect to the rule at law on this subject, see ante, note 964, p. 1442, 3.

As to the evidence necessary to make out the trust, when it is not apparent on the instrument, the party must prove the payment, and its object, or other necessary facts, with great clearness. (Botsford v. Burr, 2 John. Ch. Rep. 409. Hart v. Hawkins, 3 Bibb, 506. Malin v. Malin, 1 Wend. 648, 9. Foote v. Colvin, 3 John. Rep. 222. Boyd v. McLean, 1 John. Ch. Rep. 590. Wallace v. Duffield, 2 Ser. & Rawle, 527. Snelling v. Utterback, 1 Bibb, 609.)

Such proof may be gathered, either from expressions or recitals in the purchase deed, from some agreement, memorandum or note of the nominal purchaser, from his answer to a bill of discovery, or from papers left by him, and discovered after his death. (2 Story's Eq. 444, note, and the cases there cited. See Hardin v. Baird's heirs, Litt. Sel. Cas. 340.) Parol proof, likewise, is always allowable. Many of the American cases, *supra*, speak quite distinctly to this point, allowing oral evidence of declarations of the nominal purchaser, &c. &c., to establish the facts necessary to raise a trust. (See particularly, Perry v. Head, 1 Marsh. Ken. Rep. 46. German's lessee v. Gabbald, 3 Binn. 302. Wallace v. Duffield, 2 Ser. & Rawle, 521. Boyd v. McLean, 1 John. Ch. Rep. 582. Botsford v. Burr, 2 John. Ch. Rep. 409. Foote v. Colvin, 3 John. Rep. 216. Stark v. Canady, 3 Litt. Rep. 399. Jackson, ex dem. Benson, v. Matsdorf, 11 John. Rep. 91. Jackson, ex dem. Williams, v. Miller, 6 Wend. 228. Malin v. Malin, 1 id. 625, 648, 9. Goodwin v. Hubbard, 15 Mass. Rep. 210. Pritchard v. Brown, 4 N. Hamp. Rep. 397. Scoby v. Blanchard, 3 id. 170. Buck v. Pike, 2 Fairf. 9. Letcher v. Letcher's heirs, 4 J. J. Marsh. 592, 3.) It has been doubted, in England, whether the clearest parol proof can be received, against an answer denying the trust. (See Skett v. Whittemore, 2 Freem. 280. Newton v. Preston, Prec. Ch. 103. Cottington v. Fletcher, 2 Atk. 155. Bartlett v. Pickersgill, 4 East, 577, note (b.)) But it is held admissible in New-York. (Boyd v. McLean, 1 John. Ch. Rep. 590.) So, also, in Indiana. (Jenison v. Graves, 2 Black. Rep. 440. Elliott v. Armstrong, id. 198.) Whether after the death of the supposed nominal purchaser, parol proof alone is admissible, against the express declaration of the deed, has been a subject of controversy; (2 Story's Eq. 444, note, and the cases there cited; and see 1 Sand. on Uses, 259, and the note to Lloyd v. Spillet, 2 Atk. 150; Rob. on Frauds, 99;) but it seems it is. (2 Sugd. on Vend. 156, 7, 8, Am. ed. of 1836, from 9th Lond. ed. See Boyd v. McLean, 1 John. Ch. Rep. 582.) The depressed pecuniary circumstances of the nominal grantee may be shown, to preclude the supposition that he could have been the purchaser. (Willis v. Willis, 2 Atk. 71. Malin v. Malin, 1 Wend. 651.)

This presumptive trust, when raised, may be met and rebutted, either by direct or circumstantial evidence, showing that, in truth, no such trust was intended by the party who made the advance. It may be rebutted by proof of the particular intent, or of an intention in favor of the party in whose name the conveyance or grant is made. (Math. Pres. Ev. 58. 2 Story's Eq. 445, 6. Farmer v. Samuel, 4 Litt. Rep. 187.) Parol evidence, for this purpose, is admissible, either in respect to real or personal property; (Math. Pres. Ev. 58; Mann v. Mann's ex'rs, 1 John. Ch. Rep. 231, 234, per Kent, Ch. J.;) and in one instance the testimony of a single witness was relied on; (Mad-

dison v. Andrew, 1 Ves. Sen. 60, 61;) for, the evidence does not vary, but sustains the literal import of the deed. It is called rebutting an equity. (Math. Pres. Ev. 58, 9. Steere v. Steere, 5 John. Ch. Rep. 18, 19. Jackson, ex dem. Feller, v. Feller, 2 Wend. 465, 469. Botsford v. Burr, 2 John. Ch. Rep. 416. Gillespy v. Moon, id. 585. Livingston v. Livingston, id. 539, 540.) So it may be rebutted by showing, that its execution would contravene the spirit of an act of the legislature; (Ex parte Houghton, 17 Ves. 251; Ex parte Yallop, 15 id. 60; and see Curtis v. Perry, 6 id. 739; Redington v. Redington, 3 Ridg. Parl. Cas. 185; Parker v. Bodley, 4 Bibb, 102;) or, that it is attempted to be raised in fraud of the government; (Jackson, ex dem. Williams, v. Miller, 6 Wend. 228;) and, *quere*, whether it can be raised in favor of an alien, so as to be executed for the commonwealth. (Hubbard v. Goodwin, 3 Leigh, 492.)

The direction which the trust is to take, seems resolvable into a question of intent among the parties; and, therefore, the actual enjoyment of the property by the apparent grantee, inconsistent with the notion of his taking as trustee, may be alleged in attestation of a claim by him to the absolute interest. (Math. Pres. Ev. 59.) So, whether the apparent grantee be not one for whom the person who advanced the money was bound to provide, either legally or morally, (e. g. a wife, a child, legitimate or illegitimate, a grand-child, the father being dead,) may be gone into; for, in these cases, an advancement will sometimes be presumed. But otherwise, in respect to a grand-child, when the father is living; and so of nephews and nieces, for they, it seems, are too remote. (Math. Pres. Ev. 59, 60. 1 Story's Eq. 443, 4, et seq. 2 Sug. on Vend. 165, Am. ed. of 1836, from 9th Lond. ed. See Hamilton v. Thomas, 5 Hayw. 127. Guthrie v. Gardiner, 19 Wend. 414.) And in strengthening and repelling the presumption of advancement, various other circumstances will come in; as for instance, that the child, &c. had already been fully or only partially advanced, or had been emancipated; the age of the child; the character of the consideration; the conduct of the parties in respect to the actual use and avails of the property; the nature and productiveness of the property or estate, &c. &c. (See Math. Pres. Ev. 59, et seq. 2 Story's Eq. 444, et seq. 2 Sugd. on Vend. 153, et seq. Sampson v. Sampson, 4 Ser. & Rawle, 329. Stewart v. The State, 2 Harr. & Gill, 114. Jackson, ex dem. Benson, v. Matsdorf, 11 John. Rep. 91.) When purchases in the name of a wife or child shall be deemed void as to creditors, see Math. Pres. Ev. 76. Guthrie v. Gardner, 19 Wend. 414.

The doctrine, as to these trusts, has been much narrowed in New-York by the revised statutes, which took effect in January, 1830. They provide as follows—"Where a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section." (1 R. S. 728, § 51, 1st ed. Id. p. 722, 2d ed.) "Every such conveyance shall be presumed fraudulent, as against the creditors, at the time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." (Id. § 52.) It is then declared, that the section first above quoted shall not extend to cases where the nominal alienee took the conveyance as absolute, in his own

name, without the knowledge of the person advancing the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed, with monies belonging to another. (Id. § 53.)

2. The hardships arising from the freedom with which the English law allows the *jus accrescendi*, in joint tenancy, is often relieved against by courts of equity, who receive parol evidence of what the parties intended by a joint acquisition of the property; though contradicting the legal effect of the transaction.

With regard to joint purchases of real estate, by two or more in their own right, the statute of New-York, (1 R. S. 727, 1st ed. and 721, 2nd ed. § 44,) and probably the statutes of most of the other American states, change such titles into tenancies in common, unless expressly declared to be joint in the grant or devise. (See 4 Kent's Comm. 361, 3d ed.) Independent of any statute, if the purchase money was advanced in equal shares, even equity would not ordinarily interfere to take away the right of survivorship. (See Math. Pres. Ev. 76, 77. Cuyler v. Bradt, 2 Cain. Cas. in Err. 326. Per Story, J. in Randall v. Phillips, 3 Mason, 383. Appleton v. Boyd, 7 Mass. Rep. 131. Per Jackson, J. in Goodwin v. Richardson, 1 id. 472. Caines v. Grant's lessee, 5 Binn. Rep. 119. 2 Story's Eq. 449.)

Equity, however, will receive evidence that the joint purchase was by a partnership for the purposes of its trade; or by persons for the purposes of a joint adventure or business, with a view of sharing profit and loss; or that the purchase money was advanced in unequal shares; for in this way, the presumption on which the *jus accrescendi* rests, may be rebutted. (See Math. Pres. Ev. 77, et seq. 2 Story's Eq. 449, 450, et seq. Smith v. Jackson, 2 Edw. Ch. Rep. 28. Hoxie v. Carr, 1 Sumn. Rep. 173. Randall v. Phillips, 3 Mason, 378.) So, two or more persons advancing money and taking a mortgage, and one of them dying, the survivor shall not have the whole money due on the mortgage; for the nature of the transaction, as a loan of money, repels the presumption of an intention to hold the mortgage in joint tenancy. (1 Story's Eq. 450. See 2 Pow. on Mort. (by Coventry & Rand,) 671, and the notes. Randall v. Phillips, 2 Mason's Rep. 378.) So, even after foreclosure, and a purchase by the mortgagees, they shall hold as tenants in common. (Goodwin v. Richardson, 11 Mass. Rep. 469. Appleton v. Boyd, 7 id. 137. Math. Pres. Ev. 82.) A like consequence, it seems, would follow, if the mortgagees purchased in the equity of redemption. (Math. Pres. Ev. 82, 3.)

3. Real estate purchased by partners in their joint names, with the partnership funds, may, in equity, through the operation of parol evidence, showing the circumstances of the purchase, be treated as personal, for certain purposes. (3 Kent's Comm. 37, et seq. 3d ed. Sigourney v. Mann, 7 Conn. Rep. 11, 19. Hoxie v. Carr, 1 Sumn. Rep. 173.) Though at law it is otherwise. (Coles v. Coles, 15 John. Rep. 159, 161. Goodwin v. Richardson, 11 Mass. Rep. 469.) And some courts of equity have followed the law in this respect, contrary to the English doctrine as now understood. (See 3d Kent's Comm. 38, et seq. 3d ed. Yeateman v. Woods, 6 Yerg. 20. McAllister v. Montgomery, 3 Hayw. 96. Smith v. Jackson, 2 Edw. Ch. Rep. 28, and the American cases there cited and reviewed.)

4. Another case in which equity is quite latitudinarian in the admission of parol evidence to fix the construction of written instruments, arises where there is an agreement for a provision in favor of a family, or some member of it, either in personal or real es-

tate. Here, though the agreement (which is usually a covenant) be not literally or expressly performed, yet a court of chancery will so construe it, that various acts of the covenantor, equivocal in their character, shall be brought within its provisions, and held to be either a performance or satisfaction. Thus, a man's covenant to leave his widow £600, was held constructively performed by dying intestate, leaving her a distributive share to that amount. (*Blandy v. Widmore*, 1 P. Wms. 324. 2 Vern. 709, S. C.) That case has been followed ever since, and the principle somewhat extended. (See *Math. Pres. Ev.* 85. 2 *Story's Eq.* 365.) The satisfaction of such covenants, as distinguished from the performance, opens the enquiry what the party intended by his act, and goes measurably in disregard of literal fulfilment. As if a man covenants to make a certain provision for his wife, or child; and afterward, without expressly referring to his covenant, gives, or settles, by deed or will, on such objects, a property, equivalent to, or exceeding the proposed provision, of a similar nature, and equally advantageous. (*Math. Pres. Ev.* 88, 89.) That a motive, other than to fulfil the covenant, appears on the face of the transaction, or an intention to make an additional provision, will answer the presumption which would otherwise arise, and make the provision cumulative. (*Mathews v. Mathews*, 2 Ves. 635. *Hooke v. Grave*, 5 Vin. Abr. 293. 2 *Eq. Abr.* 219. *Prime v. Stebbins*, 2 Ves. 409.)

But the main purpose of mentioning these points and the cases, is to say, that parol evidence is receivable in regard to the various instruments upon which the equity is sought to be raised, either to fortify it on the one hand, or repel it on the other. (*Peacock v. Glascock*, 1 Ch. Rep. 45. 6 Ves. 321, 397. 10 Ves. 10. 17 Ves. 184. *Timberlake v. Parish's ex'r*, 5 Dana, 351.) It seems, however, that parol evidence is not admissible, in the first instance, to corroborate the presumption, and to show a specific intention in the covenantor to substitute one provision for another; but only to meet other evidence which has before been introduced to rebut the presumption. (*Math. Pres. Ev.* 93.) Clearly not, to show that satisfaction was intended, where the case itself does not warrant the inference; especially where a contrary inference arises from the face of the papers. (*Id.*) Though parol evidence may, of course, be given as to any facts *aliunde*, which are necessary to raise the presumption; e. g. facts that enable the tribunal which is to decide, to institute a comparison between what has been done, and what was contracted for, &c. (*Id.* 89, 93.)

Presumed satisfaction, in these cases, depends on the same principles as that of debts due to strangers. (Per *Kenyon*, master of the rolls, in *Devese v. Pontet*, 1 Cox, 191. *Tolson v. Collins*, 4 Ves. 483. And as to the doctrine generally, see 2 *Story's Eq.* 360, et seq.)

5. Similar topics of discussion and enquiry arise, and are treated as depending upon nearly the same principles, where the covenant is to purchase and settle real estate on members of the covenantor's family. Instead of doing so expressly, if he merely purchase lands, the estate, local situation, tenure, &c. corresponding with that contemplated by the covenant; or if he raises an incumbrance on the family estate, which descends to the person to be provided for; or devises or suffers lands already in his possession to descend to the object of the provision; these cases will, according to the features of each, be construed a performance, satisfaction, or a mixed case of both; of the *whole* covenant, under certain circumstances, if the value be equal; or *pro tanto*, if it be deficient. (*Math. Pres. Ev.* 94. See *Bryant v. Hunters*, 3 Wash. C.

C. Rep. 48. Chichester v. Vass' adm'r, 1 Munf. 98. Roper v. Bartholomew, 12 Price, 797.)

Parol evidence, whether to repel the *prima facie* presumption, or fortify it in answer to contrary evidence, is equally admissible in this case, on the common ground of rebutting and sustaining equities. (Math. Pres. Ev. 105.)

6. So, on nearly the same principles, where a man is indebted, either in the common way, to a stranger; or to a wife, on account of having retained her pin-money; a child, on account of having received and retained his legacy; a servant, for wages; or as executor or trustee, or for an annuity, &c. In such and the like cases, if the debtor bequeath a legacy to his creditor, in amount equal to, or greater than the debt, and full as beneficial in other respects, it shall, if no contrary intention appear, be presumed to be given in satisfaction of the debt. Under what circumstances this presumption will arise, see Math. Pres. Ev. 108, et seq. 2 Story's Eq. 378. See also Williams v. Crary, 5 Cowen's Rep. 368. 4 Wend. 443, S. C. Massey v. Leaming, 4 Dall. 123. Owings' ex'rs v. Owings, 1 Harr. & Gill, 484. Ladson v. Ward, 1 Dess. Eq. R. 314. Guignard v. Mayrant, 4 id. 614. Scott's ex'r v. Osborne's ex'r, 2 Munf. 413. Strong v. Williams, 12 Mass. Rep. 390. Byrne v. Byrne, 3 Serg. & Rawle, 54, 60. Mulheran's ex'rs v. Gillespie, 12 Wend. 349. Keely v. Keely's ex'rs, 6 Rand. 176. Clarke v. Bogardus, 12 Wend. 67. Ricketts v. Livingston, 2 John. Cas. 98. Foster v. Evans, 6 Sim. 15. Scott's ex'r v. Osborne's ex'r, 2 Munf. 413.

With regard to parol evidence in elucidation of the testator's intention, it seems now to be fully established, notwithstanding Lord Talbot's objection in Fowler v. Fowler, (3 P. Wms. 354,) that such evidence is alike admissible, for the purpose of repelling, or, when contradicted, of corroborating the legal implication. (Cuthbert v. Peacock, 2 Vern. 593; 1 Salk. 155, S. C. Pole v. Lord Somers, 6 Ves. 324—6. Wallace v. Lord Pomfret, 11 id. 542, 547, et seq. And see the cases supra, pl. 5, as to parol evidence on the subject of purchases, devises, &c. in performance or satisfaction of covenants in family settlements, &c.; also Williams v. Crary, 4 Wend. 443.) In the case last cited, the supreme court of New-York went not only the length of the English cases, in receiving parol evidence as to all the extrinsic circumstances calculated to raise the presumption; but they appear to have received and acted upon evidence of a conversation between the testator and the legatee, to raise the presumption in the first instance. (4 Wend. 449 to 452. See also Clarke v. Bogardus, 12 Wend. 67.)

The doctrine of the constructive satisfaction of a debt, by advancing a marriage portion to the creditor, seems to depend on the same principle. (Chidley v. Lee, Prec. Cha. 223, overruled in McDowell v. Halfpenny, 2 Vern. 484. Wood v. Briant, 2 Atk. 521, 2. Seed v. Bradford, 1 Ves. sen. 501. Chave v. Farrant, 18 Ves. 8.)

7. Much more readily will the courts presume that a legacy, or a second portion advanced, was intended by the testator or portioner to be in satisfaction of a portion which he had previously stipulated, in a family settlement, to bestow on the legatee or object to whom the second portion is advanced. Nor is it material, in such case, that the bequest by will, or advance in the life time of such debtor, was in value equal to, or greater or less than the provision before secured. But in all cases it shall be deemed a total or partial satisfaction, unless incidental circumstances oppose the application of the rule. Indeed, it will be seen by some of the cases, that a second settlement,

securing portions similar to those in the first, shall be construed merely as a further security, which, on being satisfied, would discharge the prior obligation. The motive is different in the case of a debt; and the law is opposed to double portions. Hence arises the liberality with which the presumption is, in the latter case, indulged. (Math. Pres. Ev. 120, 1, et seq.)

Extrinsic evidence is here, as in other like cases of presumption, admissible to rebut the constructive satisfaction; and for this purpose parol declarations of the person bequeathing the legacy, or making the advancement, &c. seem to be sufficient. Similar testimony is also admissible to fortify the presumption. (Id.)

Sometimes the instrument executed by the father, providing portions for children, also expressly directs that if he advance his children before the portions become due, this shall be taken in total or partial discharge of the portions. And it may, in connection with the above head, be well to examine the authorities, upon the question, what species of preferment shall satisfy such a clause. (See on this subject *id.* 128, et seq. and the cases there cited.)

8. Upon the same principle that a legacy will be construed to be in satisfaction of an unexecuted covenant for a portion, the voluntary advancement of a portion, by a parent, or one *in loco parentis*, shall, under circumstances, be construed to satisfy or take away a legacy which he had before inserted in his will. This rule of presumption takes place where, after making a pecuniary provision for his child, in his will, he advances to the child, on marriage, or preferment in business, or secures by settlement, &c. a sum equal to or greater than the testamentary bounty. It is said that this is, *prima facie*, an ademption of the legacy. The doctrine has not maintained its ground without some animadversion; but it is too well established to be shaken. (Math. Pres. Ev. 133, et seq. 2 Story's Eq. 369, et seq. See also *Jones v. Mason*, 5 Rand. 577; *Devereaux v. Barnwell*, 1 Des. Eq. Rep. 497; *Timberlake v. Parish's ex'r*, 5 Dana, 350, 1.)

In this case, also, extrinsic evidence of intention is available to repel the legal presumption. (*Jones v. Mason*, 5 Rand. 577. *Timberlake v. Parish's ex'rs*, 5 Dana, 351.) And it may consist either of written documents, letters, memoranda in the testator's books of account, or in other private papers. So parol declarations are admissible; as, for instance, that the father declared the advance was for the particular intent to buy furniture; or that the gift was accompanied by a declaration that the donor would also leave something by will, though he would not be considered bound to do so; or that he told the father of his daughter's intended husband, "he could only give at the time of her marriage a certain sum, but there would be more afterwards, as his life was a bad one;" or that referring to his will, he declared the donee the object of his bounty. (Math. Pres. Ev. 143, 4.) But the words should not be left of doubtful reference. If they be so, the general rule will prevail. (Id.)

These oral declarations are admissible to whomsoever and under whatever circumstances made, whether to people having or not having any concern in the matter, or making impertinent inquiries and obtaining angry answers; though they are of course entitled, like other declarations, to very different weight and credit from these causes. If made to the intended husband himself, (*Shudal v. Jekyll*, 2 Atk. 516, *Ellison v. Cookson*, 1 Ves. jun. 100,) to his father, (*Debeze v. Mann*, 2 Bro. C. C. 165, 519,) an agent in the marriage treaty, (*Ellison v. Cookson*, 2 Bro. C. C. 307, 3 id. 60, 1 Ves.

jun. 100, S. C.) to the testator's wife or others having an interest of affection in the object, (*Robinson v. Whitley*, 9 Ves. 577,) they are of the first importance. They are also much regarded when made to a stranger, if they bear a general character of seriousness and veracity; (*Dwyer v. Lysaght*, 2 Ball and Beat. 156; see also 7 Ves. 520;) while vague, frivolous or evasive discourse, addressed to officious and intrusive inquirers, is altogether void of force. (*Math. Pres. Ev.* 145, 6. *Trimmer v. Bayne*, 7 Ves. 508, 519, 520.)

Extrinsic evidence may be resorted to for the purpose of fortifying the presumption when impeached. A recital in the settlement, shewing the object of the advance, (*Farnham v. Phillips*, 2 Atk. 215, *Watson v. Earl of Lincoln*, Amb. 325,) a written statement of this, delivered on receiving the money, (*Scotton v. Scotton*, 1 Str. 235,) or parol declarations, are admissible for that purpose; (*Math. Pres. Ev.* 146; *Webley v. Lanstaff*, 3 Dess. Eq. Rep. 504; *Bailey v. Herkes*, 1 Pennsylv. Rep. 126;) though testimony of the latter kind cannot be received to show that an ademption was intended, unless the circumstances be such as primarily raise that supposition. (*Math. Pres. Ev.* 147.)

9. Certain equitable rules of presumption are also established with a view to obscurities arising from the carelessness of testators, in bequeathing what are called double legacies; that is to say, where two or more legacies are given by the same will or codicil, of the same amount, or thing, to the same person; or where such legacies are given, the one by will, the other by codicil, or by different codicils. If the bequest be specific, whether in the same or different instruments, the gift must of course stand single. Where the double legacies are pecuniary, and in the same instrument, they are also *prima facie* single, unless it be apparent that they were given on different motives; and this presumption will not be repelled by slight modal differences between them. (*Math. Pres. Ev.* 149. *Dewitt v. Yates*, 10 John. Rep. 156.) But the presumption is the other way, where the legacy is in a different instrument, as in a will and codicil, or different codicils. This presumption may be strengthened, or entirely done away by the language of the instrument giving the subsequent legacy; as by declaring the motive, nature, or mode of the gift. (*Math. Pres. Ev.* 150. *Dewitt v. Yates*, 10 John. Rep. 156. *Wray v. Field*, 6 Madd. 300; S. C., 2 Russ. 257. *Mackenzie v. Mackenzie*, 2 Russ. 262. *Chatteris v. Young*, id. 193. *Hemming v. Gurney*, 1 Dow, N. S. 35. 1 Bligh, N. S. 479. 1 Dow & Clark, 35. 2 Sim. & Stu. 311. *Mayor of London v. Russell*, Finch, 290. *Simon v. Barber*, Tam. 14. *Fraser v. Byng*, 1 Russ. & My. 90. *David v. Reed*, id. 687. *Lord v. Sutcliffe*, 2 Sim. 273. *Watson v. Reed*, 5 Sim. 431. *Guy v. Sharp*, 1 Myl. & Keen, 589. *Gillespy v. Alexander*, 2 Sim. & Stu. 145.)

Where the presumption of law, arising on the face of the documental proof, is favorable to carrying both legacies, according to the literal expression, parol evidence to repel such presumption would be inadmissible, as contradicting the express and legal signification of a written instrument. Otherwise, where the presumption is that the legacy is single. (*Math. Pres. Ev.* 158. See also the cases cited by counsel in *Guy v. Sharpe*, 1 Mylne & Keene, 589, et seq.)

10. Another very difficult and complicated head of presumption grows out of the case where a will is made with legacies, and an executor appointed, but a residue of the testator's estate remains, after paying funeral and testamentary charges, debts and

legacies, without being disposed of by an express clause in the will. The rule of the common law, from the earliest period, has been, that the whole surplus should vest in and belong to the executor beneficially. (Math. Pres. Ev. 160. 2 Story's Eq. 452. *Shelton v. Shelton*, 1 Wash. Verg. Rep. 53, 64. Per McKean, Ch. J. in *Boudinot v. Bradford*, 2 Dall. 268, cited in *Grasser v. Eckart*, 1 Binn. 580, 584. *Wilson v. Wilson*, 3 Binn. 557, 561.) Prima facie, the rule in equity is the same as at law; but it has been controlled, where a necessary implication or strong presumption appeared that the testator intended to give merely the office of executor, and not the beneficial interest. (See *Whitaker v. Tatham*, 7 Bing. 628.) In the latter instance the statutes of distribution apply. But the circumstances from which such a deduction is to flow may be so infinitely varied, that many cases of great uncertainty will arise; and no general rules can be laid down to prevent the frequent recurrence of the question. (See per Sir W. Grant, M. R. in *Pratt v. Sladden*, 14 Ves. 197.) The ancient rule is now abolished in England, (Stat. 1 Wm. 4. ch. 40;) in Pennsylvania, (since April 7, 1807, 4 Smith's Laws, 402, and see *Wilson v. Wilson*, 3 Bin. 557, 9 Serg. & Rawle, 424, 428, S. P., and see case of Neaves' estate, 9 Serg. & Rawle, 186, 189, 190;) in Massachusetts, (since 1783, Laws of that year, ch. 32, § 1 and 7, see *Hay's ex'r v. Jackson*, 6 Mass. Rep. 153;) and North Carolina, (since 1716, *Hill v. Hill*, 2 Hayw. Rep. 298.) As to Virginia and New Jersey, see 2 Tuck. Bl. 514, note 44, *Shelton v. Shelton*, 1 Wash. Verg. Rep. 53, 64, 3 Bin. 567, *Denn v. Allen*, 1 Penningt. Rep. 44. Mr. Story says that in the United States the surplus is *universally* distributable among the next of kin, in the absence of all contrary expression of intent on the part of the testator. (2 Story's Eq. 453.) If this be so, the doctrine is no farther useful than as it may serve to exhibit the boundaries set to the application of parol evidence in other instances.

As to the admissibility of parol evidence in these cases, Mr. Mathews remarks—"To repel presumptions founded on the circumstance of a legacy being given to a sole executor, or of equal legacies being given to two or more executors, or upon the fact of one of several executors being expressly denominated a trustee, parol evidence, though disapproved of, is admissible. And it is received on this principle, that while the construction by which the executor is excluded, assumes the testator to have meant what he has not said; the effect of the evidence is to show, that the actual intention was such as exactly corresponds with the strict and literal interpretation of the instrument, and with the legal incidents and rights which attach to the office of executor.

"The efficiency of a testator's parol declarations to rebut the presumption, and to restore the executor to the rights from which other circumstances might have displaced him, seems to depend rather on the occasion of making them, than on the time when they were made considered with relation to the executing of the will. For although all such declarations are alike admissible, and are accounted of weight, yet their importance is measured by the circumstances under which they were made, and which, as they ascertain the sincerity or insincerity, the seriousness or levity of the party at the time of utterance, properly determine the degree of consideration which is due to them. Where seriousness and sincerity appear, it does not seem material whether the evidence consist of declarations previous to, contemporaneous with, or subsequent to, the execution of the will. But in cases of conflicting testimony, dec-

larations at the time of preparing or executing a will are deemed of more consequence than declarations either before or afterwards, and declarations subsequent than those which are antecedent; for the statements of a man as, to what he has already done are more likely to show the real nature of his intentions, at the time of performance, than statements of what he merely designs to do, and, still more, statements made at the time of a transaction than statements either before or after it.

“Concerning the nature and substance of declarations relied on as available in this respect, it has been held, that not only explicit avowals of intent to give the executor a beneficial interest, but intimations to such effect, if clear, will serve to prevent the usual construction. Declarations by a testator, that legacies bequeathed to his next of kin formed the whole he intended they should take,—that legacies to the executors were given purposely that they might be sure of something in case of a deficiency, but that if there should be a surplus, such surplus would be theirs,—that he had left or should leave to his executors handsome fortunes,—or, in reference to particular chattels, that after his death they would belong to the executors,—have, accordingly, been adjudged sufficient to re-annex to the office its legal properties. But it is an invariable rule, in order to parol declarations being effectual to re-instate the executor, that they must be not merely such as render the applicability of the general construction doubtful, but such as plainly and indisputably prove the intention to have been to give the residue absolutely. Declarations therefore of equivocal signification much more declarations met by counter declarations, will leave the question to be decided on the ordinary principle.

“The admission of parol evidence, it must be likewise observed, is confined to cases strictly of presumption. Where the executor is expressly styled a trustee in the will, evidence of intention to give him the surplus beneficially is not allowed; for that would break in upon the principle, that extrinsic evidence cannot be received to contradict a written instrument. On the same ground, it has been decided, that a legacy expressed to be given for the care and trouble incident to the executorship, precludes all parol testimony to show that the parties were meant to have more; since a bequest of this kind is equivalent to a declaration, that they should hold the residue merely as trustees.

“But where a specific legacy is given to the executor, with the exception of a particular part of it,—as a bequest of testator’s household goods, excepting plate,—and the part excepted not being afterwards disposed of falls into the residuary estate, this is not considered a case so distinctly and indisputably proving the testator’s intention to give the residue away from the executor, as excludes the reception of parol evidence; although it has been argued, that as the part excepted constitutes an integral portion of the residue, and must be taken and go along with it, the circumstance of such part being expressly withdrawn from the gift to the executor, shows to demonstration the testator’s meaning, that the executor should not take the surplus beneficially: for to this it was replied, that the gift with the exception amounts to no more than a gift of the several particulars of the actual bequest, taking no notice of the article excepted; and further, that the executor takes the principal bequest and the exception, under different qualifications, the former being liable to contribute only to the payment of debts, the latter also to the payment of pecuniary legacies. The reason for admitting parol evidence is obviously stronger in the case of a legacy to the execu-

tor, which is merely, though in pointed terms, ordered to be paid out of the personal estate.

"Parol testimony may, in like manner, be adduced by the next of kin, to oppose similar evidence on the part of the executors, and to fortify the presumption that the latter were not intended to take a beneficial interest. But such testimony is not admissible, in the first place, to show the testator's intention to impose a bare office of trust. To allow its admission would violate the principle before noticed, that external evidence shall not be received to contradict a written instrument." (*Math. Pres. Ev.* 188 to 193.)

11. We have already mentioned incidentally that a deed conveying real estate, absolute on its face, may be shown in equity to have been intended as a mortgage. So of other instruments; e. g. bills of sale of personal property. The English cases do not seem to go this length unless there be either fraud or mistake. So with many American cases; while others require nothing except proof of the original intention; thus allowing a most striking exception to the general rule. The main body of the cases bearing on this subject are cited ante, note 961, p. 1432, et seq., and we there noticed the peculiarity of the New-York doctrine, which allows deeds, &c. apparently absolute, to be converted into mortgages by parol evidence, even in courts of law.

SUPPLEMENT.

OF THE COMPETENCY OF WITNESSES.

On recurring to the original notes upon the above head, which were printed some years since, it has been found necessary to add a considerable supplement, the extent of which can, in part, be accounted for only by the principal editor. The importance of a full reference to authority upon matters of daily practice, will occur to every one; but this consideration would, in the ordinary course, have demanded the addition only of the very latest cases, such as came to hand intermediate the printing of the original notes, and the supplement. The reference now made, among others, to several American cases, would have been unnecessary, had it not been for an unpleasant, not to say painful concurrence of circumstances. Mr. Osgood, a very intelligent and industrious lawyer, had engaged to prepare references to the older American cases upon competency, and arrange them under their appropriate subdivisions. He applied himself with great assiduity; and the editor had derived the impression, from general conversation with him, that he had finished his task. The editor left for the northern circuit, under this impression; and, while absent, Mr. Osgood died. On the editor's return, he assumed that Mr. O.'s references were complete; connected them with his own; and proceeded to arrange, combine, and print the whole. Sometime afterwards, he discovered that he had misunderstood the deceased, who had, in truth, omitted a good many important cases. In this supplement, the editor has endeavored to supply the defect, beside doing what is, perhaps, more useful, carrying on the references from the time where he had himself stopped, to the present period. He felt all this to be the more important, as, in respect to the interest of witnesses, the leading rule has been but recently established. (*Bent v. Baker*, 3 T. R. 27, A. D. 1789.) Its object was to rescue the law from the dominion of the old, and somewhat arbitrary authorities; and bring it back to the principle of a certain interest in the event of cause, to testify for the party calling the witness. Since that time, the courts, both English and American, have been engaged in reducing decisions, both old and new, to the line thus established. In performing this office, they have done much; but they have often encountered unforeseen difficulties; and occasionally been inconsistent. Perhaps no branch of judicial duty has proved more perplexing. The disproportion be-

tween the apparent simplicity of the rule, and that of the doctrine which has arisen from its practical application, may be collected in a general way, from the remarks of Senator Tracy, in *Gregory v. Dodge*, 14 Wend. 607. These should, however, in their result, be taken with considerable qualification. When the learned senator throws out a doubt whether we are advanced "one inch beyond the original proposition," laid down in *Bent v. Baker*, he by no means appreciates the certainty which subsequent cases have already introduced into those branches of judicial business, where the proposition has come to be most frequently considered; nor the promise given by other cases, however conflicting, that the dominion of certainty is in the steady progress of enlargement. This progress has been attended, in most respects, with the same discouragements which mankind have witnessed in every branch of the law, in every art, in every science. It is of the nature of each, to be progressive; to present its professors with perplexing points. These must be studied and understood, and brought in as parts of the general system. Becoming discouraged in such a degree as to turn back and start on a new rout, would be but to estrange us from those things with which the profession have become familiar, without clearing any single obscurity that would otherwise have attended them on their way. If the greatest minds have, in some measure, failed, after many years of labor, let us not too readily give in to the belief, that mankind can do better by starting on first principles; or complain that nothing has been done. If the profession can now, with ordinary application, advise with tolerable certainty in 990 cases out of 1000, let us rather try to secure the same degree of certainty in the ten remaining cases, than introduce the same degree of doubt, for many years, into the 990, or a great part of them. While the principles of human veracity and credence are every where the same, the general rules of competency are widely different, under different systems of law. The civil law excludes witnesses for many causes, which the common law regards as merely affecting their credibility, while some speculative writers have advocated their indiscriminate admission. (See Best, C. J. in *Hovill v. Stephenson*, 5 Bing. 493.) Mankind have so long adhered to a degree of exclusion, as to evince an opinion that the cause of truth and justice would, in the aggregate, suffer more from the falsehood of such as are directly interested, than it would gain by that occasional elucidation now lost by their incompetency. This is, perhaps, the highest evidence we can have, that human rights are not reasonably safe, unless, in some instances, they shall be placed beyond the reach of temptations to testify falsely. These instances must be pointed out by the general rules of law, as declared and applied by the courts. The common law has adopted the medium ground; and its decisions have already introduced such a degree of certainty, that, with forecast and diligence, aided by professional advice, the citizen can rarely fail in exhibiting the facts of his case to a court and jury. Anxiety to contribute every possible assistance to the attainment of so important an object, must form an excuse for adding a considerable supplement to volumes which have already swelled to a size far beyond what the editor anticipated, when he undertook the compilation of these notes. While engaged on the question of competency in respect to interest, the labor of collecting the cases in arrear, which relate to other causes of incompetency, was not much. These, therefore, are also now added.

NOTES 44 and 45, p. 58; NOTE 326, p. 428; NOTE 495, p. 706.—*Competency presumed. The court, not the jury, determines the fact, as well as the law of competency. The right of the jury is confined to a trial of facts on the merits.*

Competency is presumed till the contrary is shown. Notes 44 and 45, p. 58, and note 495, p. 706. (*Hall v. Gittings*, 2 Harr. & John. 112, 120 and 121, and the cases cited by Chase, C. J. at the last page. *Stoddard v. Manning*, 2 Harr. & Gill, 147. *Callis v. Tolson's ex'rs*, 6 Gill & John. 80, 91. *Saxton v. Boyce*, 1 Bail. 66. *Smith v. White*, 5 Dana, 392, 3. *Savage, C. J. in Jackson, ex dem. Howell, v. Delancy*, 4 Cowen, 427, 430.)

But the interest once being established, it should be clearly removed; and the witness leaving the question doubtful on the facts stated, and the judge at N. P. rejecting him, the court in bench refused to grant a new trial. (*Seymour v. Beach*, 11 Conn. Rep. 275, 281, 2. *McManagil v. Ross*, 20 Pick. 99, 103.) These cases, in short, with many others, (see ante, note 326, p. 428, *Witter v. Latham*, 12 Conn. Rep. 392, 400, and the cases there cited, especially *Donelson v. Taylor*, 8 Pick. 390, see *Coleman v. Wolcott*, 4 Day, 388, contra,) hold, that it is for the court alone to try and determine the question of competency, both as to the law and the fact, wherein it comes in place of a jury; and a new trial will not be granted where there is a fair conflict of evidence, even though the court may find against a slight preponderance. The rule here does not apply, that the court shall decide the law, and the jury find the facts. All this was also fully considered and expressly determined, in *Townsend v. The State*, 2 Blackf. 151, 162, and see *High v. Stainback*, 1 Stew. Rep. 24. And, above all, error does not lie for a finding, one way or the other, upon the facts. (*Taylor v. Taylor*, 2 Watts, 357, 8.) After the court has determined the question, it is not proper to submit it to the jury. (*Witter v. Latham*, supra.) Though it is said that where the point depends on the decision of an intricate question of fact, judges occasionally, in practice, take the preliminary opinion of the jury. (8th ed. Phil. Ev. by Amos and Phillips, p. 2 and note there.)

It is no ground for a new trial, that, on a preliminary examination as to the competency of a witness, the judge allows, in order to prove interest, improper evidence to be given in the presence of the jury; he, in the end, properly receiving the witness on the merits, and submitting his credit to the jury. (*Ackley v. Kellogg*, 8 Cowen, 225.)

Under what qualifications, it shall be said that the jury are, on the merits, to find the law and fact, either in civil or criminal cases, was much and ably inquired, in *Townsend v. The State*, supra. The trial was on an indictment under the excise law, for selling spirituous liquor without license. A license was offered in evidence; but appearing on its face to be in consideration of a sum less than the statute required, (50 cents instead of \$5,) the court pronounced it void, excluded the evidence, and directed the jury that it was not their province to determine the law. On error, it was held that the jury are judges of the fact, both in civil and criminal matters, on such evidence as the court shall submit to them as competent. But they are not, in general, either in civil or criminal cases, judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed find a general ver-

dict, including both law and fact; but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath.

The same thing was lately held by Story, J. in a capital case. (*United States v. Battiste*, 2 Sumn. 240, 243.) He stated it as the opinion of his whole professional life, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. He said, that in each case, they had the physical, but not the moral right to decide the law according to their own notions or pleasure. That it is the duty of the court to instruct them as to the law; and of the jury to follow such instruction. That if the jury were to decide, it would render the law uncertain; it would be almost impracticable to learn what they did decide; the court would have no right to review their decision; that every person has a right to be tried according to the fixed law of the land. If he thought the jury were judges of the law, he should hold it his duty to abstain from stating the law to them. And to this it may be added, if the law give the right to the jury, why should it run into the inconsistency of requiring the court to determine the admissibility of evidence? But all the leading arguments and authorities on the question will be found fully and ably considered by Holman, J. in *Townsend v. The State*, 2 Blackf. 156, et seq. He cites *Addison, J.'s charges*, Suppl. Add. Rep. 53 to 63, No. 6, and *Pennsylvania v. Bell*, Add. Rep. 156, and *The Same v. McFall*, id. 255, which go strongly to uphold the same doctrine. The learning of the question is perhaps exhausted in charge No. 6 of Judge Addison, p. 57, et seq., and his arguments such as it is difficult for the legal mind to resist.

NOTE 46, p. 59.—*Of the competency of slaves and blacks.*

The admission of slaves and free blacks as witnesses, is generally a matter of state regulation, as we saw ante, note 46, p. 59. See also the following cases: *Rusk v. Sowerwine*, 3 Harr. & John. 97. *Sprig v. Negro Mary*, id. 491. *Cox v. Dove*, Mart. N. C. Rep. 43. *State v. George*, id. 40. *Winn v. Jones*, 6 Leigh, 74.

NOTE 47 to 52, p. 60, 61.—*Of incompetency for want of understanding.*

A witness is not incompetent merely because he has been judicially declared an habitual drunkard, and his estate committed to trustees. (*Gebhard v. Shindle*, 15 Serg. & Rawle, 235. See note 47, p. 60.) It is enough if he be competent at the time of examination. (15 Serg. & Rawle, 238.) Though if he be, at the time, insane, an idiot or a lunatic, he is not competent. (*Ellis, J. in Phebe v. Prince*, Walk. Rep. 131.)

NOTE 52, p. 61.—*Children when incompetent for want of religious instruction.*

A child eight years old being called, it appeared that, to within sixteen weeks of the trial, she had never heard of a God or a future state of rewards and punishments; that she never prayed nor knew the nature of an oath; but since, a clergyman had twice visited and instructed her in the nature of an oath. *Patteson, J.* rejected her, saying he must be satisfied that she felt the binding obligation of an oath from the general course of her religious education; that the effect of an oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated for the purpose of the trial. (*Rex v. Williams*, 7 Carr. & Payne, 320.)

NOTES 53 and 55, p. 62, 3.—*Of incompetency from defect of religious belief.*

We noticed, ante, notes 53 and 55, p. 62, 3, the character of religious belief essential to a witness, and the mode of proof. The courts in New-Hampshire cited and adopted the principle of the New-York cases there cited, in *Norton v. Ladd*, 4 N. Hamp. Rep. 444. It was in proof by third persons, that the witness had several times, and shortly before the trial, deliberately disavowed his belief in the existence of a God. He was rejected as incompetent. It was doubted in Ohio, whether a defect in religious belief should go to the competency or merely the credibility of the witness. The objection was raised, and it was shown by third persons, that the witness' creed, so far as collectable from his conversations, was as follows: he said he did not believe in the existence of a God; but added that he saw God in trees, bushes, herbage, and every thing he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The court held, that it was unnecessary to inquire whether, in Ohio, the same rule should prevail as in England; for, if it should, the witness was competent. Wright, J. said, the court thought his declarations equivalent to an avowal of belief in the existence of a God. "He sees him in all created nature." (*Easterday v. Kilborn*, 1 Wright, 345, 6.) A person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for deeds done in the body, is a competent witness. (*Farnandis v. Henderson*, in chancery before Ch. Desaussure, Aug. 1827. *South Car. Law Journal*, 202.)

"It seems that an infidel who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath." (*Phil. Ev.* 12, note (6) to 8th ed. citing "*By Willes, C. J., Omichund v. Barker, Willes*, 550.") For the general doctrine, see *Phebe v. Prince*, Walker's Rep. 131.

NOTE 54, p. 62, and NOTE 494, p. 705.—*Of the form in which the witness' oath is to be administered. Witness examined by mistake without being sworn.*

Swearing with the uplifted hand is itself an election of that form; and therefore valid in order to sustain a charge of perjury. (*Text*, 24. *Gill v. Caldwell*, 1 Breeze, 28.) The court said, they usually directed a Catholic to be sworn on the Evangelists, as a form deemed most binding by the Catholic sect. But an oath taken by him in any other legal form would be equally binding. (*Commonwealth v. Buzzell*, 16 Pick. 154, 6, 7.) And if, by mistake of both parties, the witness be examined without oath, this is no cause for granting a new trial, although he proved a material fact. (*Cady v. Norton*, 14 Pick. 236.)

NOTE 58, p. 64.—*Of incompetency from infamy. Form and effect of a pardon.*

We saw ante, note 58, p. 64, the sort of crimes, a conviction of which disqualifies a witness.

At common law a conviction of petit larceny disqualified; but whether this was so under the peculiar enactments of Ohio in 1832; quere. (*James v. Bostwick*, 1 Wright, 142, 3.)

The effect of a pardon was considered ante, note 63, 4, 6, p. 66, 7. "I do hereby remit unto him the said J. B. the remainder of the said sentence," (before recited in the pardon) "and order him to be liberated from further confinement, on payment of costs," was held sufficient in form, to restore competency. (*Hoffman v. Coster*, 2 Whart. 453, 468, 9.) At the latter pages, various operative words are pointed out on authority, English and American, as sufficient. Among them are such as *acquit*, *pardon*, *release*, *exonerate*, *remit*, &c. So *remit the crime*, or the *sentence*, or the *indictment*, before sentence, &c. Otherwise of only part of the sentence; e. g. the fine, where there was also imprisonment in the sentence.

By a stat. of Geo. 4, ch. 32, undergoing the punishment of felonies not capital, is made equivalent to a pardon, for the purpose of restoring competency. (See note 62, p. 66.)

"It does not seem clear whether the restoration to competency, by suffering a sentence, has proceeded on the ground of incompetency being in the nature of punishment, or on the ground of a regenerating effect of punishment upon the moral feelings of the offender: in either point of view the principle is not justified by sound reasoning or experience. On the general subject of incompetency of witnesses from infamy, see a treatise on the incompetency of witnesses by R. Whitcomb, Esq., A. D. 1824." (Phil. Ev. 8th ed. 25, note (1).)

NOTE 67 TO 71, p. 67, 8.—Of the admissibility of accomplices, and of their confirmation.

That accomplices are admissible for either party, see notes 67 to 71, p. 67, 8.

For the general doctrine, see also *Rex v. Long*, 6 Carr. & Payne, 179.

Where one is indicted jointly with his accomplices, it is in the discretion of the state's attorney to try the prisoners separately, and use the accomplice or not, on trial, as a witness; but the prisoners have no such right of election for such a purpose, because the accomplice jointly indicted is not competent for them though they sever. (*State v. Calvin*, R. M. Charl. 151, 169.) And it was said generally, that the state may use the accomplice as a witness, but the prisoners not. (*Id.* 169.) *Quere* of this, independent of their being joined as parties. See note 74, p. 70, and the text 39, that he is competent for either party, if not indicted. And *quere*, whether the accomplice, so long as he remains on the record as a joint indietee, can be received as a witness for either party, though his associates be tried separately. (*Rex v. Rowland, Ry. & Mood*. N. P. Rep. 401 and note. Ante, note 122, p. 135; note 123, p. 139. See also text 74, 5, and note 72, p. 69, and note 136, p. 145.)

The course of recent English decisions with respect to the necessity and extent of corroboration in order to warrant conviction on the testimony of an accomplice, has elicited the following remarks from Messrs. Amos & Phillips, the editors of the 8th ed. of Phil. Ev. p. 80, et seq.

"Since accomplices are competent witnesses, it appears to follow as a necessary consequence, that if their testimony is believed by a jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine on the degree of credit to be attached to any competent evidence submitted to their consideration; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained by the unsupported

testimony of an accomplice is strictly legal. (Cases cited in text to this ed. p. 41, note 2, with the addition of 1 Hale, P. C. 303; per Lord Denham, 7 Carr. & Payne, 152, and per Alderson, J. id. 273." See also *The State v. Haney*, 2 Dev. & Bat. 390; *Same v. Hardins*, id. 407; and ante, note 77, p. 71. But see ante, note 324, p. 396, et seq.)

"But great injustice would result, if it were the practice of juries to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution. For, upon their own confession, they stand contaminated with guilt; they admit a participation in the very crime, which they endeavor by their evidence to fix upon the prisoner; they are sometimes entitled to reward upon obtaining conviction, and always expect to earn a pardon. Accomplices are therefore of tainted character, giving their testimony under the strongest motives to deceive; and a jury would not in general be justified in giving to such witnesses credit for a conscientious regard to the obligation of an oath. Sometimes they may be tempted to accuse a party who is wholly innocent, in order to screen themselves or a guilty associate; and if the prisoner has been their participator in crime, they may be disposed to color and exaggerate their statement against him, with a view to hide their own infamy, or, by obtaining his conviction, to protect themselves from his vengeance, and secure the expected benefit. (1) The doctrine, therefore, of a legal conviction upon the unsupported evidence of an accomplice, has been greatly modified in substance and effect; and it has long been considered, as a general rule of practice, that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (2)

"It has been laid down, that the practice of requiring some confirmation of an accomplice's evidence must be considered in strictness as resting only upon the discretion of the presiding judge. See per Lord Ellenborough in *Rex v. Jones*, 2 Camp.

"(1) See Lord Hale's remarks on Tongue's case, (1 Hale's P. C. 304.) In the earlier state trials the protection and countenance afforded by the courts to accomplices, spies and informers, was often carried to great lengths; and prisoners were sometimes tauntingly asked, whether they thought the King would bribe his witnesses. See Langhorne's case, 7 St. Tr. 446. The language of Lord Holt in the trials for the assassination plot, may probably be thought, at the present day, too favorable towards accomplices; (see particularly Charnock's case, 12 How. St. Tr. 1454.) The exordium of Lord Howard to his evidence in Algernon Sidney's case is a curious specimen of the hypocrisy of an accomplice."

"(2) On the subject of the evidence of accomplices, see a tract by the late Chief Baron of Ireland, published in 1836, which contains an elaborate examination into the origin and history of this practice. According to the view of this learned writer, the practice of requiring confirmation cannot be traced back more than half a century. And he observes, that in the earlier cases which have been referred to as authorities for the practice, nothing can be found which leads to the inference of any general regulation on the subject; and that the credibility of an accomplice, whether confirmed or unconfirmed, appears to have been treated as a question for the jury. (See Tongue's case, 6 How. St. Tr. 226, per Sir O. Bridgman, 1 Hale, P. C. 334.) See also *Rex v. Charnock*, 12 How. St. Tr. 1454. In this case almost the only material witnesses were accomplices. The observations of Lord Holt as to their competency have been cited in the text ante, p. 27. [p. 36 of this ed.] And they were said by Lord Ellenborough, in *Rex v. Despard*, to comprise in a few words the good sense and sound law on the subject. In *Rex v. Rudd*, Cowp. 339, Lord Mansfield says, 'the single testimony of an accomplice is seldom of sufficient weight with the jury to convict the offender.' The practice of requiring confirmation has been stated not to extend to misdemeanors. (See per Gibbs, Att. Gen., *Rex v. Jones*, 31 How. St. Tr. 315.)"

132; (and see *State v. Haney*, and *Same v. Hardins*, ut supra.) And this, indeed, appears to be the only mode, in which it can be made reconcilable with the doctrine already stated, that a *legal* conviction may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority, that a deviation from it on the part of a judge, in any particular case, would, at the present day, appear singular and of questionable propriety. Although the judge does not in express language, declare that a case depending on the unconfirmed evidence of an accomplice, is insufficient in law to warrant a conviction, but merely advises the jury not to place credit on the evidence; yet, as it is not likely an instance should arise, in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same, as if the practice had depended on a rule of law, instead of being the exercise of the discretion of the presiding judge. The only distinction appears to be, that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued;—or, if a jury were to convict in opposition to the recommendation of the judge, it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.

“From the anomalous nature of the rule of practice requiring confirmation, more especially from the circumstance that it is considered in law to rest merely upon the discretion of the presiding judge, and that it appears in fact to have originated in the exercise of such discretion, it might be expected, that some difference of opinion would arise as to the nature and extent of the necessary confirmation. It is clearly unnecessary that the accomplice should be confirmed in *every circumstance* which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. (See report of the trials at York, on special commission, 1813, pp. 16, 17, 50, 150, 165, 201, particularly the charges of Thompson, C. B. in *Rex v. Swallow*, and of Le Blanc, J. in *Rex v. Mellor*.) The rule on the subject which has generally been laid down is, that if the jury are satisfied that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing, that he also speaks truth in other parts, as to which there may be no confirmation. (Id., and *Despard's case*, 28 How. St. Tr. 488, and per Lord Ellenborough, 31 id. 325. *Rex v. Barnard*, 1 Carr. & Payne, 88.) So far all the authorities agree; but the point upon which a difference of opinion and practice appears to have prevailed is, as to the particular part or parts of the accomplice's testimony which ought to be confirmed.

“In some cases it has been considered, that the confirmation ought to be such as affects the *person of the prisoner*, and connects him directly with the crime; but in other cases this description of confirmation has been considered unnecessary, and it has been held, that confirmation of the accomplice in other parts of his testimony, which do not affect the identity of the prisoner, may be sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit. (a)

(a) That former statements of an accomplice have been received as confirmation, without regard to the time when they were made, see ante, note 533, p. 776 to 778, with the cautions there suggested.

"In the first case in which this question appears to have been expressly raised, two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offence, but not as to the identity of the prisoners; and the judges were unanimously of opinion, that the conviction was good, upon the general ground already mentioned; namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice. (*Rex v. Atwood, Leach*, C. C. 521. 7 T. R. 609.) In a case occurring shortly afterwards, a similar decision took place, and, as it appears, on the same ground. At the trial the court observed, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the judge, than a rule of law; and the case having been left to the jury, and the prisoner convicted, the judges afterwards held the conviction good. (*Rex v. Durham, Leach*, C. C. 538.) It was, however, said in this case, that the witness (a receiver) was rather an accessory after the fact than an accomplice in the fact. In *Rex v. Smith* and another, reported in a note to the last case, where the only witness affecting the prisoners was an accomplice, the court admitted the rule of law, that the uncorroborated testimony of an accomplice was legal evidence, but thought it too dangerous to suffer a conviction to take place on such testimony, and the prisoners were acquitted. The same general doctrine was subsequently laid down in *Rex v. Jones*, 2 Campb. 132, 31 How. St. Tr. 325, by Lord Ellenborough, who there referred to a case in which the judges were of opinion, that four prisoners had been properly convicted upon the testimony of an accomplice, whose evidence had been confirmed as to three of the prisoners, but not as to the fourth. And in the report of the York trials under a special commission, it is laid down by C. B. Thompson, that confirmation need not be of circumstances which go to prove that the accomplice speaks truth with respect to *all the prisoners*, (when several are tried,) and with respect to the share they have each taken in the transaction; for, if the jury are satisfied, that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the *other prisoners*, as to whom there may be no confirmation. (*Rex v. Swallow*, 31 How. St. Tr. 325.) Again, in a later case, where an accomplice was confirmed as to one of several prisoners jointly indicted, but not as to the others, Bayley, J. told the jury, that if they were satisfied from the confirmation, that the accomplice was a credible witness, they might act on his testimony with respect to the prisoners, as to whom he had not been confirmed, and they were convicted. (*Rex v. Dawbar*, 3 Stark. N. P. C. 34, and see *Rex v. Barnard*, 1 Carr. & Payne, 88, per Hullock, B.) In Birkett's case, (*Russ. & Ry. Cr. Cas.* 252,) on a case reserved, the judges were of opinion, that an accomplice did not require confirmation as to the person charged by him, if he were confirmed in the other particulars of his statement. And in a very recent case at the Old Bailey, before Lord Denham, Mr. Justice Park and Mr. Baron Alderson, when the counsel for the prosecution stated that he should not be able to confirm an accomplice, who was to be called as a witness, with regard to the persons of the prisoners, but only as to the general circumstances of the case, Lord Denham said he considered, and he believed his learned brothers concurred with him, that it was altogether for the jury, who might, if they pleased, act on the evidence of the accomplice without confirmation; but observed, that a person so situated, would not be likely to receive any great degree of credit. (*Rex v. Hastings*, 7 Carr. &

Payne, 152.) The prisoner was, however, acquitted, as on hearing the case there was contradiction rather than confirmation.

"The authorities above stated appear to shew, as it has been before observed, that the rule, which requires some confirmation of an accomplice to be given, is to be considered, not as a strict rule of law, but as a practice depending on the discretion of the presiding judge. And these authorities also shew, that judges, in the exercise of their discretion, have generally, if not always, considered that some confirmation ought to be given, but have not considered evidence, affecting the identity of the prisoners charged, to be essential for the purpose of confirmation.

"On the other hand, there are several recent decisions, in which judges, in the exercise of their discretion, have thought confirmatory evidence of identity ought to be given.

"Thus, in the case of *Rex v. Addis*, (6 Carr. & Payne, 388,) an accomplice who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice, or with the transaction: Mr. Justice Patteson observed, that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in a subsequent case, (*Rex v. Webb*, 6 Carr. & Payne, 595,) where it was proposed on the part of the prosecution, to confirm the accomplice as to the mode in which the felony was committed, Mr. Justice Williams said, that something ought to be proved which would tend to bring the matter home to the prisoners; and that confirming the accomplice as to the mode in which the felony had been committed, was not enough to entitle his evidence to credit, so as to affect other persons; that in fact this would be no confirmation at all, since every one would give credit to a man avowing himself a principal felon, for at least knowing how the felony was committed. In a later case, on an indictment against two persons, the same doctrine was laid down by Mr. Baron Alderson, (*Rex v. Wilkes*, 7 Carr. & Payne, 272,) who pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged; the former only proves that the accomplice was present at the commission of the offence; the latter shews that the prisoner was connected with it. In summing up, the judge observed, that confirmation merely as to the circumstances of the felony, was really no confirmation at all; that it was true, the jury might legally convict on the evidence of an accomplice only, if they could safely rely on his testimony, but that he always advised juries not to act on the evidence of the accomplice, unless confirmed as to the particular person charged with the offence. After adverting to the facts of the case, as affecting the two prisoners, the same judge stated to the jury, that if they thought the accomplice was not sufficiently confirmed as to one, they would acquit that one, and that if they thought he was confirmed as to neither, they would acquit both. In another case, (*Rex v. Moores*, 7 Carr. & Payne, 270,) where a thief and receiver were jointly indicted, the same learned judge expressed his opinion, that confirmation as to the thief, did not advance the case against the receiver. And in a former case of a similar description, where there was a slight confirmation as to the receiver, but none as to the principal felon, Linstead, J. thought the case failed altogether, and that the accomplice ought to be confirmed as to the principal, before the jury could be asked to believe the witness' testimony. (*Rex v. Wells*, Mood. & Malk. 336.) The ground of this decision

appears to have been, that it was necessary to establish the guilt of the principal, by confirming the accomplice as to him, before the question of the guilt of the receiver could arise.

“ From the class of cases which have been last cited, it will appear, that the recent practice of several judges, in exercising their discretion as to the evidence that ought to be adduced, in order to entitle an accomplice to credit, has been to require a confirmation upon some point affecting the person of the prisoner charged: and that when several prisoners are jointly tried, confirmation is to be required as to all of them before all can be safely convicted. Indeed, it would be difficult to assign a satisfactory ground for requiring confirmation as to the person of a prisoner indicted alone, and dispensing with confirmation as to prisoners jointly indicted: the same reasons which render confirmation necessary in the former case, appear to require it in the latter; if a distinction between the two cases were allowed, a prisoner's acquittal or conviction, upon an accomplice's testimony, might depend upon the mere accident of his being indicted alone, or jointly with others. It will be observed, that it is still laid down by judges, even when calling for this personal confirmation, that the jury, if they think proper, may legally convict upon an accomplice's testimony unsupported; and that, in the absence of such support, they do not withdraw the case from the jury, but only advise them not to give credit to the accomplice.

“ Whether the rule of practice, which, as we have seen, has been recently followed, will be adopted as a general rule, by which all judges will consider themselves bound, may, perhaps, not be wholly free from doubt, but the weight of the later authorities appears to be in favor of such a rule. The distinction between confirmation, as to the manner in which an offence was committed, and as to the parties by whom it was committed, is of obvious importance; and although cases may arise, in which, from the confirmation of an accomplice, as to the circumstances attending the commission of a crime, the jury may be led to conclude, that the accomplice speaks truth with regard to the person charged, still, as the two points are, in general, essentially different, great caution is to be used in drawing such a conclusion. If the witness has really been an accomplice, as he states himself to be, he must be acquainted with the manner in which the offence was committed; and in describing the manner, it would not, in general, be the interest or desire of an accomplice to swear falsely. But, with respect to persons concerned, there may be strong reason to infer the existence of motives which would induce an accomplice to fabricate or pervert some facts against a party charged, notwithstanding the other facts related by him, may be indisputably true, or even notwithstanding the general consistency of his story may be clearly established.

“ This subject, so important in itself, has created much difference of opinion at the Irish bar. See an anonymous pamphlet by an Irish barrister, Dublin, 1824; the object of which is to prove, that some evidence of personal identity ought to be given in all cases. And see the tract of C. B. Joy, which, though only recently published, was written some years ago, in answer to the former pamphlet. The Lord Chief Baron considers that the rule of practice, requiring confirmation, may be satisfied, by corroborating parts of the accomplice's evidence, not affecting the persons of the prisoners. In the preface, the learned writer states, that he was induced to publish his treatise in consequence of the cases of *Rex v. Addis*, and *Rex v. Webb*, cited *supra*. But the

subsequent cases to the same effect, were probably not published when the tract of the Chief Baron appeared; they are not referred to by him, neither does he allude to the previous case of *Rex v. Wells*, *supra*.

"It appears that the practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally when two or more accomplices are brought forward against a prisoner. In a case in which two accomplices spoke distinctly to the prisoner's guilt, Mr. Justice Littledale told the jury, that, if their statement were the only evidence against him, he could not advise them to convict; observing, that it was not usual to convict on the evidence of one accomplice, without confirmation, and that, in his opinion, it made no difference whether there were more accomplices than one. (*Rex v. Noakes*, 5 Carr. & Payne, 326.) But see Joy's work, cited *supra*, p. 100, *contra*, though he does not cite *Rex v. Noakes*. He refers to the speeches of the Sol. Gen. and Mr. Serg. Best, in *Rex v. Despard*, 28 How. St. Tr. 423. See on this subject, the anon. pamph. cited *supra*, observations as to the trial of the incendiaries of Wild Goose Lodge—arson by more than 100 persons marching in 3 parties, from distant points, not connected with each other. The accomplices were selected as witnesses from different parties. (See further, on the general subject, Sir T. Wetherington's arg. 5 How. 176; Discussion on Sayer's case, 16 How. 158; Sir R. Atkyn's remarks, 9 How. 721, as to the evidence of an indicted accomplice; Murphy's case, 19 How. 702; Sir T. Copley's remarks in Watson's case, 32 How. 513; Lord Ellenborough's charge in Watson's case, 32 How. 553; Lord Tenterden's charge in the Cato-street conspiracy, 33 How. 689.)

"It appears to have been held in a late case, that a confirmation by the wife of an accomplice, would be insufficient; it was said that the wife and the accomplice must be considered as one, for this purpose. (*Rex v. Neale*, 7 Carr. & Payne, 168, per Park, J.)

"In another recent case, in which the prisoner was indicted for manslaughter at a fight, it was objected, that all persons who had been present, were principals in the second degree, and that their evidence ought to receive confirmation, as in the case of accomplices; but Mr. Justice Patteson was of opinion, that they were not such accomplices as would require any further evidence to confirm them. (*Rex v. Hargraves*, 5 Carr. & Payne, 170.)"

These remarks of the learned editors, which so pointedly concede that requiring confirmation rests in mere discretion, should not go to the profession without calling their attention to some remarks which we made, and cases we cited, *ante*, note 324, p. 396, *et seq.*, in support of the proposition, that, where a case depends on the testimony of a single uncorroborated witness, whose credibility is seriously impeached, a jury have no legal power to convict.

NOTE 72, p. 69; NOTE 136, p. 145.—*When parties jointly indicted may be witnesses for or against each other.*

It seems to have been assumed, in one case, that though an accomplice and his associates be jointly indicted, yet, if the latter be separately tried, the accomplice may be a witness for the state, though not for the prisoners; and it was held, that the state's attorney, but not the prisoners, may elect to try separately with a view to use the accomplice as a witness. (*State v. Calvin*, R. M. Charlt. 151, 169.) But before

the state's attorney can in such case use the accomplice as a witness, ought not the attorney to move and have him acquitted, or at least enter a nolle prosequi against him? (See *Rex v. Rowland*, Ry. & Mood. N. P. Rep. 401, and the note.) Does not the case come within the general rule, that, so long as the witness' name stands on the record, he being thus designated as a joint party and subject to be tried as such, he is incompetent? (Note 122, p. 135. Note 123, p. 139. And see the text, p. 74.) In respect to the prisoner's right to have one jointly indicted with him sworn as a witness in his behalf, he must in all cases, whether he be tried jointly with, or separately from the witness, who has not even been arraigned, wait for a conviction or acquittal of the witness. (*The People v. Williams*, 19 Wend. 377. Text, 74, 5, and Note 72, p. 69. Note 136, p. 145. *State v. Blennerhassetts*, Walker's Rep. 7, 16, 17.) If there be no evidence against him, the court may direct an acquittal, or order the defendant to be discharged. (Ante, note 136, p. 145, 6. 2 R. S. 616, § 19, 2d ed. *State v. Blennerhassetts*, Walker's Rep. 7, 16, 17.) But until that be so, the rule of exclusion applies, even where the trials are ordered for different counties. (*State v. Mills*, 2 Dev. 420. *Carter's case*, cited id. 422.) And it makes no difference that the defendants have pleaded separately. (*State v. Mooney*, 1 Yerg. 431.) It is put in the text that, unless acquitted, he should not only be convicted, but fined, before he is competent. The American cases usually put the case of a conviction merely as restoring competency, without its being followed by the sentence of the court. But Ruffin, J. in *State v. Mills*, (2 Dev. 422,) says the practice in North Carolina has accorded with the English strictness.

In *Amos and Phillips's* ed. of *Phil. Ev.* p. 70, note (§), the case of *Rex v. Lafone*, (5 Esp. 160,) is examined, and several arguments urged in favor of receiving one joint indictee as a witness for another, after he has suffered judgment by default. The learned editors urge, what it seems difficult to deny or explain away, that there exists no objection beyond what goes to his credit, any more than in the case of an accomplice. The same reasoning would seem to apply where the witness pleads guilty, especially in all those courts which do not exclude witnesses solely on the ground of their being parties.

NOTE 73, and 4, p. 69; NOTE 74, p. 70; NOTE 75, p. 70; NOTE 84; NOTE 244, p. 256; NOTE 95, p. 107.—*Of the competency of a witness not a party, placed in the defendant's situation, as being a joint actor with him in the supposed wrong, or severally liable for the demand claimed, on contract express or implied, &c.*

A witness standing in the same situation with the party, is not, on that account, disqualified. At note 75, p. 70, and note 84, p. 87, are cases for receiving joint wrong doers, as witnesses either for the plaintiff or defendant. The additional cases on this head are quite uniform to the same effect. (See ante, note 244, p. 256, and note 95, p. 107; *Lentz v. Stroh*, 6 Serg. & Rawle, 34, 41; *Bailor v. Smithers' heirs*, 1 Litt. 110; *West v. Bolton*, 4 Verm. Rep. 558; *Moulton v. Moulton*, 1 Shepl. 110; *Smith v. Hubbs*, 1 Fairf. 71; *Moscatti v. Lawson*, 7 Carr. & Payne, 32; *Lethbridge v. Phillips*, 2 Stark. Rep. 544.)

So of an alleged several wrong doer, whose claim depends on the same question as the one in issue. (*Maus' lessee v. Montgomery*, 15 Serg. & Rawle, 221, 223.)

The case of *Cooper v. Miller*, (1 Browne, app. 68,) that one is not competent for the defendant in replevin, because he went with him and gave countenance to the distress, is contrary to almost, if not quite, the whole current of authority. It was said in one case, that the tortious vendor of the wrong doer defendant, was not competent for the plaintiff, because a verdict against the defendant would be a bar to an action against the witness. (*Pierce v. Hindsall*, 1 Tyl. 153, 155.) The case itself, as well as the reason given, seems to stand almost alone against a host of authority.

The son being sued in trespass for driving away the plaintiff's cow, the father, who directed his son, the defendant, to drive her away, was held competent for the defendant. (*West v. Bolton*, 4 Verm. Rep. 558.) In case against one for conspiring with B. to defraud the plaintiff, B. is a competent witness for the plaintiff. (*Brown v. Marsh*, 8 Verm. Rep. 310, 12, 13.)

The appearance of an attorney generally for three wrong doers, one not being summoned, will still not make them parties, if the plaintiff proceed against those only who were summoned; and so the third is competent for the others. (*Lentz v. Stroh*, 6 Serg. & Rawls, 34, 41. See ante, note 132, p. 144.)

In trover, A. was called and held competent for the plaintiff to show that he (A.) bought the goods of the plaintiff fraudulently, without the means or intent to pay for them, and sold them to the defendant. (*Triebner v. Soddy*, 7 Carr. & Payne, 718.) In separate informations of *quo warranto* against separate members of a corporation, on the trial of one, the other parties are competent for the defendant. (*Rex v. Gray*, 2 Selw. N. P. 1148, 6th ed.) In an action for infringing a patent, the purchaser from the plaintiff of a license to use the patent, is yet a competent witness for him. (*Desrosne v. Fairlie*, 1 Mood. & Rob. 457. And see *Treadwell v. Bladen*, 4 Wash. C. C. Rep. 703, 4.) In an action on the case for waste, by the reversioner against a stranger, the tenant, though jointly concerned in committing the waste, was held to be a competent witness for the plaintiff. (*Speers v. Broomlee*, 2 Huds. & Brooke, 432.) But the case in fact seems to have been no more than that of *Doddington v. Hudson*, cited and stated at p. 49 of the text. In *Lethbridge v. Phillips*, 2 Stark. Rep. 544, the action was for injuring a picture, and the man who borrowed it of the plaintiff, and without his leave sent it to the defendant, was received for the plaintiff to prove his case.

In an action against the owner of a ship, for goods supplied, the master is competent for the plaintiff to prove the ownership. *Le Blanc, J.* said he was liable in respect to his contract; but the owners were liable from their character. (*Rowcroft v. Basset*, Peak. Add. Cas. 199.) He is equally a witness for the defendant. (*Descadillas v. Harris*, 8 Greenl. 293.) In one case, the owner was received as a witness for the plaintiff, in an action to charge another with work done on the schooner at the defendant's special request. (*Nicholson v. May*, 1 Wright, 660.) In an action for use and occupation of land, the defendant's tenant of the same land, who had paid all the rent to the defendant, was held to be a competent witness for the plaintiff. (*Grant v. Beal*, 4 Har. & M'Hen. 419.) In assumpsit against the owner of a ship, for money advanced to the master in a foreign port, for which he drew his bill on the owner, he was held a competent witness for the plaintiff. (*Descadillas v. Harris*, 8 Greenl. 293.) And said, he was indifferently liable to the plaintiff or the owner, for the principal only; not, as in *Scott v. McLellan*, 2 Greenl. 199, liable to the party calling him for principal, &c. and costs, and to the other party for principal only. But see ante, note 106, p. 113.

NOTE 76, p. 70; NOTE 78, p. 71.—*Of the competency of a party to negotiable paper, and other instruments, to impeach them.*

NOTE 78, p. 71, et seq. presented many conflicting American cases, as to the prevalence and extent of the rule that one shall not be received as a witness to impeach an act to which he is a party. We add books showing, what appears there, that in some cases the rule has been very extensively applied, being extended to deeds, and even oral sales. (*Pierce v. Hindsall*, 1 Tyler, 153. *Plummer v. Lane*, 4 Harr. & M'Hen. 72.) But it has been generally denied as to these. (*Jackson, ex dem. Hopkins, v. Leek*, 19 Wend. 339. *Nichols v. Hotchkiss*, 2 Day, 121. *Caston's ex'rs v. Ballard*, 1 Hill, 406. *Hunter v. Stevenson*, id. 415. *Hudson v. Hulbert*, 15 Pick. 423, 6. *Simmons v. Parsons*, 1 Bail. 62. *Calloway v. Willie's lessee*, 2 Yerg. 1. Ante, note 76, p. 70, 1, and note 78, p. 71, et seq. *Wilmot's lessee v. Talbot*, 3 Harr. & M'Hen. 2. *Worthington v. Bicknell*, 2 Harr. & John. 53. *Hall v. Gittings*, 2 id. 380, 386, and note at the last page. *Stump v. Roberts, Cooke*, 350. *Guy v. Hall*, 3 Murph. 150. *Taylor v. Luther*, 2 Sumn. 228, 235. *Seymour's adm'r, v. Beach*, 4 Verm. Rep. 500, 2, 3. *Wise v. Tripp*, 1 Shepl. 9, 12.) Though it is often allowed as to negotiable paper, subject to certain restrictions and qualifications; (ante, note 78, p. 71, et seq.; *Drake v. Henley*, Walker's Rep. 541; *Lonsdale v. Brown*, 3 Wash. C. C. Rep. 404; *Adams v. Carver*, 6 Greenl. 390; *Lane v. Padelford*, 2 Shepl. 94. *Story, J. in Taylor v. Luther*, 2 Sumn. 235; *Buck v. Appleton*, 2 Shepl. 234; *Wendell v. George*, R. M. Charl. 51; *Freeman's Bank v. Rollins*, 1 Shepl. 202; *Van Schaack v. Stafford*, 12 Pick. 565; *Spring v. Lovett*, 11 Pick. 417; *Wood, J. in Stone v. Vance*, 6 Ham. 248; *Harley v. Emerick*, Miles, 36; *Bank of Pennsylvania v. M'Calmont*, 4 Rawle, 307, 311; *Gest v. Espy*, 2 Watts, 265; *O'Brien v. Davis*, 6 id. 498; *Emerick v. Harley*, 2 Wharton, 50; *United States v. Leffler*, 11 Pet. 86; per M'Lean, J. in *Scott v. Lloyd*, 12 Pet. 149;) and by many of the American courts without restriction, even to avoid negotiable and other paper, unless the witness be interested; (ante, note 76, p. 70, 1, and note 78, p. 71; *Robertson v. Mills*, 2 Harr. & Gill, 98, in connection with other Maryland cases, ante, note 76, p. 80; per all the judges, in *Billingsly v. Knight*, 2 Tayl. 103, often cited as 3 N. Car. Law Repos. though ante, note 78, p. 80, several cases are cited from the North Carolina reports which go strongly the other way.) This stood with a *quere* in Connecticut; (ante, note 76, p. 79; *Cowles v. Wilcox*, 4 Day, 108;) but it is now no longer so. (Ante, note 78, p. 79.) The party even to negotiable paper is received to impeach it, in Georgia, (*Slack v. Moss, Dudley*, 161,) though this was formerly doubted. (*Wendell v. George*, R. M. Charl. 51.) So he is received in Alabama, (*Todd v. Stafford*, 1 Stew. 199, 200,) and various other states. (*Johnson v. Blackman*, 11 Conn. Rep. 342, 348. *Harmon v. Arthur*, 1 Bail. 83. Per *Johnson, J. in Char v. Keckelely*, 1 Bail. 481. *Stump v. Napier*, 2 Yerg. 35.) *Gibson, C. J. (in O'Brien v. Davis*, 6 Watts, 498, 499, 500,) anticipates the abolition of all restriction in Pennsylvania, except the interest of the witness, as in England and most of the American states. See the case of *Keefe v. Archdeken*, 1 Vern. & Scriv. Irish Rep. 195, 196, and note, which recognized *Walton v. Shelly* as law, though we suppose the courts in that country have since, like the English courts, repudiated it.

NOTE 79, p. 81.—Rules of competency in the admiralty courts.

But the rules of competency on the instance side of the admiralty, are, in general, the same as at common law. (Boston, &c. 1 Sumn. 328, 343.) See the qualification as to salvors arising from necessity. (Id. 328, 344. Henry Ewbank, &c. id. 401, 432.)

NOTE 80, p. 81 ; NOTE 84, p. 86 ; NOTE 88, p. 92 ; NOTE 93, p. 99.—*Of such remote or contingent interest as will not be allowed to affect the competency of the witness, the verdict not being evidence for or against him ; his interest, therefore, being merely in the question, or resting in uncertain benefit, or mere expectation, or he laboring under a mere bias of feeling.*

That a mere bias of feeling or interest in the question, is no objection ; but to disqualify a witness, he must have a direct and certain interest in the event, or the verdict must be evidence for or against him, see numerous cases in the notes now cited ; also *Miller v. Field*, 3 A. K. Marsh. 706. *Day v. Green, Hardin*, 117. *State v. Woodward*, 4 Halst. 21. *Caston's ex'rs v. Ballard*, 1 Hill, 406. *Hayes v. Grier*, 4 Binn. 83. *Bowman v. Willis*, 3 Bing. N. C. 669. *Benedict v. Hecox*, 18 Wend. 490. *Anderson v. Passman*, 7 Carr. & Payne, 193. *Fitch v. Boardman*, 12 Conn. Rep. 345. *Phebe v. Prince*, Walker's Rep. 131.

We shall state various other cases. On a plea of nonjoinder of a plaintiff, the person named as not joined, is competent for the defendant to prove the plea. (*Davis v. Evans*, 6 Carr. & Payne, 619.) In a suit against an agent, to recover back money paid him, on the ground that nothing was due to the principal, the latter is competent for the defendant. (*Leidel v. Peckworth*, 10 Serg. & Rawle, 442.) One co-heir and tenant in common, is a witness for or against another, in ejectment. (*Nass v. Van Swearingen*, 7 Serg. & Rawle, 192.) A grantor without warranty is competent to support the title. (*Dornick v. Reichenback*, 10 Serg. & Rawle, 84. *Connelly's heirs v. Chiles*, 2 A. K. Marsh, 442, 3. *Krause v. Reigel*, 2 Whart. 385. *Swisher's lessee v. Williams' heirs*, 1 Wright, 754. *O'Neill, J. in Cates, adm'r v. Wacter's heirs*, 2 Hill, 444, and case of *Sims v. De Graffenreid*, there stated.) And this, though he conveyed with a parol understanding that the property was still to continue his, the suit being conducted at the expense of the grantee. (*Domer v. Reichenback*, 10 Serg. & Rawle, 84.) In case, for obstructing a way claimed by the plaintiff, over the defendant's land, the grantor of the land to the defendant, with general warranty, at a time when the way ran across it, the deed making no mention of the way, was held a competent witness for the defendant. (*Greenwalt v. Horner*, 6 Serg. & Rawle, 71.) Though an interest in the fund in question in the cause will disqualify the witness, yet it must not be remote, but immediate. Thus, the surviving husband of a wife, administratrix, is a competent witness for her surety in an action on her administration bond. (*Wallis' ex'r v. Britton*, 1 Har. & John. 478.) In trespass qu. claus. freg., a witness was held competent for the plaintiff, though he answered that he expected a lease of the locus in quo, from the plaintiff. (*Baker v. Pierce*, 4 Har. & M'Hen. 502. And see *Day v. Green, Hardin*, 117. *Seaver v. Bradley*, 6 Greenl. 60.) In one case, the surety was denied to be competent for his executor, plaintiff. The surety had acted as agent, making large collections for the estate ; but released his commissions, and all reward ; yet denied to be competent. (*Bean's ex'r v. Jenkins' adm'r*. 1 Harr.

& John. 135.) Quere; for the witness came to support no right of his own; nor could the recovery benefit him, or a failure injure him, with any degree of certainty. And this case was accordingly disregarded, and appears to be overruled in *Ferguson v. Cappeau*, 6 Har. & John. 395, 402. In this last case, it was held that he would not be liable on his bond for the costs of the suit. (Id. 402.) The liability for these, even of the principal himself, is at least uncertain and contingent; for he may generally reimburse himself out of the estate. (Id.) It was said, that a witness for the state was not incompetent, merely because he was entitled to a premium on the conviction of the prisoner. But he was rejected on other grounds. (*State v. Bennet*, 1 Root, 249.)

A vendor with warranty against his own acts, and those of his co-heirs, and those claiming under them, is a competent witness for his grantee, the plaintiff or defendant in ejectment, against one who claims not under those to whom the warranty extends. (*Connelly's heirs v. Chiles*, 2 A. K. Marsh. 243, 4. *Porter's heirs v. Robinson*, 3 id. 253, 256, 7. *Burns v. Lyon*, 4 Watts, 363, 6. *Beach v. Sutton*, 5 Verm. Rep. 200, 214. *Beidleman v. Foulk*, 5 Watts, 308.) A minor son is a witness for his father, in an action for the wages of the son. (*Keen v. Sprague*, 3 Greenl. 77, 80.) That a promise by the plaintiff to pay his witness a debt out of the fund recovered, does not disqualify the witness, with the reason and authorities, see *Seaver v. Bradley*, 6 Greenl. 60, 63, 4, per Mellen, C. J. and ante, note 109, p. 119. In assumpsit, for wheat sold and delivered under a contract to deliver a certain parcel, a witness who was, after the contract, received by the plaintiff to participate in it, and deliver a part for and in the name of the plaintiff, and on his credit, at the original contract price, and whom the plaintiff had paid, was held clearly competent for the plaintiff. (*Barstow v. Gray*, 3 Greenl. 409.) In an action against a sheriff, for not levying on goods of a firm which he had attached for a debt against one of the firm, the defence was, that attachments and claims for partnership debts against the firm, had exhausted all their property. Held, that a creditor of the firm was a competent witness for the defence. (*Commercial Bank v. Wilkins*, 9 Greenl. 28, 39.) A master is a competent witness for his indentured servant, or black boy, holden to service under the abolition law, on trial for a capital offence. (*State v. Aaron*, 1 South. 231.) In assumpsit, a third person, or, if he be dead, his executor and legatee, is a competent witness for the defendant, to prove that such third person paid the debt, at the request of the defendant. (*Henarie v. Maxwell*, 5 Halst. 297.) In trover for slaves, the plaintiffs claimed under a division, by consent between joint tenants. A person who claimed and held other slaves under the same division, was offered as a witness for the plaintiff, to prove the fact of division; but was rejected as incompetent. (*Starkey's adm'rs v. McClure*, Mart. N. C. Rep. 73.) But this case (A. D. 1797,) would, doubtless, not be followed at the present day; for the interest was in the question only. In an action against the vendor on a warranty of soundness, or a defence to an action by him for the price of the article, grounded on a breach of such warranty, the vendor who sold to him with a like warranty of soundness, is a competent witness for him, to prove soundness. The case was one of the warranty of a horse. The court said, the record could not be evidence as in case of the warranty of title; for the horse might have been well when the witness sold him. (*Duncan v. Bell*, 2 Nott & McCord, 153, 156. Ante, note 85, p. 91, S. P. *Johnson v. Harth*, 2 Bail. 185, per Harper, J. and the cases

there cited by him. A. assigned to B. all his interest in certain property deposited in the hands of C., for which the latter was bound to account to A. and B. jointly. In an action by B. against C., on C.'s promise to account to B. alone, made subsequent to the assignment, A. was held to be a competent witness for B. (*Lang v. Fiske*, 2 Fairf. 385, 390.) In trespass, *quare claus. fregit*, by one claiming under the witness' prior unregistered deed with warranty, against another claiming under his subsequent deed of quit claim, registered prior to the other, the witness was held competent for the plaintiff to prove that the subsequent grantee took with notice of the first deed. (*Adams v. Cuddy*, 13 Pick. 460, 3, 4.) A grantor, without warranty, is competent to support his vendee's title, though the latter have not paid the purchase money. (*Krause v. Reigel*, 2 Whart. 385, 7.) In an action for a nuisance to the land by an assignee of a mortgagee in possession, his assignor is competent for him, inasmuch as the record would not be evidence in respect to the title, especially when the pleadings do not put that in issue. (*Hull v. Fuller*, 7 Verm. Rep. 100, 106.) A wife, though she join her husband in the execution and acknowledgment of a deed, containing a covenant of warranty, is not bound by the covenant. The object was merely to bar her dower, and she may, therefore, on her husband's death, be received as a witness to sustain the title. (*Chambers v. Spencer*, 5 Watts, 404.) In an action by a quasi corporation, e. g. a road commissioner, in his own name, on a contract made with his predecessor, the latter is a competent witness for the plaintiff; the witness, though remotely interested, yet being competent within the various cases, *passim*, in these notes, respecting the competency of municipal corporators. (*Cox v. Way*, 3 Blackf. 143.) An action was brought on the promise of the defendant, to pay, at maturity, a note which the plaintiff made for the accommodation of one Shaw, to secure a debt due by him to one Hart. And Hart was held to be a competent witness for the plaintiff, to prove the defendant's promise, though the plaintiff had not yet paid his note to the witness, and the latter had endorsed it; and anticipated that the avails of a recovery by the plaintiff in the pending suit, would be appropriated to discharge his liability as endorser. The objection was, that the witness would be, in equity, entitled to the benefit of the recovery, within *Phillips v. Thompson*, 2 John. Ch. Rep. 418, which held that the holder was entitled to the benefit of collateral securities given by the maker to the endorser. But the court held that the doctrine applied only as between assignor and assignee, it which case the latter is held to be a purchaser, not only of the principal debt, but of all collateral securities. And the witness here was not an assignee; but a mere payee of the plaintiff's note; and a purchaser of nothing but the maker's responsibility. The witness, therefore, had no legal nor equitable interest. (*Robertson v. Stewart*, 5 Watts, 442, 5, 6.) A creditor is a competent witness in favor of his debtor, though a recovery will increase his substance, and means of paying the witness. (*Gibson, C. J. in Robertson v. Stewart*, 5 Watts, 445, 6.) See *Paull v. Brown*, 6 Esp. Rep. 34, and *Noel v. Davis*, Barn. & Adol. 96, S. P.; but note the distinction between these cases, and the one just put. There, the creditor came to increase a fund on which his debt was a lien; and, therefore, *querre*. (Ante, note 109, p. 119. *Seaver v. Bradley*, 6 Greenl. 60, 63, 4.) Any interest, so remote, or of such a nature, that it cannot be released, will not disqualify a witness. (*Henderson, C. J. in State v. Kimbrough*, 2 Dev. 439.) In case for building a dam on land held as tenant in dower, by A.'s widow, and diverting a water course, to the damage

of the plaintiff, the husband of A.'s heir is competent as a witness for the defendant. (*Adams v. Butts*, 9 Conn. Rep. 79. Ante, note 567, p. 813, S. C., and see *Leach v. Thomas*, 7 Car. & Payne, 327.) The reversioner is a competent witness for the particular tenant. (*Id.*) But quere, if so in ejectment. A witness merely requesting another to become security for the plaintiff's costs, who does so accordingly, without engaging to indemnify the surety, does not disqualify the witness to testify for the plaintiff, though the witness may deem himself bound in honor to indemnify. (*Mulkevan's ex'rs v. Gillespie*, 12 Wend. 349.) In assumpsit, by a vendee, to recover back money paid to his vendor of land, founded on the defendant's breach of the contract to convey, one who had covenanted to convey the same land to the defendant, was yet held to be a competent witness for him. (*Reed v. McGrew*, 1 Wright, 105, 5 Ham. 375, S. C. but not S. P.) In an action by a jailor for jail fees, the sheriff is, prima facie, a competent witness for the plaintiff. It will not be intended that the sheriff is interested, as a sharer in the fees, merely because he has deputed the plaintiff to keep the jail. (*Saxon v. Boyce*, 1 Bail. 66.) The plaintiff took a note of T., on which C. was surety. T. assigned property to the plaintiff in payment, which one W. seized on his fi. fa. against T., alleging the assignment to be fraudulent; the plaintiff, therefore, sued the sheriff. Held, that C. was a competent witness for the plaintiff; for the note was paid by the assignment, whether fraudulent or not. (*Terry v. Belcher*, 1 Bail. 568, 571.) In an action on a bond against an administrator, one who had endorsed for the accommodation of the intestate, was offered as a witness for the defendant. He was held competent, though he admitted the estate was insolvent, and that a recovery on the bond would exhaust the assets. (*Ogier v. Holmes*, 1 Bail. 473, 5, 6.) In ejectment by a devisee, a residuary legatee of the estate is competent for the plaintiff, though a suit in favor of the estate be pending against the defendant, for use and occupation of the locus in quo. (*Sumner v. Murphy*, 2 Hill, 488.) In an action for the infringement of T.'s patent of a machine, the defendant relied on a patent to P. for the same machine, who assigned it to the defendant. P., the assignor, was held to be a competent witness for the defendant. (*Treadwell v. Bladen*, 4 Wash. C. C. Rep. 703, 4; and see *Derosne v. Fairlee*, 1 Mood. & Rob. 457.) In an action by A.'s administrator against B.'s administrator, for money had and received from C.'s administrator, to the use of the plaintiff's intestate, the administrator of C. is a competent witness for the plaintiff. (*Wiggins' adm'r v. Pryor's adm'r*, 3 Porter, 430.) In trover, for negroes, by a trustee, claiming them under a bequest to the plaintiff, in trust for an infant for life, remainder to his heirs, the uncles of the infant, now next of kin, are competent witnesses for the plaintiff. (*High v. Stainback*, 2 Stew. Rep. 24.) In assumpsit, the defence was, that the plaintiff had received a note made by A. in satisfaction. Held, that A. was a competent witness for the plaintiff, to prove the note a forgery. (*Hickman v. Nance*, 1 Stew. Rep. 354, 373, 4.) In detinue for a slave, the defendant offered W. as his witness, who had sold the slave with warranty, to M., from whom it had passed with warranty, through several sales, to the plaintiff. Held, that W. was competent. (*Martin v. Kelly*, 1 Stew. Rep. 198.) The father is a competent witness for his son. (*Smith v. Wiggins*, 3 Stew. Rep. 221.) Where the defendant contracted with A., B., C., &c., severally; in an action by one for a breach of the contract, another was held a competent witness for the plaintiff. (*Wadhams v. The Litchfield, &c.*, T. P. Co. 10 Conn.

Rep. 416, 420, 1.) In ejectment, a witness is not incompetent for the plaintiff, merely because he claims other land depending on the same location and boundary, which the plaintiff is seeking to establish. (*Woodard v. Speller*, 1 Dana, 179, 181.) So if he claim as heir of B., and be offered to defeat the plaintiff, who also claims as heir of B. (*Doe, ex dem. Bath, v. Clarke*, 3 Bing. N. C. 429.) In Kentucky, a replevin bond with surety, duly acknowledged, had the force of a judgment. In an action against a constable for not returning an execution on such a bond, the surety is a competent witness for the defendant. (*Williams v. Hall*, 2 Dana, 97.) In an action against an administrator, his surety is admissible as a witness for him, there being, in the cause, no suggestion of a devastavit. (*Bennington v. Parkin's adm'r*, 1 Harringt. 128. *Spencer's adm'r v. Brooks*, 1 Wright, 178.) In an action by the vendor, for the rescission of a sale of land, on which, upon rescission, a judicial mortgage [judgment] of the witness would attach and become a lien; he was, notwithstanding, held competent for the plaintiff. (*Russell v. Sprigg*, 10 Lou. Rep. (Curry) 421, 4, 5.) In an action by a holder against the surety, a maker of a note, the principal, a co-maker, not sued, was received as a competent witness for the defendant, the court saying his interest was balanced. (*Freeman's Bank v. Rollins*, 1 Shepl. 202, 205. *Quere.* See ante, note 107, p. 113, note 103, p. 110, 111, and note 118, p. 133.) In a like case, he was released. (*Harman v. Arthur*, 1 Bail. 83.) See also several cases in point, note 107, p. 113, in connection with the text, p. 62. In case for flowing the plaintiff's land, by the defendant's dam, the owners of mills below, though benefitted by the dam, were held competent witnesses for the defendant. (*Inhabitants of China v. Southwick*, 2 Fairf. 341.) One Tenny, by foreign attachment, recovered judgment against M. and a debtor to M. by note, not negotiable. Afterward, the debtor gave Tenny his, the debtor's, note for the judgment debt. Then one A. claiming to be a bona fide assignee of the first note, sued the debtor upon it in M.'s name. Held, that Tenny was a competent witness for the debtor, now defendant. (*Mathews v. Houghton*, 2 Fairf. 377, 380.) In trover, for goods sold to and obtained by M., on a fraudulent pretence that he would pay cash, others from whom he had obtained goods in the same way, were held competent witnesses for the plaintiffs. (*Rowley v. Bigelow*, 12 Pick. 307, 311.) In assumpsit, by a mortgagor of land, for use and occupation, the mortgagee is a competent witness for the defendant, to prove that the mortgage has been foreclosed by his entry, and that he demised to the defendant. (*Plympton v. Moore*, 13 Pick. 191.) In assumpsit on an account, the defence was, that A. sold a horse to the plaintiff, a part of the price to be in part satisfaction of the account, the defendant agreeing to pay the residue to A., which he had done; A. was held a competent witness for the defendant. (*Burt v. Nichols*, 16 Pick. 560.) In an action on a covenant of warranty, one who had conveyed the land in question to others with warranty, was held a competent witness for the plaintiff, to prove that he entered as the agent of his grantees, and evicted the plaintiff. (*Burrage v. Smith*, 16 Pick. 56, 60.) A witness is competent for a plaintiff in ejectment, though he, being in possession of lands depending on the title in question, admits that he prefers the plaintiff should succeed, hoping to purchase from him on better terms than from the defendant. (*Jackson, ex dem. Hopkins, v. Leek*, 12 Wend. 105, 108.) An attorney sues an assignee for costs upon his retainer; the assignor is a competent witness for the plaintiff. (*Watson v. Smith*, 13 Wend. 51, 2.) On a bill filed to avoid a judgment binding the

plaintiff's land, held, that persons claiming under him, as purchasers of parts of the same land, were competent witnesses for him; because the decree would not conclude them. (*Johnston v. Hubbell*, 1 Wright, 69.) Quere; for a perpetual injunction would protect them. In case, for a false representation against the vendor of land, one who had purchased part of the same land from the plaintiff, at the original price of his purchase, is competent for him, to prove the fraud. (*Wilkinson v. Root*, 1 Wright, 686.) In replevin, by A., for goods distrained by the defendant, as those of B. his tenant, and issue on a plea of property in A., the tenant B. is competent for A. to prove the plea. (*McConahy v. Kepler*, 3 Pennsylv. Rep. 467.) On a bill filed by a surety, to be relieved of his suretyship, the principal was held to be a competent witness for the complainant. (*Gass v. Stinson*, 2 Sumn. 453, 458. Quere. See *Jordan v. Trumbo*, 6 Gill & John. 103, contra. And see ante, note 107, p. 113, and several cases there cited, contra.) However, *Freeman's Bank v. Rollins*, supra, supports *Gass v. Stinson*, on the ground that the witness' interest is balanced. Quere. See also the head, of the competency of an alleged debtor not sued, &c., in this supplement, and several references there. It was held, that, in ejectment, the defendant's landlord might be a witness for him. (*McGee v. Eastis*, 5 Stew. & Port. 426, 433.) Quere. See ante, note 113, p. 123. By a successful defence, his tenant retains his possession, which is his landlord's; and by an eviction, the landlord loses his rent. See also per *Ruffin, C. J.* in *Rogers v. Mabe*, 4 Dev. 197, who says, "nor can a landlord testify for his tenant." And see *Lodge v. Patterson*, 3 Watts, 74, 6. In assumpsit, to recover money advanced to the defendant, on his contract to convey land to the plaintiff, on the ground that the defendant had previously conveyed to A. who had paid the purchase money, and was in possession; A. was held to be a competent witness for the plaintiff. (*Devere v. Lloyd*, 3 Watts, 94.) Prejudice in the witness' mind is no ground of exclusion, though he be called to impeach a witness, and request to be excused because he is prejudiced against the witness. (*Cook v. Miller*, 6 Watts, 507.) In assumpsit for money advanced on an auction purchase of two lots as disencumbered, on the ground that one was subject to common in favor of the inhabitants of a parish; the right not being directly in question, Lord Kenyon received one of the inhabitants as a witness for the plaintiff, though he confessed on his voir dire that he claimed a right of common. (*Gibson v. Spurrier*, Peak. Add. Cas. 49. See *Adams v. Butts*, 9 Conn. Rep. 79.) In trespass quare clausum fregit against a mortgagor, the mortgagee was held competent for the defendant on a plea of *liberum tenementum*. (*Simpson v. Pickering*, 5 Tyrw. 143.) This was, of course, on the ground that the verdict could not affect the witness. In ejectment against the heir, his mother, though entitled to dower, was held admissible for him. (*Doe, dem. Nightingale, v. Maissey*, 1 Barn. & Adolph. 439. See *Ward v. Wilkinson*, 4 Barn. & Cress. 410.)

In an action for toll of a public road, persons who have refused to pay are competent for the defendant, from necessity. (*Lancum v. Lovell*, 9 Bing. 465.)

It should be noted as to exclusion on account of liability over, that the liability must be legal, not merely honorary or moral; for where one agreed to indemnify the defendant against the publication of a libel, Lord Tenterden yet inclined to receive him as competent for the defendant. (*Humphreys v. Miller*, 4 Carr. & Payne, 7.) His lordship hesitated; but can there be a doubt that the inclination of his mind accorded

with settled principles? An illegal contract is void at law, and binds only in honor; and we have seen at several stages of these notes, that such an obligation is regarded as of no influence in working the exclusion of witnesses. It has been so considered by several late cases in the supreme court of New-York, arising out of transfers of property to defraud creditors. And see our remarks, *passim*, on the admissibility of execution debtors on questions of property between their vendees, sheriffs, &c.

An officer who takes a statute bond to the plaintiff for the defendant's appearance in a suit, is a competent witness for the plaintiff in an action on the bond, though he may be personally liable to the plaintiff, for neglect in his proceedings as an officer. (*Smalley v. Vanorden*, 2 South, 811. *Day v. Hall*, 7 Halst. 303. *Graccen v. Allen*, 2 Green, 74.)

In detinue by a mortgagee of slaves, against the vendee of the mortgagor, the latter was held to be a competent witness for the plaintiff. (*Miller v. Dillon*, 2 Monroe, 73.)

NOTE 81, p. 81.—*Of a witness called to testify against his own interest.*

That a witness is competent, if his interest be adverse to the party calling him, we saw by many cases, note 81, p. 81. (See also *Wright v. Nichols*, 1 Bibb, 298; *Stump v. Napier*, 2 Yerg. 36, per Haywood, J.; *Whitaker v. Salisbury*, 15 Pick. 534, 543; *Braxton's adm'r v. Hilyard*, 2 Munf. 49, 52; *Hamlin v. Fitch*, Kirb. 174; *Storrs v. Wetmore*, *id.* 203.) An insolvent debtor, who had assigned his estate for the benefit of all his creditors, is competent to sustain a bond against himself. Held, on a feigned issue between two creditors of the insolvent, to try whether the bond was given on full consideration. (*Wolf v. Carothers*, 3 Serg. & Rawle, 240.) A minor son, who does work and labor under a contract to pay him personally, is a competent witness for his father, in an action for the wages, because he is called to testify against his interest. (*Keen v. Sprague*, 3 Greenl. 77, 80.) The former attorney for the plaintiff, is competent for the defendant, to prove payment to the witness. (*McLaine v. Bachelor*, 8 Greenl. 324, 5.) In an action by the assignees of one declared a bankrupt both in respect to debts due to him separately and debts due to him jointly as the member of a firm, the claim was of his separate demand, and it appeared that his separate estate was not sufficient to pay separate creditors. Held, that a creditor of the firm was a competent witness for the plaintiffs; because the recovery as a separate demand takes so much from the fund appropriated to pay the joint demand; and so the witness comes against his interest. (*Barclay's assignees v. Carson*, 2 Hayw. 243.) In trespass *de bonis*, &c. against the sheriff, his deputy is competent and compellable to testify as to his own taking of the goods, though incompetent for the defendant. (*Sheerer's assignees v. Lautzerheizer*, 6 Watts, 543, 551.) In a suit for a slave, the defendant's vendor was held competent for the complainants, to defeat the title of the defendant. (*Shropshire v. Shropshire*, 7 Yerg. 165.)

The case of *Phebe v. Prince*, Walker's Rep. 131, so far as it decides that a witness called to testify against his interest would be incompetent, is anomalous, and utterly without support, at least from any modern common law authority.

NOTE 81, p. 82; NOTE 104, p. 112; NOTE 107, p. 113; NOTE 103, p. 110; NOTE 118, p. 133.—*Of the competency of an alleged debtor, not sued, as a witness for or against his joint debtor, who is sued.*

We have seen by the cases in the previous notes, that a joint debtor not sued, has often been received to testify as a witness, for or against the defendant. He is of

course a witness for the plaintiff unless he be called to prove the joint liability. (Ante, note 81, p. 82, 3. *Purviance v. Dryden*, 3 Serg. & Rawle, 402, 5, 6. *Redfield, J. in Pike v. Blake*, 8 Verm. Rep. 401. Ante, note 104, p. 111, 12. *Miller v. M'Clenachan*, 1 Yeates, 144. *Miller v. Hale*, Dudley, 119. *Whatley v. Johnson*, 1 Stew. Rep. 498. *Doebler v. Snively*, 5 Watts, 225. *Nelson, J. in Gregory v. Dodge*, 14 Wend. 602.) And, on being released, or otherwise discharged of his interest, he is equally a witness for the defendant. (Ante, note 81, p. 82. Note 262, p. 266, 7. *Richardson, C. J. in Jewett v. Davis*, 6 N. Hamp. Rep. 520.) And some cases hold that he is competent without a release, as being interested against the defendant. (Ante, note 81, p. 83, 4.) A majority of the cases, however, hold that he is not so without a release. (Ante, note 104, p. 111, 12. Note 107, p. 113. *Gardiner v. Levaud*, 2 Yeates, 185. *Owings v. Low*, 7 Harr. & John. 124. *Kile v. Graham*, 1 M'Cord, 552. *Ross v. Wells*, 1 Stew. Rep. 139, 141. *Pike v. Blake*, 8 Verm. Rep. 400. *Leeds v. Leeds*, 12 Conn. Rep. 176.) At ante, p. 113, is a case that on a plea of nonjoinder of a defendant, the person alleged to be nonjoined is not competent to prove the plea. There are several cases which hold the same thing. (*Spaulding v. Smith*, 1 Fairf. 363. *Jewett v. Davis*, 6 N. H. Rep. 518, S. P.) But *Siorrs v. Wetmore*, (Kirb. 203,) *semble*, contra. And the rule is otherwise on a plea of nonjoinder of a plaintiff. There the person alleged to be nonjoined is competent to prove the plea. (*Davis v. Evans*, 6 Carr. & Payne, 619.)

A joint debtor is held not to be sued if he be not served with process, though he be named in it, and it issued against him. (*Purviance v. Dryden*, 3 Serg. & Rawle, 402, 5. *Henderson v. Lewis*, 9 id. 379, 382, 3. *Gibbs v. Bryant*, 1 Pick. 118. *Le Roy v. Johnson*, 2 Pet. 136.) But see ante, note 122, p. 135, and note 132, p. 144. In some states, e. g. New-York, he would be deemed in court for the purpose of a judgment and proceeding against the joint property of the defendants. Of course the cases now cited would then have no application.

A joint obligor not sued, though released by the defendant, his co-obligor, was held still incompetent to prove the set-off of a debt due to the witness. It was said the verdict would bar an action against him; and the release cut off all claim for contribution; but he was still interested in the demand to be *defalked*, and should have himself released to his co-obligor all claim on that account. (*Henderson v. Lewis*, 9 Serg. & Rawle, 379, 383.) A partner not sued, who made a note signing the name of his firm was held competent for his co-partner sued alone, to prove that the witness made the note for his own private benefit, with notice of that fact to the plaintiff. (*Robertson v. Mills*, 2 Harr. & Gill, 97.) *Quere*. In a suit against A., on a note made by B. and signed by his own name only, the suit being on the ground that in truth the note was on the partnership account of A. and B., the latter is incompetent as a witness for the plaintiff; for he comes to throw one half his debt upon another. And though the plaintiff release him from all demands, *except demands against him jointly with A.*, this leaves him precisely where he was before. (*Miller v. Hale*, Dudley, 119.) In an action by the payee, against the surety alone, the principal and co-signer was received as competent for the defendant, on being released by him. (*Harmon v. Arthur*, 1 Bail. 83.) And so in one case without a release. (*Freeman's Bank v. Rollins*, 1 Shepl. 202, 205.) *Quere*. See ante, note 103, p. 110, 111, and note 118, p. 133. See also several cases in point, note 107, p. 113, in connection with the text, p. 62, all contra

the last case. So *Jordan v. Trumbo*, 6 Gill & John, 103. But see *Gass v. Steinson*, 2 Sumn. 453, 458, acc. also *Steele v. Boyd*, 6 Leigh, 547, 558, 9. But in the latter case no action had yet been brought. The principal was received as a witness for the surety on a summary application to discharge the latter. See also *Barnes v. Dick*, *infra*. In a case where only one of three joint makers of a note was sued, the others were held competent for the defendant, because the plaintiff who objected did not show that they were principals in the note, or otherwise interested in the event against the plaintiff. (*Long v. Ray*, 1 Dana, 430.) But *quere*. In debt against the administratrix of one of two joint obligors, the widow and distributee of the other was held to be a competent witness for the defendant, the court saying that if she were interested either way, it was in favor of the plaintiffs. (*Braxton's adm'x v. Hilyard*, 2 Munf. 49, 52.) See, as to the joint-debtor-principal, not sued, being a witness for a surety who is sued, several references in this supplement under the head of *remote or contingent interest*, &c. *passim*. Where a judgment is against principal and surety, and the former replevies the debt, *semble*, that the surety is a competent witness for the principal, in a chancery suit by him for relief against the replevin bond. (*Griffith v. Miller's adm'rs*, 6 J. J. Marsh. 330.) On a separate issue whether C. was legally bound as surety for A. and B.; held that A. was a competent witness for C. (*Barnes v. Dick*, 9 Yerg. 430.) *Quere*.

NOTE 81, p. 83; NOTE 85, p. 91, 2; NOTE 111, p. 120.—Of the competency of the execution debtor, in respect to property sold on execution.

In the notes now referred to, we considered several cases as to the competency of an execution debtor, between his own vendee and the sheriff's vendee of his property. There are several other cases, which we shall proceed to notice here. It was held that the debtor was competent for the plaintiff claiming under the sheriff's vendee of land sold on execution against the debtor. The defendant claimed by a title paramount the debtor's. (*Shirk v. Vanneman*, 3 Yeates, 196.) He was held receivable to sustain his sale of personal property, in favor of his vendee, against the constable's vendee, under an execution against the debtor. (*Giese v. Thomas*, 7 Harr. & John. 458.) In detinue by the heirs of the debtor's vendee against the sheriff's vendee, who purchased on a credit, and had not paid, the debtor was held competent in favor of the plaintiffs; for, by supporting their rights, he would subject himself again to the execution. (*Baylor v. Smither's heirs*, 1 Litt. 105, 110. See *Commercial Bank v. Wilkins*, 9 Greenl. 28.) In a writ of entry on the title of the debtor's vendee with warranty of land, against the execution creditor, in possession under an extent, it was doubted whether the interest of the debtor was not balanced. (*Leighton v. Perkins*, 2 N. H. Rep. 427, 8.) In Georgia, the question is raised by a claim in which the creditor under the process levied is the plaintiff, and the debtor's vendee defendant. The courts of that state reject the debtor as incompetent even for the defendant, though they admit that, technically, the witness is called to testify against his interest. By a rule of policy which seems peculiar to that state, he is shut out from being a witness for either party. (*Edwards v. Musgrove*, Dudley, 219.) The form of proceeding is the same in Alabama; and yet in that state the execution debtor and vendor is received as a competent witness in support of his sale. (*McKenzie v. Hunt*, 1 Porter, 37, 39.) This is said to create an equipoise of interest in the witness, as he

stands indifferent between his vendee and creditor. But where the property was sold to the creditor by the officer, and the avails applied to satisfy the execution, and the action was then brought against the creditor and officer by one claiming under a prior sale from the debtor, it was held that he was inadmissible for the plaintiff, because the execution must be taken to be so far satisfied by the avails, and could not be revived by the vendee's recovery. Therefore the debtor was interested to sustain his own sale, and there was no countervailing interest. (*Pruit v. Lowry*, 1 Porter, 101, 105.) The same thing was held in an action against the levying officer alone, who had made a similar sale and application of the avails. (*Burns v. Taylor*, 3 Porter, 187, 9, 190, and *vid. Holman v. Arnett*, 4 Porter, 63, 64.) The decisions go on the doctrine that, though the officer and purchasing creditor fail to hold the property, yet the sale and application of the avails shall operate as a conclusive credit, incapable of disturbance. Accordingly, where the avails had not been applied, the witness was held to be competent. (*Holman v. Arnett*, *ut supra*.) Under that doctrine, and admitting the warranty to be available, the decisions cited are doubtless correct. In New-York, so far as we are acquainted with the decisions, such a mistaken credit on the execution would be nullified by the vendee's recovery. (*Richardson v. McDougall*, 19 Wend. 80.) Again, the officer generally alleges that the sale was fraudulent, and both sides admit the title of the debtor. This would seem to make it questionable whether the objection that the debtor is called to support his title, under peril of being sued for a breach of the warranty, applies. In the case of *Pruit v. Lowry*, too, there was another difficulty in the way of the objection. The action was not brought by the immediate vendee of the debtor, but by another who purchased from him. If, therefore, the common objection would have applied in respect to an action by the immediate vendee, was not the witnesses' interest too indirect to avail one claiming so remotely? (*Ante*, note 88, p. 93, and note 94, p. 106.) But this point was not raised by counsel, nor considered by the court. In Vermont, the plaintiff in ejectment claimed in virtue of a levy and extent against the defendant, who was in possession by virtue of a deed executed prior to the judgment, which the plaintiff alleged on the trial and sought to prove, and did show, *prima facie*, was fraudulent against creditors. The debtor had conveyed with warranty, but the defendant, calling him as a witness, thought it safe to release him; and he was, therefore, clearly competent, and so held to be by the court. (*Edgell v. Lowell*, 4 Verm. Rep. 405.) In another and exactly similar case, except that the debtor had conveyed with warranty, and was not released, he was offered as a witness by the plaintiff, to sustain the levy by impeaching his deed, and his competency was pressed on the ground of a balanced interest; but he was held inadmissible, the court, by Williams, J. saying that his title being conceded by both parties, it would be no breach of his covenant though his grantee should fail on account of the fraud. (*Seymour's adm'r v. Beach*, 4 Verm. Rep. 493, 499.) In this case it was held, (see p. 493, 9) that the plaintiff's failure to hold under the extent would result in a revival of his judgment by *scire facias* against the witness who, escaping from his covenant, was therefore, technically interested in favor of the creditor. (See *Leeds v. Leeds*, 12 Conn. Rep. 176.) The case of *Giddings v. Canfield*, (4 Conn. Rep. 492,) was a case precisely similar to the last; and the ground that a recovery by the plaintiff would not be a breach of the warranty was expressly taken and very fully considered on principle and authority, by Hosmer, Ch. J. (*id.*

492, 3.) In trover for a slave, by one claiming in virtue of a title from A., paramount to and disconnected with the debtor's, the latter having, as the plaintiff alleged, purchased in fraud of his right and turned out the slave to the defendant, the levying officer, the debtor was, of course, very properly held to be an incompetent witness for the officer to prove the title in the witness. (*Waller v. Mills*, 3 Dev. 515, 517.) In the ordinary case, where the parties claim under the debtor, it is an additional argument for his competency as a witness for his vendee, after the party claiming under the execution has set up the ground of fraud, that any implied or express warranty, which the law would otherwise raise or sustain against the witness would, on the very assumption taken up against him, be void, and not capable of enforcement. (*Surlott v. Beddow*, 3 Monroe, 109, 111, 12. *Smith v. Hubbs*, 1 Fairf. 71.) This doctrine was virtually held by the supreme court of New-York, at July Term, 1838, in respect to a note given by a vendee on a purchase of land, with a view to defraud the vendor's creditors. That court refused to aid the *mala fide* holder of the note by allowing a recovery upon it. (See per O'Neill, J. in *Caston's ex'rs v. Ballard*, 1 Hill, 408. But see *Findley v. Cooley*, 1 Blackf. 262.) In a case too, wherein it seems that the competency of the debtor as a witness sometimes depends on the effect allowed by the courts to a failure of title in the levying officer or his vendee, it is material to consider whether this revives the execution to the extent of the failure. In general, we apprehend that it does; and that the creditor may proceed by *scire facias*, as held in *Seymour's adm'r v. Beach*, supra, or a motion for a new execution. In one case, as the title was supposed to have failed in regard to part of the personal property sold on a *fi. a.* his property was surrendered by the sheriff to the adverse claimant, and a new *fi. fa.* issued of course against the debtor's land, which it was moved to set aside. The court refused to grant the motion, it appearing that the sheriff acted in good faith; but stayed proceedings, and directed a *scire facias* to ascertain what sum still remained due on the judgment in respect to the failure. (*Anonymous, M.S. coram Cowen, J. Albany, August Special Term, 1838.*)

The proceeding to commence a suit by attachment of goods, &c. being an incipient execution, a trial of title between conflicting claimants involves the same considerations as to the competency of the alleged debtor. Thus, in replevin against the attaching officer, the debtor was held incompetent for the latter. (*Pratt v. Stephenson*, 16 Pick. 325.)

Another shape is a feigned issue to try between conflicting creditors, the right to money raised by a sale of property levied on. Here the debtor is competent, for his interest is equal. (*Stewart v. Stocker*, 1 Watts, 135.) And so where, before a levy, junior judgment creditors complain that a senior judgment is fraudulent, upon which it is opened and a trial ordered, with liberty to contest it, the defendant was held competent for either party. (*Sommer v. Sommer*, 1 Watts, 303.)

In an action brought in behalf of the debtor's vendees against an attaching officer who had sold the goods and received the proceeds, the debtor was held a competent witness for the plaintiff. The debtor had become insolvent. The court remarked that the proceeds would go indifferently to his attaching creditors, or his assignees to satisfy his other creditors; and so his interest was balanced, and he competent for either side. (*Bailey v. Capelle*, 1 Harringt. 449.) In *Eldridge v. Wadley*, (3 Fairf. 371, 3.) Weston, J. in delivering the opinion of the court, remarked—"Suits are very common in our courts between an attaching creditor, or the officer who repre-

sents him, and the vendee of the debtor; turning upon the question, whether the sale was or was not fraudulent. The debtor, in these cases is received as a witness for either party. He is most generally called by the vendee; and yet no objection has been sustained to his admission. His legal interest is balanced. If the vendee prevails, his warranty is satisfied, if the creditor, the value is applied to the payment of the debt." (Blaisdell v. Cowell, 2 Shepl. 370, and Sherron v. Humphreys, 2 Green's Rep. 217, S. P.) In trover against a constable, for levying an execution on a horse as the property of A., he (A.) was held a competent witness for the plaintiff to prove that he purchased the horse as the agent of the plaintiff. (Waldo v. Peck, 7 Verm. Rep. 434.) His interest was adverse to the plaintiff. (See Fonda v. Van Horne, 15 Wend. 631.)

Upon a trial of an issue on the validity of the sale, made up between the levying officer and the vendee, in trust for the benefit of the debtor's sureties or creditors, the latter are of course inadmissible to sustain the sale; for they are interested to create and increase the fund for their benefit. (Bank of Alabama v. McDade, 4 Porter, 252, 270.)

The question raised by several of the above cases, lately came before the supreme court of New-York, in trover by the debtor's vendee against the levying officer. The latter offered the debtor as a witness, having first released him from "all claims and demands which he might have against him, for or on account of the determination of the suit." Yet the debtor was held incompetent. The reason given by the Chief Justice (Nelson) was that the witness was in no way liable to the plaintiff, who could not sue on his warranty and set up his own fraud. And the release was void, because it did not come from the party in interest. (Rea v. Smith, 19 Wend. 293.)

TEXT, 52; NOTE 89, p. 96; NOTE 103, p. 110; NOTE 106, p. 113; NOTE 241, 2, p. 254, 5; NOTE 95, p. 106, in connection with NOTE 245, p. 256.—*Of the competency of agents, trustees and servants.*

The cases upon the competency of *agents*, *servants* and *trustees* are very closely connected in principle; but we shall here endeavor to place them each under their appropriate head.

We would first merely remark a distinction which some of the cases render striking; that where an action is brought *against* the principal, the master or the cestui que trust, for the misconduct of the agent, servant or trustee, neither is a competent witness for the defendant without a release. (Ante, 56 of the text, and notes.) But where the action is brought *by* the principal, master or cestui que trust, although the action be grounded on the conduct of the agent, servant or trustee, and his misconduct be set up as a defence, yet he is competent for his principal to prove that the transaction was within the scope of his authority, and to repel the charge of misconduct in respect to it. However, by the modern cases this is but a general rule; and there have been exceptions made, especially in the case of actions brought for an injury to specific property while in the care and under the use of a servant; and some few of the books, both English and American, give countenance to the like exceptions in regard to agents. Such is the tendency of Mr. Starkie's remarks, (3 Stark. Ev. 1728, 9, 30, 2d Am. ed.) which are cited at length, and with approbation, by Baylies, J. in Denison v. Hibbard, 5 Verm. Rep. 598, though the case itself drew in question the competency of the plain-

tiff's servant. The same remarks are repeated in 1 Stark. Ev. 111, 113, 6th Am. ed. The 8th ed. of Phil. p. 101, gives as the result of the English cases, that where the witness is so connected with the question, that a verdict for the plaintiff would entirely relieve him from liability over, in a subsequent action, to the plaintiff, he is incompetent. The cases cited are *Rotheroe v. Elton*, Peak. N. P. Cas. 84, and *Morish v. Foote*, 2 Moore, 508; 8 Taunt. 454, S. C.; *Wake v. Lock*, 5 Carr. & Payne, 454, also cited *infra*, and *Sherman v. Barnes*, 1 Mood. & Rob. N. P. C. 69. But in *Johnson v. Harth*, (2 Bail. 183, 4, 5,) which directly drew in question the conduct of the plaintiff's agent, or rather perhaps his sub-agent, he was held competent for his principal. And *Harper, J.* takes the distinction between an action *by*, and one *against* the principal; for in the latter case his misconduct is made the very ground of the proceeding, and is directly in issue. And the general rule seems to be well sustained by the English and American cases on which he proceeds. The same distinction is asserted by *Kernedy, J.* in *M'Dowell v. Simpson*, 3 Watts, 129, 134, 5. Yet it does not seem to prevail, at least in England, as we saw above, and shall see *infra*, especially with regard to servants, and the American cases are conflicting even in respect to the agent. The distinction between agents and servants is perhaps very difficult to maintain on principle. But we shall see, as we have before seen, in the previous notes, that the exception cannot be extended to agents and trustees, especially the former, without overturning a line of cases most formidable in number, and strong in the learning and character by which they were adjudged.

With these remarks we shall proceed to the cases, without further regard to their arrangement than that which we have suggested. And *first*,

Of agents as witnesses. In an action involving the validity of a deed, the attorney who prepared it is competent to prove it valid, even though there be another action pending against him in which he must fail if the deed be invalid. (*Hudson v. Revett*, 5 Bing. 368.) A broker who effected a policy is competent as to all matters connected with the policy, though he have an interest arising from a lien on the policy. (*Hunter v. Leathley*, 10 Barn. & Cress. 858.) This was said to be *ex necessitate*. In an action by the sheriff against a vendee, for the price of goods sold at auction by his deputy, the latter is a competent witness for the sheriff. *Brent v. Green*, 6 Leigh, 16, 28, 9, and *Carrington v. Anderson*, 5 Munf. 32, *contra*, is not law. (6 Leigh, 29.) In *assumpsit*, for use and occupation, it was held that the plaintiff's agent might prove his own *parol* authority to make a *parol* lease from him to the defendant. (*McGunnagle v. Thornton*, 10 Serg. & Rawle, 251.) This is contrary to some of the Pennsylvania cases on the same subject, *ante*, note 241, p. 255, and seems to be so regarded by *Duncan, J.* 10 Serg. & Rawle, 252. It contradicts *Anderson v. Hayes*, 2 Yeates, 95. In an action for goods sold, the plaintiffs' servant for carrying them was held competent for the plaintiffs, to prove that the defendant artfully obtained them from him without ready payment, though his instructions were not to let them go without cash down. *Tilghman, Ch. J.* puts his competency on the ground that, from the whole of his testimony, it appeared he had not violated orders. (*Wilmarth v. Mountford*, 8 Serg. & Rawle, 124, 6.) In *covenant* by an executor for rent, the defendant was allowed to prove by A. that he (A.) received payment by order of the plaintiff's intestate. (*Buchanan v. Montgomery*, 2 Yeates, 72.) Note. The defendant released the witness; but *quere*, whether this was necessary. In *assumpsit*

for the proceeds of goods shipped on board the defendant's schooner, as the goods of P., the ship's agent was held competent for the plaintiffs, to prove their interest in the goods. (*Andre v. Carr*, 3 Yeates, 101.) The plaintiff in detinue derived his title from a sale to him, made by an agent, who was held competent for him to prove his authority by letter, and testify to its loss and contents. (*Kirkpatrick v. Crisna*, 3 Bibb, 244.) Connelly's heirs v. Chiles, S. P. in ejectment as to an agent who conveyed the land to the plaintiff. In assumpsit, the defendant offered a witness to prove that he was the plaintiff's agent and as such received property in satisfaction of his claim. Held competent. (*Alexander v. Emerson*, 2 Litt. 25.) The attorney on record for the plaintiff is competent for the defendant, to prove payment, though he claim the money as assignee. (*McLaine v. Bachelor*, 8 Greenl. 324, 5.) But some books hold him inadmissible, as being the real party. (Ante, note 122, p. 135.) In assumpsit against the owner of a ship for money advanced to the master, for which he drew on the owner, the master is competent for the latter. (*Descadillas v. Harris*, 8 Greenl. 298.) In assumpsit by a bank on a note, the cashier is competent for the plaintiff, to prove its loss and contents. So to prove an over payment. (*Stafford Bank v. Cornell*, 1 N. H. Rep. 192. Ante, note 89, p. 97, S. P. as to a teller.) And this though he had given a bond with sureties, for the correct discharge of his duties. (*U. States Bank v. Stearns*, 15 Wend. 314.) So of an action for money obtained from him, through his alleged misconduct. (*Franklin Bank v. Freeman*, 16 Pick. 535, 538, 9.) He is a competent witness for the plaintiff in an action against the bank for the amount of a deposit. (*Jolinson v. The Farmers' Bank, &c.* 1 Harringt. Rep. 117.) The counsel for the plaintiff is competent for him, though he intend to charge a commission for receiving and remitting the avails of the recovery. (*Slocum v. Newby*, 1 Murph. 423.) The agent of the proprietor of land conveyed to A. and then to B.; on an issue whether the former conveyance was on good and valuable consideration, he was held competent as a witness to sustain the first deed. (*Alston's ex'rs v. Jones' devisees*, 1 Murph. 45.) In an action for money received by the defendant for the plaintiff's use, the defence was payment to A. as the plaintiff's agent, who was held competent for the defendant to prove a parol authority. (*Blackledge v. Scales*, 1 Murph. 179.) In a like action, the plaintiff's case was, that his agent gambled his money into the defendant's hands, at the game of *faro*. Held that the agent was not a competent witness for the plaintiff without his release. (*Allen v. Lacy, Dudley*, 81.) But in another case, where the plaintiff's agent had been negligent, e. g. a notary in giving notice to charge the plaintiff's endorser, yet he was received for the plaintiff, to prove a waiver of notice by a promise from the endorser, though it was admitted that, had the action been *against* the principal for the neglect of his agent, the latter would have been incompetent for the former, because the record would be evidence. (*Johnson v. Harth*, 2 Bail. 188, 4, 5. See our notice of this case, *supra*.) An agent from whom his principal's goods were obtained by a fraudulent representation of the credit of a third person, was held competent as a witness for his principal, in an action for the fraud. (*Raymond v. Howland*, 12 Wend. 176.) In an action of account by one joint owner against another for the proceeds of timber owned by them and sold by their joint agent, he was held to be a competent witness for the plaintiff, to prove that, by direction of the defendant, he had applied the whole proceeds to the payment of a debt due to him by the defendant individually. (*Spencer v. Barnum*, 4 Verm. Rep. 298.) In this case,

too, the agent knew that the timber was joint property, and so was doubtless accountable to the plaintiff. The court, per Baylies, J. likened it to the case of a trespasser testifying against his joint trespasser. In trover, the defendant offered the agent of the true owner of the goods, to prove that he, as agent, had sold them to the defendant; and that the proceeds were, by agreement of the principal, to be applied in paying a debt due from him to the witness. The court treated him as a vendor in his own right, subject by law to the imputation of an implied warranty in favor of his vendee, and so incompetent. (*Saunders v. Addis*, 1 Bail. 49.) In debt, for the use of a town, on the collector's official bond for not paying over moneys to the clerk of the commissioners of the poor the clerk was held a competent witness for the plaintiff, to negative the fact that he had received the moneys. (*State v. Davidson*, 1 Bail. 35.) In assumpsit on a note, and issue on a plea of payment, the question was how certain moneys received by the plaintiff's attorney, had been applied, whether to extinguish the plaintiff's demand, or another debt in favor of C., against the defendant, of which the attorney also had the control. He, the attorney, was held competent for the plaintiff to prove that the defendant agreed, at the time of payment, that the moneys should be applied on the claim in favor of C. (*Marshall v. Nagel*, 1 Bail. 308; in connection with *S. C. id.* 266.) In assumpsit, for not accepting and paying for stock, the plaintiff offered the defendant's agent as a witness to prove the sale, who swore that he purchased the stock, without disclosing the name of his principal. Held incompetent without a release; for he was liable to be treated as the principal vendor, and to be sued as such, and was, therefore, called to throw off his *prima facie* liability upon another. And *McBrain v. Fortune*, 3 Camp. 317, and *Ripley v. Thompson*, 12 Moor. 55, were very properly treated, as in point. (*Hickling v. Fitch*, 1 Miles, 208, 9.) And so are a class of cases cited ante, note 104, p. 111, 112, and note 106, p. 113, though it will be seen there, that they are not consistent. See also ante, note 107, p. 113, 114. In these notes are several cases, that, where one of two joint debtors are sued, he who is not sued, shall not be received for the plaintiff, against the other; for he comes to throw a share of the debt off himself, and fasten it on the defendant. And see several cases to the same effect, cited in this supplement. In *scire facias* on a judgment, the defence was payment to, and a discharge by the plaintiff's attorney, in fact; but the answer was, that the discharge was obtained by a fraud committed on the attorney, and he was held a competent witness for the plaintiff to prove it. (*Irwin v. Allen*, 1 Pennsylv. Rep. 444, 7.) So of an attorney on record, in the suit, who, by mistake, received the principal sum, omitting the costs, and gave a general discharge, his client, though learning from him but part of the circumstances, having directed him to proceed with the suit, at his, the client's, expense. (*Steward v. Riggs*, 1 Fairf. 467.) In ejectment, the defence was, that the defendants held by a valid lease, from one having no actual or express authority at the time, to give it; but a general power, to be made out by previous acts of the plaintiffs, and their subsequent recognition. Held, that the agent was a competent witness for the defendant to prove these facts. (*McDowell v. Simpson*, 3 Watts, 129. *Myers v. Anderson's heirs*, 1 Wright, 513, 14;) for, said, he is liable indifferently, to either party, according to circumstances. The attorney on record is competent, as a witness for the plaintiff, though the latter be indebted to him, and he expect to obtain some of the money in payment. (*Geisse v. Dobson*, 3 Whart. Rep. 34.) Otherwise, if a portion of the recovery be assigned to

him. (*Morris' adm'r v. Bills*, 1 Wright, 343, 4;) or he is to have a portion of the money, when collected. (*Commonwealth v. Moore*, 5 J. J. Marsh. 655, 6.) An agent, selling goods with warranty of soundness, and a personal guaranty of the truth of the warranty, was made liable to the vendee by an award. In an action by the same vendee against the principal, founded on the same warranty, the agent was held competent for the defendant, as a witness, inasmuch as his fate was fixed by the award, and could not be changed by the event. (*Jackson v. Wright*, 3 Whart. Rep. 601, 606, 7.) Otherwise, had it not been for the award. (*Richardson v. Dorr*, 5 Verm. Rep. 9, 17.) In assumpsit for goods sold, the plaintiff called a witness who purchased them, the bill being made out to him in his own name; and he drawing for the price. Held not competent. (*Hewitt v. Lovering*, 3 Fairf. 201, 203, and the books there cited.) The plaintiff's agent, as such, retains the attorney to prosecute his cause. This does not render the agent incompetent, as a witness for the plaintiff. He is not personally responsible to the attorney. (*Morris v. Wadsworth*, 17 Wend. 103, 117.) So, though he take an active part in obtaining security, &c., if he be not personally responsible; and though he has long acted as the party's agent in respect to the land in question, and received delivery of possession, and made an entry in his name. (*Smith v. White*, 5 Dana, 376, 382.) In assumpsit against a school district, for rent of a school room, the prudential committee of the district is a competent witness for the plaintiff, to prove that he hired it for the defendant, and that a school was kept in it. (*Allen v. School Dist. No. 2*, 15 Pick. 35, 39.) In assumpsit for goods sold, the plaintiff's attorney, who sold the goods for him, and caused the suit to be brought, was held competent for him, to prove his demand. (*Zino v. Verdelle*, 9 Lou. Rep. (Curry) 51.) It was held that an agent who had sold land, was a competent witness for defendants in ejectment, who did not derive title from his sale; though said that on the trial of an action by his principal, against one claiming under his, the agent's sale, he would not be a competent witness for the latter. (*Swearingen v. Fields*, 1 Dana, 387, 8.) On a bill by a judgment and execution creditor to compel the sheriff's vendee to complete his purchase of land, sold to him under the execution, the sheriff is a competent witness for the plaintiff. (*French v. Sturdevant*, 8 Greenl. 246, 9. See *Mockbee's adm'r v. Gardner*, cited *infra*, from 6 Har. & Gill, 176.)

Secondly, of the competency of trustees. An executor was received, as competent to prove transactions between himself, as such, and the guardian of the children of his testator, in an action between the guardian and a third person. (*Fenwick v. Forrest*, 6 Harr. & John. 415.) As to the competency of a trustee in chancery, though a party in the cause, see *Hawkins v. Hawkins*, 2 N. Car. Law Repos. 627. The doctrine of implied warranty of title does not extend to executors, and other trustees, selling goods, lands, &c., therefore they are competent to support the title of their vendees. (*Mockbee's adm'r v. Gardner*, 2 Har. & Gill, 176, and see *French v. Sturdevant*, *supra*, cited from 8 Greenl. 246.) But they may make themselves incompetent by an express warranty, as where a collector, selling land, added an express personal covenant for the title. (*Richardson v. Dorr*, 5 Verm. Rep. 9, 17.) The trustee and agent of an incorporated village, is competent as a witness for the village, in a suit with regard to its property. (*Trustees of Watertown v. Cowen*, 4 Paige, 510, 513.) So, a trustee of a savings bank. (*Middletown Savings Bank v. Bates*, 11 Conn. Rep.

519, 522. And see *Randel v. Chesapeake and Delaware Canal Company*, 1 Harringt. 233, 295.)

Most of the English cases, as to the competency of trustees, are very well summed up in the late treatise of *Willis on Trustees*, p. 227, 8, 9, republished in the Law Lib. No. for Dec. 1835. See the text of our author, p. 52.

With respect to a trustee who is not a party in the cause, and having no interest in the subject matter of dispute, except as a trustee, the cases are entirely uniform that he is admissible. (*Jones v. Sasser*, 1 Dev. & Batt. 452. *Potter v. Burd*, 4 Watts, 15, 17. *Newman v. Milbourne*, 1 Hill's Ch. Rep. 13.) E. g. a general guardian for the plaintiff. (*Den, ex dem. Newton, v. Ayres*, 1 Green, 153.) A captain of a company, in a prosecution for a fine, to a part of which he was entitled for the use of the company. (*Burt v. Dimmock*, 11 Pick. 355, 6. *State v. Wilson*, 7 N. Hamp. Rep. 543, 8.) So the executor of a distributee is not incompetent to testify in a cause wherein his testator would have been incompetent, because he was a distributee. (*Howard's adm'r v. Burgen*, 4 Dana, 137.) A father has no such interest in his child's personal property, as to preclude his being a witness for him in a suit involving its title; though he is guardian by nature. That gives him no control over the child's property; and his competency is not therefore open even to the objection that he is a trustee. (*Fonda v. Van Horne*, 15 Wend. 631, 3.) So a general guardian, though he be entitled to the care of the property, expect to support the child, and be paid by the property in question, and though he have retained counsel and taken an active part in conducting the cause. (*Den, ex dem. Newton, v. Ayres*, 1 Green, 153, 156.)

Thirdly, of the competency of servants. The mere relation of servant does not disqualify, any more than that of agent or trustee. But servants are not competent, either for the plaintiff or defendant, when answerable to them in respect to the matter in issue. (Ante, p. 56 and 131 of the text, and notes 95, p. 106, and 245, p. 256.)

That the servant of the plaintiff driving his carriage, &c. for an injury to which, while in the care of the servant, the plaintiff sues, is not competent for him, see in addition to the cases ante, note 95, p. 106, 7, the following cases: *Wake v. Lock*, 5 Car. & Payne, 454; *Heming v. English*, 6 Car. & Payne, 542; *Harding v. Cobley*, id. 664; *Allen v. Lacy*, Dudley, 81; also cases cited supra, at the introduction of this head. In *assumpsit*, for money committed to the defendant, as a common carrier, it appeared that his servant received the money to deliver to H. for the plaintiff's use, to be transmitted to him, which the defendant contended was done; but the plaintiff offered H. to prove that he never received it. Held, that he was inadmissible; for a recovery and satisfaction would exonerate him. (*Dennison v. Hibbard*, 5 Verm. Rep. 496, 8.) See our notice of this case, supra. But some cases are to the contrary. In an action on a policy of insurance on a steam boat, which was defended on the ground of the master's negligence, he was held a competent witness for the plaintiff. (*Powell v. Cincinnati Ins. Co.* 7 Ham. Rep. pt. 1, p. 266, 282, 3.) In an action by the vendee of a vessel, against the vendor, on a warranty that it was seaworthy, the master in whose care the vessel was alleged to have been lost for unseaworthiness, was held competent as a witness for the plaintiff. (*Newbold v. Wilkins*, 1 Harringt. 43.)

As to the defendant. In case, for digging near, and injuring the plaintiff's wall, the defendant's workman who dug, is not competent for him, without a release. (*Mitchell v. Hunt*, 6 Carr. & Payne, 351.) So, a carrier's servant, who carried a parcel, is

not competent for him, in case for negligence in carrying it. (*Harrington v. Caswell*, 6 Carr. & Payne, 352.) In case against the owner of a ship, for losing the shipper's (plaintiff's) goods, the master is not a competent witness for the defendant. (*Gardner v. Smallwood*, 2 Hayw. 349.) In case against a town for special damage arising from the non-repair of a bridge, the surveyor of highways of the district where the bridge is situated, is not a competent witness for the defendant. (*Yuran v. Inhabitants of Randolph*, 6 Verm. Rep. 369, 373.)

But a distinction must be taken, that where the man sued for the injury was himself present, and engaged in the immediate direction of his servant, (e. g. the owner and master sued for his helmsman's negligently sailing his canal boat, so as to come in collision with the plaintiff's boat, he, the master, immediately superintending,) there the servant is a competent witness for the defendant. The negligence of the servant, for which he is answerable over, is not in question. The act is that of the master. (*Noble v. Paddock*, 19 Wend. 456.) Beside, it may be added, that they stand in the nature of voluntary joint wrong doers, one of whom is always a witness for or against the other.

NOTE 91, p. 98; NOTE 92, p. 99.—*Witness merely conceiving himself interested, or feeling bound by an honorary obligation.*

We saw ante, note 91, p. 98, that the cases which respect the competency of a witness believing himself interested, without being so in law, are conflicting. That he is incompetent, see the following cases: *Sentney v. Overton*, 4 Bibb, 445. *Elliott v. Porter*, 5 Dana, 304, 5. *Ewing, J. in Commonwealth v. Gore*, 3 Dana, 476. *Phebe v. Prince*, Walker's Rep. 131. Per *Robertson, Ch. J. in Commonwealth v. Moore*, 5 J. J. Marsh. 656. That he is not incompetent, see the following: *Dellone v. Rehmer*, 4 Watts, 9, 10. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 101, 2. *Stall v. The Catskill Bank*, 18 Wend. 466. If he conceive himself disinterested when he is in fact interested, he is not competent. Per cur. in *Dellone v. Rehmer*, 4 Watts, 10, ante, note 91, p. 99, note to *Phebe v. Prince*, Walker's Rep. 134.

We saw in note 92, p. 99, that a mere honorary obligation should not disqualify him. To this the cases are almost without exception, as we saw there, and as may be seen by other cases: *Tilford v. Hayes*, 2 Yerg. 89. *Dellone v. Rehmer*, supra. *M'Causland v. Neal*, 3 Stewart & Porter, 131, 133. *Mulheran's ex'rs v. Gillespie*, 12 Wend. 349, 351. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 101, 2. *Commonwealth v. Gore*, 3 Dana, 474, 6. *Stall v. The Catskill Bank*, 18 Wend. 466. *Phebe v. Prince*, Walker's Rep. 131, and id. 134, note.

NOTE 94, p. 106; NOTE 98, p. 108; NOTE 107, p. 113; NOTE 113, p. 123.—*Of incompetency, where the verdict will be evidence either for or against the witness; and various other cases in which his interest may be said to be direct or certain in the event of the suit.*

Although the verdict may not affect, in another suit, the person offered as a witness, yet wherever the verdict may create a new responsibility, which the law would recognize and render available, in favor of or against the witness, or increase or decrease an existing one, he ought to be rejected. (Per *Gibson, J. in Conrad v. Keyser*, 5 Serg. & Rawle, 371, and see *Hillhouse v. Smith*, 5 Day, 432.) The plaintiff pro-

mised the witness, his vendee, that if any one succeeded in obtaining his land on the *Wallace contract*, which the plaintiff was contesting in the suit, he would make a deduction from the agreed price. The witness was held incompetent for the defendant. (*Robinson v. Eldridge*, 10 Serg. & Rawle, 140, 143.) In an action against one who became surety to stay execution, the principal is not a competent witness for the defendant. (*Milliken v. Brown*, 10 Serg. & Rawle, 188.) The defendants' intestate had promised to pay back to the plaintiff the amount of a bond against R., if the plaintiff failed in any attempt to set it off against R. In a suit brought on the ground that it was disallowed as a set off, held that W. who was a surety in the bond, was not a competent witness for the defendants; for their success would prove that the bond had been paid by a set off; and their failure would, as a consequence, subject the witness as a surety at their suit. (*Reigart v. Hicks*, 14 Serg. & Rawle, 134.) One who has given his bond and judgment as collateral security for an endorser, is not competent for him. (*Sterling v. Marietta, &c. Trading Co.*, 11 Serg. & Rawle, 179.) In assumpsit by the county treasurer, for taxes paid to his agent, by B. the person assessed, he was held incompetent for the plaintiff. (*Hayes v. Grier*, 4 Binn. 80.) In assumpsit for use and occupation, C., the plaintiff's witness, swore that the plaintiff had demised to him, the lease not being yet ended. Held he was incompetent to prove that he had let the defendant into possession; for the plaintiff's recovery would discharge him of so much as should be recovered. (*Hodgson v. Marshall*, 7 Carr. & Payne, 16.)

In an action by a lessee for market toll, whether one who has refused to pay toll, be a witness for the defendant, *quere*; for the verdict may be evidence against him. (*Laucum v. Lovell*, 6 Carr. & Payne, 437.)

That a vendor of goods is not competent to support the title of his vendee, on account of his implied warranty, we saw ante, note 113, p. 124. There are various other cases to the same effect, as also in regard to an express warrantor of goods or land. (*Mockbee's adm'r v. Gardner*, 2 Harr. & Gill, 176. *Giese v. Thomas*, 7 Har. & John, 458. *Hale v. Smith*, 6 Greenl. 416, 420. *Harwood v. Murphy*, 4 Halst. 215. *Per Nott, J.* in *Duncan v. Bell*, 2 Nott & McCord, 153, 156. *Lowrey v. Summers*, 7 Halst. 240. *Brewster v. Curtis*, 3 Fairf. 51. *Baxter v. Graham*, 5 Watts, 418. *Saunders v. Addis*, 1 Bail. 49, 50. *Richardson v. Dorr*, 5 Verm. Rep. 9. *Swisher's lessee v. Williams' heirs*, 1 Wright, 754.) But it should be noted that the doctrine of implied warranty of title does not extend to sales by sheriffs, executors, administrators and other trustees, who are therefore competent. (*Stone v. Pointer*, 5 Munf. 237. *Brent v. Green*, 6 Leigh, 29. *Mockbee's adm'r v. Gardner*, 2 Harr. & Gill, 176. *Petermans v. Laws*, 6 Leigh, 523, 529.) Though they may make themselves liable by an express warranty. (*Richardson v. Dorr*, 5 Verm. Rep. 9, 17.)

In assumpsit, a witness offered by the defendant was held incompetent to prove that he the witness had paid the debt for the defendant, by drawing an order on the plaintiff in favor of the defendant, which was accepted by the plaintiff as payment. (*Huntington v. Champlin*, Kirb. 166.) *Quere*; for the record would not be evidence, for or against the witness. All his rights would still depend on other proof as before.

Indemnitors of an officer levying on goods under their respective executions are not competent for him in an action for the levy. And it was held that a direction by them to levy on specific goods, raised a contract of indemnity; and neither was, therefore,

competent, though his debt were afterward satisfied out of other estate. (*Bulkley v. Richards*, Kirb. 203.) But an indemnitor against neglect to serve an execution was held competent; for his contract is void for the illegal consideration. (*Hodson v. Wilkins*, 8 Greenl. 113.)

In a suit to recover of B. on the ground of a lien by the plaintiff on money in the defendant's hands for a debt of A. due to the plaintiff, A. was held incompetent as a witness for the plaintiff. (*Alsop v. Magill*, 4 Day, 42.)

In ejectment [disseisin] by one tenant in common, held that another was incompetent for the plaintiff. (*Barret v. French*, 1 Conn. Rep. 354. Reasons given by Swift, Ch. J., p. 364, which compare with ante, note 84, p. 90, a case contra with the reasons by Gibson, Ch. J. there given, and *Nass v. Van Swearingen*, 7 Serg. & Rawle, 192.) Swift, C. J. says—"One tenant in common recovers for the benefit of the whole." So a tenant in common with the defendant cannot be a witness for him. (*Den, ex dem. Rogers v. Mabe*, 4 Dev. 180, 196.) At p. 197, the same reason is given as by Swift, C. J., supra. So it was held that the defendant's setting up an outstanding title in A. and B. neither of these were competent as witnesses in support of it. (*Lodge v. Patterson*, 3 Watts, 74.) But see ante, note 84, p. 88, that a tenant in common with the defendant is admissible, e. g. a co-devisee.

In a *scire facias* against the defendant as the debtor of A. to compel the defendant to pay to the plaintiff his judgment against A., the defendant contended that he owed the debt in question to one P., in his own right. The plaintiff insisted that it was due to P. in trust for A., and the wife of the latter was held incompetent as a witness for the defendant; because, though her husband A.'s interest was balanced as to the principal sum, yet he was moreover liable to the plaintiff for costs. (*Beach v. Swift*, 2 Conn. Rep. 269, 275.) On a bill filed by the principal, for relief against a judgment on a bond, the surety in the bond is not a competent witness for him. (*Shelby v. Smith's heirs*, 2 A. K. Marsh. 508.) In an action by a town treasurer on a collector's bond given to his predecessor for moneys received by the collector, the defendants produced the receipt of the plaintiff's predecessor for the money. Held, that the predecessor was not a competent witness for the plaintiff. It was likened to an endorser offered as a witness for the endorsee, against the maker. (*Pingree v. Warren*, 6 Greenl. 457.) In a suit commenced by attachment of the defendant's land, the defendant's grantee pending the suit is not competent for him. (*Schillinger v. McCann*, 6 Greenl. 364.) The party injured is not a competent witness for the state, in a prosecution for a forcible entry and detainer under a statute; for, on a conviction, he is entitled to restitution. (Ante, note 235, p. 252. *State v. Fellows*, 2 Hayw. 340.) In assumpsit by a levying officer against a receptor of property, who left it with the person against whom the attachment issued, the latter was held incompetent as a witness for the defendant, because he was bound to indemnify him, not only against damages, but all costs. (*Davis v. Miller*, 1 Verm. Rep. 9, 13.) One who has contracted to pay a part of the costs of the suit, if the plaintiff should fail, is incompetent as a witness for the plaintiff. (*Lowrey v. Summers*, 7 Halst. 240. *Bell v. Smith*, 7 Dowl. & Ry. 846; 5 Barn. & Cress. 188, S. C. *Benedict v. Brownson*, Kirb. 70.) One owing taxes turned out a cow to the collector, as his own. Held, that he should be holden to warrant the title, and was therefore incompetent as a witness for the collector, in an action of replevin against him, by one claiming to be the true owner.

(*Brewer v. Curtis*, 3 Fairf. 51, 53.) In an action by the assignee of a bail bond, the sheriff (the assignor) was held incompetent for the plaintiff, the court saying that he was a warrantor by implication, that the bond was regularly taken, and executed properly. (*Baxter v. Graham*, 5 Watts, 418, 19.) In assumpsit for work and labor, the defence was, that 100 dollars had been paid by the defendant on the demand in question; to which the plaintiff answered, that the one hundred dollars had been paid by the defendant, not on the demand in question, but was paid to the plaintiff to reimburse him that sum paid by him as a second endorser of a note of 300 dollars. This note, he averred, was made by the now defendant, and endorsed first by one W., and then by the plaintiff, both endorsements being for the defendant's accomodation; that the note being protested, the now plaintiff paid 100, and W. the other 200 dollars. W. being offered by the plaintiff to prove that the 100 dollars in question was intended and applied by the defendant to satisfy the same sum so paid by the plaintiff, as endorser, and having disclosed his situation in respect to it, on his *voir dire*, was held incompetent, because such an application of the payment, sealed by the verdict and judgment, would discharge himself as first endorser for so much. (*Rhodes v. Lent*, 3 Watts, 364.) In an action against a town for special damage arising from the non-repair of a bridge, the surveyor of highways in the district where the bridge is situate, is an incompetent witness for the defendant. (*Yuran v. Inhabitants of Randolph*, 6 Verm. Rep. 369, 373.) Whether, on trial, for a capital offence, one entitled to an estate expectant on the prisoner's death, be a competent witness against him? *Quere*. (*State v. Kimbrough*, 2 Dev. 431, 8, 9.)

A direct interest merely in the costs, renders the witness incompetent. (*Lowry v. Summers and Bell v. Smith*, *supra*. *Beach v. Swift*, 2 Conn. Rep. 269, 275, also stated *supra*. *Barnwell v. Mitchell*, 3 Conn. Rep. 101, 5, 6. *Bill v. Porter*, 9 id. 23, 29. *Seymour v. Harvey*, 11 id. 275.) In case for a false return to the plaintiff's *fi. fa.* the sheriff defended, on the ground that he had properly applied the proceeds of goods, partly on a prior *fi. fa.* of A. and B., and partly in paying the debtor's landlord his rent. Although B. assigned, and was released as between him and A. and the sheriff, he was still held incompetent, because he was a real party, liable over to the plaintiff for costs. (*Quere* of this, since *Miller v. Adsit*, 19 Wend. 672.) And as to the landlord, it was doubted whether he was not competent, although a different opinion was entertained at N. P. in England, 3 Camp. 593. (*Benjamin v. Smith*, 12 Wend. 404, 406, 7.)

In an action against the principal alone, the surety is not competent for the defendant. This was said in *Cochran v. Dawson*, 1 Miles, 278, 9. But *quere*. In trespass against the sheriff for levying, the surety in a bond to indemnify him, is not a competent witness for the defendant. (*Terry v. Belcher*, 1 Bail. 568, 571.) In trover, one claiming the property as delivered to him and the defendant under a contract by the plaintiff to deliver it absolutely in payment to them, but the plaintiff claiming that the delivery was on a condition not fulfilled, and taking this as the ground of his action, such joint claimant is not a competent witness for the defendant. (*Caldwell v. Cole*, 1 Shepl. 120.) In assumpsit for goods sold, a witness for the plaintiff said he received the goods from the plaintiff, on account, and in pursuance of directions by the defendant; but it appearing that the goods never came to the hands or use of the defendant, the witness was rejected as incompetent. (*Winslow v. Kelley*, 3 Fairf. 513.)

In trespass and plea of a right of way for all the inhabitants of M., one of the inhabitants is not a competent witness to prove the plea. (*Odiorne v. Wade*, 8 Pick. 518.) In trespass against a deputy sheriff, for attaching and selling horses, &c. at the suit of, and by direction from, several creditors under their several and respective process, one of them, though his suit be discontinued, is still incompetent; for though it may be doubtful whether he be an indemnitor, yet by losing the property he loses a fund which will pay the expenses of the sale. (*Boyden v. Moore*, 11 Pick. 362, 366.) But he was, beside, an indemnitor by joining in the request. (*Buckley v. Richards*, *supra*.) It seems, that in a suit against the administrator, the heir is not a competent witness for the defendant, in a case where the exhaustion of the personal assets is necessary, before the plaintiff can resort to the real estate. (*Scott v. Young*, 4 Paige, 542.) In assumpsit by a bank for alleged overdraw by the defendant, through the carelessness of the cashier, the surety of the cashier was rejected as an incompetent witness for the plaintiff, as a recovery would diminish pro tanto his liability as surety. (*State Bank v. Littlejohn*, 2 Dev. 331.) The defendant in ejectment having taken a conveyance of the *locus in quo* under an agreement to pay the debts of A. and B., their creditor is not a competent witness for the defendant. (*Paul v. Mackey*, 3 Watts, 110, 124.) In case for a nuisance on the defendant's land by damming and flowing water back upon the plaintiff, it was held that one who, pending the suit, purchased the land and succeeded to the defendant's right of possession, was not a competent witness for him; and so of one who is special bail for the defendant in a subsequent action for continuing the nuisance; for the record would be evidence against the first in respect to his privity of estate, and against the principal of the bail in respect to the identity of parties and subject matter. (*Miller v. Frazier*, 3 Watts, 456, 8, 9. See also the text, p. 334, 5, and ante, note 594, p. 844.) In assumpsit by a legatee to charge the estate of one out of two executors, because assets had come to the hands of the former, the other executor is not a competent witness for the plaintiff. (*Doebler v. Snively*, 5 Watts, 225, 8, 9.) In trespass de bonis, &c. a witness offered by the plaintiff had purchased the goods from the defendant with condition not to pay, if the defendant failed to establish his title in the action; and was therefore rejected as incompetent. (*Jones v. M'Neil*, 2 Bail. 466, 471, 2, 3.) In assumpsit for money received under pretence of being the plaintiff's assignee of a debt, the debtor was held incompetent as a witness for the plaintiff. (*Penniman v. Patchin*, 5 Verm. Rep. 346, 354.) In an action by the vendee on a warranty that a vessel was seaworthy, the plaintiff offered the master to prove her not so, in consequence of which she was lost while under his care. Held incompetent. (*Newbold v. Wilkins*, 1 Harringt. 43.) In ejectment, one who occupies a part of the premises in question, though not a party, is not a competent witness for the defendant; for one result of a recovery would be a liability of the witness for mesne profits. (*Boyer v. Smith*, 5 Watts, 55. See *Doe v. Preece*, 1 Tyrwh. 410.) The defendant holding as lessee under the witness, the latter is of course not a competent witness for the defendant. (*Tindal, C. J. in Doe, ex dem. Bath, v. Clarke*, 3 Bing. N. C. 429.)

We saw ante, note 97, p. 98, 9, that in ejectment by a grantee with general warranty, who had never been in possession, his grantor was said to be competent for him; because, though he might fail, it would not be a breach of the warranty, which can only be broken by ouster from a possession actually taken. The contrary was

held in *Randolph v. Meek*, Mart. & Yerg. 58, 61. The court rely on *Hamilton v. Cutts*, 4 Mass. Rep. 349, and *Duval v. Craig*, 2 Wheat. 46, 61, 2.

In the case of *Briggs v. Crick*, (5 Esp. Rep. 99,) it was held that the former proprietor of a horse, who had sold with warranty of soundness, was, in an action against his vendee on a like warranty, competent to prove the soundness without a release, as a witness for his vendee. (*Baldwin v. Dixon*, 1 Mood. & Rob. 59, S. P. *Duncan v. Bell*, 1 Nott & McCord, 153, 156, S. P. *Lightner v. Martin*, 2 McCord, 214, S. P. Per Harper, J. in *Johnson v. Harth*, 2 Bail. 185, S. P.) But Alderson, J. held contra in *Biss v. Mountain*, 1 Mood. & Rob. 302; and see ante, note 94, p. 106, and note 113, p. 124. The cases cited in these notes are those of a warranty of title. The reason given in *Biss v. Mountain* was, that the effect of a verdict for the defendant would be to relieve the witness from an action at his suit; a result obvious enough if unsoundness in the hands of the witness be in issue. If it confessedly occurred after he had parted with the horse, the verdict could in no event affect the witness. See per Harper, J., ut supra.

When a suit is commenced by attaching property which the debtor has sold after the levy, though with warranty, the vendee is not a competent witness for the defendant in the cause, even though he may have sold to another with warranty. The result of the suit may deprive his vendee of the specific property, and he would be liable on his warranty; and the court in Maine will not allow that his interest shall stand balanced by his remedy over against his own warrantor. (*Kendall v. Field*, 2 Shepl. 30.)

It is not necessary in order to render a witness incompetent, that the record in the pending cause should be evidence for or against him in a subsequent suit. It is enough that a decision of the cause in favor of the party calling him will prevent the witness' liability to a subsequent suit. See the several cases cited by Chancellor Walworth, 6 Paige, 81. Accordingly, where two of three copartners in a mercantile firm sold and assigned all the partnership property and effects to W., their copartner, and D. W., as his surety, joined with him in a bond to B., one of the retiring partners, to pay the debts of the firm and indemnify him against any liability on account of such debts; and a bill in chancery was afterwards filed by W., as such assignee, against S., to recover a demand claimed to be due from him to the firm, and also to bar a claim against the firm on the part of S., which he by his answer alleged to be due and claimed to have allowed to him against the copartnership; held that D. W. was not a competent witness for the complainant, to establish his claim against S., and to disprove the claim set up by the latter against the firm; as a decision in favor of the complainant establishing or increasing the amount of the company claim against S., or diminishing the amount of the claim sought to be offset by the defendant, would discharge or diminish the liability of the witness on the indemnity bond *pro tanto*. (*Woods v. Skinner*, 6 Paige, 76.) *Quere*. Would not the witness be competent as having a remedy over against his principal for whatever he might have lost by a decree against his surety, within the principle of *Benedict v. Hecox*, 18 Wend. 490? We have adverted to this principle several times in the course of these notes.

NOTE 101, p. 109. — *Bail and other judicial sureties not competent.*

That special bail and other sureties are not competent for their principal in the suit wherein they are bound, we saw ante, note 101, p. 109. (And see *Miller v. Frazier*,

3 Watts, 456, 8, 9.) The doctrine in the cases there cited, and in various others, has been applied to sureties in a replevin bond. (Bailey v. Bailey, 1 Bing. 92; 7 Moore, 439, S. C. Sanderson's ex'rs v. Marks, 1 Harr. & Gill, 255. Morton v. Beall's adm'r, 2 id. 136. Hall v. Bailies, 15 Pick. 51.) The endorsement of a writ, in several states, makes the endorser a surety for costs, and so incompetent; (Roberts v. Adams, 9 Greenl. 9; Beckley v. Freeman, 15 Pick. 468; Clark v. Kensell, 1 Wright, 480;) and held that in Ohio the attorney's clerk might bind his principal by endorsement, if he have special authority. (Id.) The receptor of goods attached is not a competent witness for the defendant in the attachment suit, where he has allowed them to pass into the hands of the latter; but his competency was restored by the deposit of a sum of money in his hands equal to the greatest amount for which he stood liable on the receipt. (Allen v. Hawks, 13 Pick. 79. Beckley v. Freeman, id. 468.) The bail for one who appeals from a justice's court is not competent for the appellant in the appellate court. (Craven v. Updike, 3 Blackf. 272. And see Lavender v. Pritchard, 2 Hayw. 337, and McCulloch v. Tyson, 2 Hawks, 336.) The surety in an attachment bond to secure the defendant his damages and costs, is not a competent witness for the complainant. (Miller v. Henshaw, 4 Dana, 325, 333. And see Garmon v. Barringer, 2 Dev. & Bat. 502.) So in an attachment bond conditioned to return the property attached and pay the judgment. (Stowe v. Sewall, 3 Stew. & Port. 67, 74.)

NOTE 104, p. 111; NOTE 262, p. 266.—*Of restoring the competency of a joint debtor or partner not sued.*

The difficulties attending the discharge of interest in an ordinary joint debtor not sued, so as to make him competent for the defendant, were considered ante, note 104, p. 111, 112, and note 262, p. 266; and where he is a partner, note 262, p. 266. It will be seen by these notes, that his competency for either party has been thought materially to depend on the effect of the verdict in the immediate suit, and the liability of the witness, in the event of the insolvency or death of the defendant. (Gardiner v. Levaud, 2 Yeates, 185, S. P.) The text, p. 134, holds that his competency for the defendant cannot be restored, by any arrangement between the witness and the defendant, (James v. Bostwick, 1 Wright, 142, 3, 4, S. P.) while several American cases hold that it can. The latter position has lately been adopted as law in England, and the former cases to the contrary disregarded. General releases were interchanged between the defendants and their copartner, which were held to restore his competency, as cutting off his liability to contribute, his right to any surplus in the partnership fund, &c. The case is also remarkable as disposing of the question how his interest would be affected by the verdict. At the bar it was objected that if in favor of his copartners the defendants, it would be a bar as to him. (And see several American cases cited at note 262, p. 266, 7; note 583, p. 823; note 104, p. 111, 112; Gardiner v. Levaud, 2 Yeates, 185; Bill v. Porter, 9 Conn. Rep. 23, 9; Scott v. Colmesnil, 7 J. J. Marsh. 418.) This the court conceded; but said that it would be equally so if in favor of the plaintiffs—and the defendants having released him from contribution, it was, in respect to the verdict, a case of balanced interest. (Wilson v. Hirst, 4 Barn. & Adolph. 760.) The release, as there, must be by all the defendants. One cannot release for himself and copartners, *inter se*; (Bill v. Porter, 9 Conn. Rep. 23, 29, 30;) and there must be mutual releases; one from the defendant alone will not do. (Wil-

son v. Hirst, *supra*. Black v. Marvin, 2 Pennsylv. Rep. 138. M'Coy v. Lightner, 2 Watts, 347, 351.)

"It is true," says Williams, J. in Bill v. Porter, 9 Conn. Rep. 28, "that the judgment is not against him, [the witness] nor does execution issue against him; but by virtue of that judgment, the partnership effects may be taken in execution, in the same manner as if all the partners had been made defendants." *Quere*, unless he be named in the process, and pursued as a joint debtor. (Carter v. Connell, 1 Whart. Rep. 392, 398. 2 id. 542, 561, 2, S. C.) In Black v. Marvin, *supra*, the court said "the joint funds will be decreased by an execution against either." (M'Coy v. Lightner, *supra*, S. P.) Bagley v. Osborne, 2 Wend. 527, cited *ante*, note 262, p. 266, should also have been mentioned as a case of mutual releases; and in Willings v. Consequa, cited in note 88, p. 95, and note 262, p. 266, from 1 Pet. C. C. Rep. 301, the witness not only took a release, but assigned his interest in the subject matter of the suit to his copartners. But the witness was in that case a party.

Yet there are several cases in which a release from partners defendant, to another partner not sued, has been alone holden sufficient. That was so in Le Roy, Bayard & Co. v. Johnson, also cited in note 262, from 2 Peters, 186. See *id.* p. 194, per Washington, J. for the reason; which is, that the witness being released from contribution to the defendant, his copartner was interested to procure a recovery against and satisfaction from him, and so discharge himself; not noticing that a verdict for the defendant would work the same effect, nor that a recovery would diminish the fund. Other cases are to the same effect. (Wilson v. Smith, 5 Yerg. 379, 388, 408. Willings v. Consequa, *supra*.) The reasoning in Bagley v. Osborne, *ut supra*, goes to the same point; and a late M. S. case decided by the supreme court of New-York, expressly adopts the release of the defendant alone as sufficient. The question was a good deal discussed in Carter v. Connell, 1 Whart. Rep. 392, 398, and 2 id. 542, 561, 2, S. C. wherein the process was against all the partners, but returned *non est inventus* as to the witness, who was released by his alleged copartners. It appears by 2 Whart. Rep. 562, that a statute of Pennsylvania leaves a partner still liable, though not served with process in the cause. In New-York, the joint property would be liable to execution in such a case, as if all had been brought into court. In 1 Whart. Rep. 398, it is said "judgment in favor of the plaintiff would authorize a payment of this debt by the defendants out of the partnership funds, or it could be enforced by execution, which would not be the case if the plaintiff failed." If the witness be not named in the suit, and if, as is holden by several cases, it comes to be clearly established that a verdict either way in a suit against the others, individualizes the debt, and forever discharges the witness, the question upon his competency on a release to, though not from him, may receive a different determination, even by those courts which hold mutual releases to be necessary. In assumpsit for work done to a vessel against one part owner, another part owner is competent for the defendant on being released by him. (Jones v. Pritchard, 2 M. & Wel. 199.)

Another position in which a partner may sometimes be placed is, where he, being a dormant partner, the suit is brought by the known and active partner alone for a joint debt. The dormant partner has, in such a case, sometimes been received, on releasing his interest to the plaintiff, as competent for him. (Ward v. Lee, 13 Wend. 41, 43. Curcier v. Pennoek, 14 Serg. & Rawle, 51, 54. *Ante*, note 88, p. 95.) This,

however, is denied in other cases, and apparently on very strong ground; because the fund for payment of their joint debts will not only be increased by the recovery; but the witness is liable to the defendant for costs. (*Pickett v. Cloud*, 1 Bail. 362, 4, 5.)

In a very peculiar case the interest of a partner off the record was much examined, and found to be balanced; and he was therefore received as competent. (*Gregory v. Dodge*, 4 Paige, 557; 14 Wend. 593, 602, 604, &c. S. C. on appeal.)

NOTE 108, p. 114.—*Of the incompetency arising from the witness' testimony tending to create, increase or prevent the diminution of a fund in which he is interested.*

That where the effect of a witness' testimony will be to create, increase or avoid the diminution of a fund in which he has an interest, he is incompetent, was illustrated by many cases at note 108, p. 114, and see *Hillhouse v. Smith*, 5 Day, 432. The cases are quite uniform as to the principle; but not entirely so, in its application. Thus a bankrupt cannot testify for his assignees, unless he release his allowance. (*Schneider v. Parr*, Peake's Add. Cas. 66. *Dixon v. Purse*, id. 187. *Coit v. Owen*, 3 Desauss. Eq. Rep. 175.) A distributee of a testator or intestate is incompetent for the executor or administrator, in a suit against him as such. (*Allington v. Bearcroft*, Peak. Add. Cas. 212. *Dunnington's ex'r v. Dunnington's adm'r*, 3 Harr. & John, 279. *Scott v. Young*, 4 Paige, 542, 4. *Caperton v. Callison*, and *Terry v. Belcher*, infra. *Brown's executors v. Durbin's administrator*, 5 J. J. Marsh. 170, 174.) Yet in an action against an executor, one entitled to an annuity under the will, which was of course a charge, and depended for its very existence on the fund, was holden competent for the defendant by the K. B. in *Noel v. Davis*, 5 Barn. & Adolph. 96. The court said it was not distinguishable from *Paull v. Brown*, 6 Esp. N. P. Cas. 34. That was trover by an administrator; and a creditor of the estate was offered for the plaintiff. *Macdonald B.* received him, saying it was not distinguishable from an action by a party in his own right, wherein it never was heard that his creditor was an objectionable witness. And see *Russell v. Sprigg*, 10 Lou. Rep. (Curry) 424, 5, per Martin, J. But is there not a plain difference? Before the debtor's death, the liability is personal;—after his death, *the fund*, the estate *alone*, is liable, on which the debts of the deceased are cast as a lien. The cases above cited from Peake's Add. Cas. seem most clearly to be correct in principle, and will be found sustainable by an almost unbroken line of English and American authority. (See notes 108 and 109, p. 114 to 119. See also *Paull v. Mackey*, 3 Watts, 110, 124. *Willis v. Dun*, 1 Wright, 153, 4. *Cleverly v. M'Cullough*, 2 Hill, 445.) One who sold his stock in a turnpike company with a guaranty that it should bring the *par* price, was held incompetent as a witness for the company. (*Grayble v. York, &c. Co.*, 10 Serg. & Rawle, 269.) In assumpsit as sail maker against a prize agent, for the plaintiff's share in the proceeds of a captured vessel; the captain was held competent for the defendant to reduce the amount of the plaintiff's recovery to the share of a common sailor; inasmuch as the captain's share was fixed by act of congress. (*Murray v. Wilson*, 1 Binn. 531, 533.) The witness had retained and agreed to pay the plaintiff's attorney, and had a promise of the plaintiff that the avails of the suit should be applied to discharge his debt against the plaintiff. He was excluded for the last reason. (*Benedict v. Brownson*, Kirb. 70.) *Quere*, whether the first, viz. liabili-

ty to the attorney, was not the true ground, (Bell v. Smith, 7 Dowl. & Ryland, 846; 5 Barn. & Cress, 188, S. C.,) and whether the reason given was more than an interest in the question. (Ante, note 109, p. 119.) In trover by an executor, for a conversion subsequent to his testator's death, a legatee was held a competent witness for the plaintiff, on the ground that it appeared that the recovery was not necessary to render the estate adequate to the payment of his legacy. (Carlisle v. Burley, 3 Greenl. 250. See Richardson v. Freeman, 6 Greenl. 57.) Though the witness offered for the plaintiff have a promise from him that the money recovered shall be paid to the witness for a debt due him by the plaintiff, yet the witness is competent for the plaintiff. (Seaver v. Bradley, 6 Greenl. 60.) There must be an assignment of the fund to be recovered, to the witness, or something equivalent, as an order on the attorney to pay the witness, &c. in order to disqualify him. (Seaver v. Bradley, 6 Greenl. 63, 4, per Mellen, C. J. and the cases there cited. Ante, note 109, p. 119, S. P.) In trover or trespass by the bailee against a stranger, the bailor is not competent for the plaintiff; because the bailee recovers the value beyond his own interest for the use of the bailor, thus creating a fund for his benefit, unless indeed the property tortiously taken by the defendant has been returned to the plaintiff. (Chestney v. St. Clair, 1 N. Hamp. Rep. 199, 190.) A paid legatee, who was released by the executor, was held incompetent for him at the suit of a creditor, the will providing that the legacy should abate, if the assets proved insufficient. (Hedges' ex'rs v. Boyle, 2 Halst. 68.) It was said the creditors still had a lien on the subject of the legacy in the legatee's hands. It was a specific legacy. It was also added that the record would be evidence against the legatee. (Id. 70, 1.) In the same case, for the reason that debts would be a lien on the land, devisees of a contingent remainder in land were excluded as witnesses to defeat the recovery against the executor. In debt against the administratrix of one of two joint obligors, the widow and distributee of the other was held to be a competent witness for the defendant. The court said, if interested at all, it was in favor of the plaintiff. (Braxton's adm'x v. Hilyard, 2 Munf. 49, 52.) In debt on an administration bond, a distributee is incompetent for the plaintiff. He is himself the real plaintiff. (Ordinary, &c. v. Bracey, 2 Bay, 542.) In assumpsit against the defendant as executor *de son tort*, a distributee was held inadmissible as a witness for the plaintiff. (Anderson v. Primrose, Dudley, 216.) A creditor of A., the latter having assigned for the benefit of his creditors generally, is not a competent witness to impeach a claim which is adverse to the assignment. (Bates v. Coe, 10 Conn. Rep. 280.) Where, in an action on an administration bond by the state founded on the alleged fact, that there is no next of kin within such a degree of consanguinity to the intestate as to be entitled to the residuum, B. who claimed to be such next of kin, was held an incompetent witness for the defendant to prove that fact. (State v. Greenwell, 4 Gill. & John. 407.) The husband of a distributee was held incompetent as a witness for the estate of the intestate, (Caperton v. Callison, 1 J. J. Marsh. 396, 7;) and this, though his wife lived and dealt separately, and each was under bonds not to interfere with the property of the other. (Terry v. Belcher, 1 Bail. 568.) The creditor of an insolvent was held incompetent to testify in favor of his assignees in a suit by them to recover a debt. (Cleverly v. M'Cullough, 2 Hill, 445.) So of one who was held out as a partner of the insolvent, [bankrupt,] for a recovery would diminish his liability to creditors, by increasing the fund of the bankrupt partner.

(*Holland v. Reeves*, 7 Carr. & Payne, 36. See also *Bank of Alabama v. M'Dade*, 4 Porter, 252.) In trover, for property claimed by the defendant as executor, a legatee was held incompetent for him. *Semb.* from the opinion of the court, he was a residuary legatee. (*Dimond v. M'Dowell*, 7 Watts, 510, 519.)

The main difference between the cases lies in what shall be deemed proof of such a direct and certain interest as to disqualify the witness. Some cases hold him at once disqualified; and do not stop to inquire into the state of the fund in the first instance, as whether it would be solvent or sufficient actually to benefit the witness by its increase, or injure him by diminution. (See cases at note 108, p. 114 to 119, *passim*. *M'Kinney's ex'rs v. M'Kinney's adm'rs*, 2 Stew. Rep. 17. *Hillhouse v. Smith*, 5 Day, 432, 438, per Mitchell, Ch. J. *M'Kinney, J.*, in *Finks v. English*, 3 Blackf. 139.) Others demand an inquiry into the state of the fund in the first instance, with proof that the increase or diminution will, in fact, be material to the witness. (*Barclay's assignees v. Carson*, 2 Hayw. 243. *Leary's ex'rs. v. Littlejohn*, 1 Murph. 406. *Boyer v. Kendall*, 14 Serg. & Rawle, 178. *Youst v. Martin*, 3 Serg. & Rawle, 427. *Edgell v. Bennett*, 7 Verm. Rep. 534, 6.) And others require, that if the fund can be in truth no probable benefit to the witness, this should be proved by the party producing him. (See cases in note 108, p. 114 to 119, *passim*. *Morris' adm'r v. Bills*, 1 Wright, 343, and see *Williams v. Baldwin*, 7 Verm. Rep. 503.)

A creditor of the estate was held competent for the administrator plaintiff, because it did not appear affirmatively that he would be benefitted by the recovery, it not being shown that the estate was otherwise insolvent. (*Boyer v. Kendall*, 14 Serg. & Rawle, 178. *Youst v. Martin*, 3 id. 427, S. P.) The competency of the creditor is laid down by these cases almost as unqualifiedly as in *Noel v. Davis*, *supra*. So of a specific legatee. (*Leary's ex'rs v. Littlejohn*, 1 Murph. 406. *Torrence v. Graham*, 1 Dev. & Bat. 284, 6.)

NOTE 116, p. 125; NOTE 126, p. 139; NOTE 237, p. 253; NOTE 240, p. 254.—*Of a corporator as a witness for his corporation.*

By a decided balance of the cases stated in the notes last above cited, it will be perceived that a corporator of a state, county, town, village, or other corporation formed for municipal purposes, is a competent witness in behalf of his corporation, in respect to corporate claims, or liabilities of all kinds, if he have no personal interest beyond that of a corporator. The rule is well expressed, with its principle, in Willcock on Municipal Corporations, p. 146, § 350; and see per Walworth, C. in the matter of Kip, 1 Paige, 601, 613. The doctrine has been applied, by the following cases, to the corporator of a town: *Canning v. Pinkam*, 1 N. Hamp. Rep. 353, *Smith v. Barber*, 1 Root, 207, 8, *Eustis v. Parker*, 1 N. Hamp. Rep. 273, which refers to and considers numerous English and American cases; to an inhabitant of an incorporated village, (*Trustees of Watertown v. Cowen*, 4 Paige, 510, 513;) again, to a corporator of a town, (*Orange v. Springfield*, 1 South. 186, *Schenck v. Corshen County Collector*, 1 Coxe, 189, *Fuller v. Hampton*, 5 Conn. Rep. 416, *Pond q. t. v. Sage*, 1 D. Chipm. 250, *Mayor and Aldermen of Jonesboro' v. M'Kee*, 2 Yerg. 167, *Doe, ex dem. Jackson, v. Commissioners of Hillsborough*, 1 Dev. & Batt. 177;) to members of charitable corporations, (*Methodist Church v. Wood*, 1 Wright, 12;) of a civil district charged with the support of the poor, (*State v. Davidson*, 1 Bail. 35;) to

inhabitants of a county, (*Board of Justices of Burlington v. Fennimore*, late county collector, 1 Coxe, 190;) to the inhabitants of a city, (*Mayor, &c. v. Wright*, 2 Porter, 230, *Maysville v. Shutz*, 3 Dana, 10, *Van Wormer v. The Mayor, &c. of Albany*, 15 Wend. 262;) and to corporators of parishes and school districts, (*Congregational Society, &c. v. Perry*, 6 N. Hamp. Rep. 164.) The contrary doctrine was formerly held in Vermont. (*Chester v. Rockingham*, Brayt. 239.)

In consequence of the doctrine being left questionable by the cases at common law, as in Pennsylvania, (*Commonwealth v. Keighler*, Whart. Dig. 330, pl. 710, 2d ed., *Commonwealth v. Baird*, 4 Serg. & Rawle, 141,) it is sometimes declared by statute. (*Thornbury v. Directors of the Poor, &c.* 12 Serg. & Rawle, 110. *M'Farland v. Commissioners of Moyamensing*, 12 Serg. & Rawle, 297. *Van Wormer v. The Mayor, &c. of Albany*, 15 Wend. 262, 263. 1 R. S. 376, 2d ed. § 4. *Doe, ex dem. Higgs, v. Cockell*, 6 Carr. & Payne, 525.)

In an action by a road commissioner, in his own name, on a bond for work given to his predecessor, the latter was held a competent witness for the plaintiff. (*Cox v. Way*, 3 Blackf. 143, 145.)

The general result of the cases is well expressed by the sup. court of Ohio, in *Methodist Episcopal Church of Cincinnati v. Wood*, (5 Ham. 583, 4.) "In cases where corporations of a *public nature*, comprehending the divisions of the state, or institutions for charitable or pious purposes, such as counties, towns, school districts, religious or charitable societies, are parties to the record, or interested, the members of the corporation, having no individual interest, are competent witnesses." And see per Hitchcock, J. in *Mayor, &c. v. Wright*, 2 Porter, 235. Those adjudged cases which present any difficulty in reaching this result, are well considered by Johnson, J. in *State v. Davidson*, (1 Bail. 35, 36 to 38.) See also *Lancum v. Lovell*, 9 Bing. 465, though the English cases are by no means to be considered as going the length of the above doctrine. *Rated* inhabitants or members of municipal corporations, are still excluded there independently of certain statutes. (*Tothill v. Hooper*, 1 Mood. & Rob. 392. *Oxenden v. Palmer*, 2 Barn. & Adolph. 236. *Rex v. Bishop Auckland*, 1 Adolph. & Ellis, 744. *Davis v. Morgan*, 1 Tyrwh. 457.) They are, as heretofore, admissible if not *actually rated*; but merely *liable* to be so. (Per Bayley, J. in *Marsden v. Stansfield*, 7 Barn. & Cress. 815. *Doe, ex dem. Hobbs, v. Cockell*, 4 Adolph. & Ellis, 478.)

If the corporation be for private purposes, as a bank, turnpike company, &c. (*Robertson, C. J. in Maysville v. Shultz*, 3 Dana, 13, 14, *Methodist Church v. Wood*, 1 Wright, 12,) or the corporator be offered to establish some private right, beneficial to himself, he is incompetent in behalf of his corporation. (See the cases in the same notes above cited, *passim*. Per cur. in *Eustis v. Pinkam*, 1 N. Hamp. Rep. 275. *Williams, J. in Mayor, &c. v. Jonesboro'*, 2 Yerg. 167, 169.) This doctrine was applied to the corporator of a turnpike company, though he had sold his stock; for he had guaranteed that it should bring the *par* price to the vendee. (*Grayble v. York, &c. Co.* 10 Serg. & Rawle, 269.) It was held generally applicable to the stockholder of a bank, though held that he might be sworn to prove himself the past or present depository of the corporate muniments. (*Union Bank, &c. v. Ridgeley*, 1 Harr. & Gill, 324, 403.) So the rule is applicable to the incorporated society of Shakers; for whom the deacons are trustees. Yet to disqualify a member, the act in respect to which he is called to testify must have been performed by them as trustees. And in

a case where they are sued as sureties for one member of the society for her private debt, another may be a witness for them. (*Richardson v. Freeman*, 6 Greenl. 57, 58, 9.) A mere trustee of a savings bank, not being either a stockholder or depositor, was held a competent witness for the institution. (*Middletown Savings Bank v. Bates*, 11 Conn. Rep. 519.) But the trustee and corporator of a private incorporation for embanking meadows, was held incompetent for the plaintiffs in an action to recover an assessment. (*Crozer v. Leland*, 4 Whart. 12.)

The result of the cases, as to the competency of private corporators, is well summed up by the supreme court of Ohio in *Methodist Church of Cincinnati v. Wood*, supra. "Where corporations of a private nature instituted for special purposes and private emolument, such as banks, insurance, turnpike and canal companies, bring suit, the interest of the corporators is direct, and they are incompetent to testify in support of their claim." Of course, it is the same where the corporation is a defendant.

NOTE 117, p. 126. *Of the competency of a witness whose interest is equal between the parties; and instances in which it has been holden, or denied to be equal.*

That the witness is not incompetent where his interest is equal between the parties, see note 117, p. 126. (*Harwood v. Murphy*, 9 Halst. 215. *Wright v. Nichols*, 1 Bibb, 298. *Reed v. McGrew*, 1 Wright, 105. *Potter v. Burd*, 4 Watts, 15, 20. *Benedict v. Hecox*, 18 Wend. 490, 503. *Fancourt v. Bull*, 1 Bing. N. C. 681. *Woods v. Skinner*, 6 Paige, 76.) Other cases of balanced interest are the following. In ejectment between two claimants by deed with general warranty from A., his widow was held competent for either. (*Brindle v. McIlvaine*, 10 Serg. & Rawle, 282.) In trover by the assignees of the witness, in trust to pay his debts, and return the surplus, against his creditor who claims to hold the goods in virtue of a lien for his debt, the witness is competent for either party. (*Jacoby v. Laussatt*, 6 Serg. & Rawle, 300.) How far the doctrine that a complete remedy ever shall work a balance will be carried, is doubtful. It is of modern origin; and has been denied by the older cases. (See per *Mills, J.* in *Shelby v. Smith's heirs*, 2 A. K. Marsh. 507. But see several cases, infra, in this note.) Thus the witness received payment for land from the defendant in ejectment, by a note endorsed by A., under an agreement that, if the defendant failed in his defence, the witness should refund, and look to A. for the money; though the latter was perfectly able to pay, yet the witness was held incompetent for the defendant. (*Owen v. Mann*, 2 Day, 399.) The reasoning of the court, (p. 403 to 405,) is certainly very strong, on authority, against the whole doctrine. Though the witness' interest be balanced as to the principal sum in question, yet if he be liable to the party offering him, for costs, and not to the other, this destroys the balance, and renders him incompetent. (*Beach v. Swift*, 2 Conn. Rep. 269, 275. *Bill v. Porter*, 9 id. 23, 29. *Barnwell v. Mitchell*, 3 id. 101, 5, 6. *Seymour v. Harvey*, 11 id. 275.) In assumpsit against a ship owner, for money advanced to the master, for which he had drawn his bill on the defendant, the master was held competent for the latter, as being indifferently liable to either party. (*Descadillas v. Harris*, 8 Greenl. 298.) But see ante, note 106, p. 113. In assumpsit by A. against C., for goods delivered to B. on C.'s order, B. is a competent witness for the plaintiff. (*Cochran v. Dawson*, 1 Miles, 276, 8.) The defendant, as bailiff of C., distrained and sold his tenant Brooks' goods, and

paid the avails to C. Then the plaintiff sued the bailiff for the money, because Brooks had, prior to the distress, mortgaged the same goods to the plaintiff. Held, that Brooks was a competent witness for the plaintiff, as being indifferently liable to him for his mortgage debt, or to the landlord for the rent, according to the event of the contest. (*O'Farrell v. Nance*, 2 Hill, 484.) In one case the action being against one of two makers of a note, the surety, the other maker, his principal, was held to be a competent witness for the defendant, the court saying his interest was balanced. (*Freeman's Bank v. Rollins*, 1 Shepl. 202, 205.) But *quere*, for he would be liable to the surety for costs. See the text, p. 62, and ante, note 107, p. 113; also note 103, p. 110, 111, and note 118, p. 133. In *Perryman v. Steggall*, 5 Car. & Payne, 197, the method directed by Gaselee, J. was for the surety to release the principal from the costs only. One sells goods with warranty to both parties; he is a competent witness for either. (*Jones v. Park*, 1 Stew. Rep. 419.) And so of a mortgage of the goods forfeited to one party, and a sale to the other; for if the vendee recover, the witness will be liable to the mortgagee for the value. (*Butler v. Tufis*, 1 Shepl. 302.) Although, in an action against one of two alleged joint debtors, the one not sued is incompetent for the plaintiff, as a witness to charge the defendant, yet where the latter has agreed with the witness to pay the whole debt, this creates a balance, in respect to the witness' remedy over. (*Nelson, J. in Gregory v. Dodge*, 14 Wend. 602, et seq. as explained by him in *Lake v. Auburn*, 17 Wend. 19.) Preponderance of difficulty is not received to determine the balance either in England, or in this country. (*Id.* p. 605. 4 Paige, 557, S. C.) In this last, the case, as considered, was, that two persons only filed a bill to account, the defendants insisting that A. was the complainant's partner, and introducing a set-off against all three. Held, that A.'s interest stood equal between the parties; and so he was a competent witness for the defendants. In replevin, the plaintiff claimed by sale from W., who swore that he had bought the goods of the defendant, but had not paid for them. W. was received as a witness for the plaintiff, and Weston, J. who delivered the opinion of the court, said he was competent for either party, being liable to the plaintiff on his warranty, or to the defendant for the price, accordingly as the plaintiff or defendant should fail in the suit. (*Eldridge v. Wadleigh*, 3 Fairf. 371.) We have seen that one who sells with warranty to each party, is indifferent between them; and it was held that the equipoise is not destroyed by the circumstance that the witness has specially indemnified one of the parties, by giving security. He is still a competent witness for that party. (*Jones v. Park*, 1 Stew. Rep. 419.) In a suit against sureties, the principal was offered as a witness for them; and Gaselee, J. directed him to be released from the costs only; and then held him to be competent. (*Perryman v. Steggall*, 5 Car. & Payne, 197.) In detinue for slaves, by the mortgagee against the vendee of the mortgagor, the latter was held a competent witness for the plaintiff. (*Miller v. Dillon*, 2 Monroe, 73.) We adverted above to the question, whether a remedy over, though clear, and against one perfectly solvent for what the witness is to lose by a determination against the party calling him, would create such an equality of interest as to save or restore his competency. On this, we have already seen, the cases are conflicting. Walworth, Ch. expressed a doubt of this in *Brown v. Lynch*, 1 Paige, 147, 157. For his competency, see ante, note 117, p. 130, 131, and cases there cited. Also note 118, p. 131. *Gregory v. Dodge*, 14 Wend. 593, as explained by Nelson, C. J. in 17 Wend. 19. *Lake v. Auburn*, 17

Wend. 18. Against it, several cases cited in note 107, p. 113, note 117, p. 131, and note 102, p. 110. *Shelby v. Smith's heirs*, 2 A. K. Marsh. 504, 507. *Whitehouse v. Atkinson*, 3 Car. & Payne, 344. The question is very fully examined in *Owen v. Mann*, *supra*. And see *Saffold, J. in Kennon v. McRea*, 2 Porter, 393, 4; also *Kendall v. Field*, 2 Shepl. 30, 32; *Schillinger v. McCann*, 6 Greenl. 364, and *Allen v. Hawks*, 13 Pick. 79, 85. There seems to be little or no difference in the cases that funds in hand, of the witness, or a deposit of a sum of money with him equal to his liability, will restore his competency. Ante, note 117, p. 131, note 259, p. 265. And in a late case in the court of errors, N. Y., it was held that where one of several sureties pays the whole, and sues the principal, the other surety is a competent witness for the plaintiff; for, if he fail, and the witness be made liable for part, he still has a remedy over against the principal. (*Benedict v. Hecox*, 18 Wend. 490, 503, reasoning of Paige, senator, on which the case turned.)

It will have been observed by the learned reader, that the principle of this last case, if carried out to its full extent, will subvert those cases which hold that a surety, not sued, is incompetent as a witness for his principal. See ante, note 107, p. 113, with several parts of this supplement, and *Leeds v. Leeds*, 12 Conn. Rep. 176.

The same principle will also subvert the rule excluding special bail and other judicial sureties; see ante, note 270, p. 271, and several parts of this supplement; for, in all, there is a remedy over. So of many other cases, as parties to bills and notes, joint debtors not sued, &c. &c. See ante, note 117, p. 130, 1, and several parts of this supplement.

The principle will also very much enlarge the means of restoring competency by counter security, &c.

NOTE 118, p. 131.—*Of the competency, in respect to interest, of a party to a bill of exchange or promissory note, as a witness in a suit between other parties to the same paper.*

The extent to which one party to a bill or note is received as a witness between others, was considered ante, note 118, p. 131. It was there seen that the courts are not consistent in their decisions. As a general rule he is, in England, a competent witness, for he is equally liable, let the suit terminate as it will, and for nothing beyond the face of the paper; not for costs, unless the party for whom he is called became a party for his accommodation, or he has otherwise made himself liable by some special undertaking. The American cases mostly come short of that, especially as to the competency of a drawer or endorser, for a subsequent holder. We are inclined to believe, however, that there is a tendency to the adoption of the English rule. True, the holder, by a recovery and *satisfaction*, discharges the drawer or endorser; but the same thing may be said as between a plaintiff in tort and the joint wrong doer of the defendant. Yet he is competent for the plaintiff, because *non constat*, that the plaintiff will proceed to obtain satisfaction. He is held competent in England, even though the mere recovery will be a bar in his favor. (*Abbott, C. J. in Blacket v. Weir*, 5 Barn. & Cress. 385. *Hall v. Curzon*, 9 id. 646. *Ashurst, J. in Walton v. Shelly*, 1 T. R. 301, 2. And see ante, note 84, p. 86; note 85, p. 91, in connection with p. 47 and 8 of the text. *Wilde, J. in Eastman v. Winship*, 14 Pick. 47.) In case of the drawer or endorser, too, beside the verdict in favor of which he is called to testify being no

bar, he usually has a remedy over. 1 Saund. on Pl. & Ev. 315, 16, who speaks of the remedy over as one reason. This was commented upon and repudiated as unsound by Saffold, C. J. in *Kennon v. M'Rea*, 2 Porter, 393, 4. He added at p. 399, that the endorser, on the holder recovering, would probably (and of this there seems to be no doubt, *Geoghegan v. Reid*, infra,) be entitled to all the benefits of the judgment by right of cession or subrogation. The witness was therefore held to be incompetent. The question was much and ably discussed in *Reid v. Geoghegan*, 1 Miles, 204, 5, 6, (district court of Philadelphia,) where the English rule was adopted. But the judgment was reversed on error, by the supreme court, who also went much on the ground that the witness was aiding to obtain a judgment to which he was entitled by right of subrogation or substitution. (*Geoghegan v. Reid*, 2 Whart. 152, 4.) The rule as laid down by Chief Justice Saffold in *Kennon v. M'Rea*, supra, is, that "an endorser of a note or bill is incompetent, in respect to his interest, as a witness in favor of a subsequent endorsee, to charge any party to the instrument whose liability is anterior to his own." It is not to be denied that he concludes according to the general current of American cases directly upon the point. They certainly either decide or assume that neither a drawer of a bill, nor a prior endorser of a bill or note, is competent for the holder, in an action against any other party, without a release or other discharge. (*Carroll v. Meeks*, 3 Porter, 226. *Geoghegan v. Reid*, 2 Whart. 152. *Juniata Bank v. Brown*, 5 Serg. & Rawle, 226, 232. *Cropper v. Nelson*, 3 Wash. C. C. Rep. 125. *Cowles v. Harts*, 3 Conn. Rep. 516. *Brown v. Vance's ex'rs*, 2 Monroe, 137. *Duncan v. Pindell*, 4 Bibb, 330. Per Mellen, C. J. in *Pingree v. Warren*, 6 Greenl. 457, 459. *Murray v. Marsh*, 2 Hayw. 290. *Billingsly v. Knight*, 2 Tayl. 103.) And this was held to be especially so where the witness had transferred the note in payment of a precedent debt to the plaintiff; for, on failure of the suit, the debt would revive. (*M'Ginn v. Holmes*, 2 Watts, 121. And see *Watson's ex'rs v. McLaren*, 19 Wend. 562, per Cowen, J.) What we mean, therefore, in speaking of a contrary tendency is, that a multitude of other cases contain principles which, applied to the drawer or endorser, would bring him within the English rule. Some of these we have just noticed, especially the principle which receives one joint wrongdoer to testify against another, though the recovery may discharge the witness. This principle was expressly adopted in Massachusetts, in *Eastman v. Winship*, stated infra; and applied to a party whose name was upon a promissory note; the court thus going the whole length of the English rule. (Vid. 14 Pick. 47.) And see *Winship v. The U. S. Bank*, 5 Pet. 529, where a like question was argued, but the court were divided. No case pretends that the verdict in the pending cause can be used as evidence for or against the witness; and, with deference, we do not see the force of the argument against competency in Pennsylvania and Alabama, arising from the right of subrogation. The right certainly exists, and we have no doubt that it should universally be enforced by rule, as in Pennsylvania. (*Burns v. The Huntington Bank*, 1 Pennsylv. Rep. 395. Per Sergeant, J. in *Geoghegan v. Reid*, 2 Whart. 154.) This, however, would not be done till the drawer or endorser should have paid the holder the principal, interest and costs. It is merely facilitating the witness' remedy over, and thus rendering the balance of interest more complete. Nothing is directly and certainly gained or saved by the witness' testimony. All is contingent. If the force of a remedy over be denied as creating a balance, we answer that it has been recog-

nized by many cases, (ante, note 118, p. 131, 2,) and some very recent ones. (*Lake v. Auburn*, 17 Wendell, 18, citing and explaining *Gregory v. Dodge*, 14 Wend. 593, but doubted in *Allen v. Hawks*, 13 Pick. 79, 85.) Saffold, J. admits, in *Kennon v. M'Rea*, supra, that it is recognized in England. The admissibility of the witness may be maintained independent of this principle; but if this be considered available, facilitated as it is, in operation, by a prompt subrogation, the argument seems to be complete. (See per Cowen, J. in *Commercial Bank of Albany v. Hughes*, 17 Wend. 97; *Descadillas v. Harris*, 8 Greenl. 298.)

Taking the cases for law which proceed upon the least comprehensive ground of competency, still a party to the paper is recognized as a very common resource for testimony. The objection does not apply to an endorser subsequent to the plaintiff. (Per Saffold, Ch. J. in *Kennon v. M'Rea*, 2 Porter, 393. *Lonsdale v. Brown*, 3 Wash. C. C. Rep. 404, 5. And see *Wendell v. George*, R. M. Charl. 51.) And so of a prior endorser, who endorses "without recourse;" (*Cowles v. Harts*, 3 Conn. Rep. 516; *Billingsly v. Knight*, 2 Taylor, 103; Per Saffold, J. in *Kennon v. M'Rea*, supra; *How v. Thompson*, 2 Fairf. 152;) or at his own risk; (*Watson's ex'rs v. McLaren*, 19 Wend. 557, 561;) or has been released or otherwise discharged by the holder. (*Duncan v. Pindell*, 4 Bibb, 330. *Juniata Bank, &c. v. Brown*, 5 Serg. & Rawle, 226.) And without being discharged, he was held competent to repel a claim of set-off, which the defendant had interposed as valid against the witness while he was holder. Here he was received on the ground of a balanced interest. (*Zeigler v. Gray*, 12 Serg. & Rawle, 42, 3, 4.)

In an action by the holder against the acceptor or maker, the drawer or any endorser is a competent witness for the defendant. (*Spring v. Lovett*, 11 Pick. 417. *Stone v. Vance*, 6 Ham. 246. *Adams v. Carver*, 6 Greenl. 390, 394.) But not if the maker signed for the endorser's accommodation, especially if he be called to show a payment made by him to the holder, even though he may not have been charged by demand and notice, for he is liable without. (*Letson v. Dunham*, 2 Green's Rep. 307, 310.) The courts in Pennsylvania, however, exclude the drawer and endorser in such case, though they admit that the exclusion is contrary to the English and American cases generally. (*Elias v. Teill*, 1 Miles, 272.) He was rejected in this case on the positive authority in that state of *Sterling v. Marietta, &c. Trading Co.* 11 Serg. & Rawle, 179, and *Rhodes v. Lent*, 3 Watts, 365.

But all the cases must be taken with the qualification that the party who calls the witness did not become a party for the witness' accommodation. If he did, the witness being liable over to him, not only for the principal but for costs, is incompetent without a release, of the costs at least. The case stands on the footing of a surety calling his principal. (*Cowles v. Wilcox*, 4 Day, 103. *Haig v. Newton*, 1 Rep. Const. Court, 423, 432, in connection with *Chur v. Keckeley*, 1 Bail. 479, 481.) These were cases of holder against endorser, the maker being offered as a witness for the latter. The witness would clearly have been competent, independent of the fact that the defendant endorsed as his surety; (see also *Letson v. Dunham*, supra, and *Watson v. Minchin*, infra;) and he is generally, in such case, equally a witness for the plaintiff, even to show that a blank left by mistake was filled up by the witness according to the intent of the parties. (*Boyd v. Brotherson*, 10 Wend. 93.)

In an action by an endorsee against W., on two notes, one made by W. and en-

dorsed by J., and the other made by J. and endorsed by W., J. was held to be a competent witness for the plaintiff, though W. had released him. (*Eastman v. Winship*, 14 Pick. 44, 47, 8.) In one case, it was held that, in an action by the holder against the surety alone, a co-maker with his principal, that the latter was a competent witness for the defendant, on the ground that his interest was balanced. (*Freeman's Bank v. Rollins*, 1 Shepl. 202, 205.) *Quere.* See ante, note 103, p. 110, 11, and note 118, p. 133. In a like case he was released. (*Harman v. Arthur*, 1 Bail. 83.) See also several cases in point, in note 107, p. 113, in connection with the text, p. 62. In a like case, Gaselee, J. directed the defendant to release the witness from all claim for costs. (*Perryman v. Steggall*, 5 Carr. & Payne, 197.)

In suits by endorsees against endorers of notes, the maker is of course a competent witness for either party; (*Venning v. Shuttleworth*, Bayley on Bills, 536, 5th ed.; *Levy v. Essex*, Chit. on Bills, 413, 7th ed.;) and in *Watson v. Minchin*, Jones' Exch. Rep. (Irish) 583, he was held competent in an action by the endorsee against the endorser, to prove that the note was given for the defendant's accommodation; and that so he was not entitled to notice of its dishonor. A partner who had signed a note in the partnership name, his copartner being sued alone, was held competent for the defendant, to prove that the note was given on a consideration for his own exclusive benefit, with notice to the plaintiff of that fact. (*Roberts v. Mills*, 2 Harr. & Gill, 98.) In assumpsit by the holder of a bill against the drawer, an endorser is a competent witness for the defendant. (*Wendell v. George*, R. M. Charl. 51.) In assumpsit by the holder against the maker, on a note payable to A. or bearer, and by him endorsed to B., but declared on as delivered directly from the payee to the plaintiff, the court said that if B. had delivered back the note to A. and he had then delivered it to the plaintiff, B. would have been a competent witness for the plaintiff. (*Caroll v. Meeks*, 3 Porter, 226, 230.)

NOTE 118, p. 133; NOTES 122 to 129, p. 134 to 142.—*When a party may be a witness in his own cause.*

In general, neither a party in interest, nor a party merely nominal, can either be received as a witness in his own favor, nor in favor of others on the same side, nor compelled to testify against himself, or against others on the same side. But many exceptions have been made by the courts of law; and still more by courts of equity, sometimes where the party proposed as a witness is interested, at others where he is either free from interest, in the same sense with any other witness, or where his interest is removed at the trial. In this supplement we shall consider most of the additional cases respecting his restoration to competency, which in some states has become as common an expedient, as a similar restoration of other witnesses. The general doctrine that a party nominal or real is incompetent, with some of its qualifications, was considered ante, notes 122 to 129, p. 134 to 142, to which may be added several cases not there cited. (*Higdon's heirs v. Higdon's devisees*, 6 J. J. Marsh. 53. *Duncan J. in Gebhardt v. Shindle*, 15 Serg. & Rawle, 239. *Bullard, J. in Gravier's curator v. Cullion*, 11 Lou. Rep. (Curry) 276. *Bill v. Scott*, Kirby, 62. *Hawkins v. Hawkins*, 2 North Car. Law Repos. 627. *Williams v. Beard*, 3 Dana, 158. *Levy v. Burley*, 2 Sumn. 355, 61. *Scott v. Lloyd*, 12 Pet. 145, 149. *Bradley v. Root*, 5 Paige, 638, 9. *Norton v. Woods*, 5 Paige, 249. *Jones v. Bullock*, 2 Dev. Eq. Rep. 638, 9. *Davis v. Morgan*, 1 Tyrwh. 457. 1 Crompt. & Jerv. 87.)

The doctrine extends to a *prochein amy*. (Ante, note 122, p. 135. *Sproule v. Botts*, 5 J. J. Marsh. 162, 3.)

The courts in Pennsylvania are very liberal in allowing the restoration of the competency of a party to the record. But his interest must be fully extinguished. An executor plaintiff in trover, on his own possession, was excluded, though he offered to pay all past costs, and to deposit what the court should think sufficient to cover the residue; for the costs may be recovered back. In this case they were not paid and relinquished absolutely. Beside, he did not release his right to commissions. (*Gebhardt v. Shindle*, 15 Serg. & Rawle, 235, 9, and 240.) So generally of an executor plaintiff, though he sue in mere right of the intestate. (*Cochran v. Cochran*, 1 Yeates, 134. *Anderson v. Neff*, 11 Serg. & Rawle, 206.) An executor or administrator defendant cannot be rendered competent, as if he were plaintiff, by paying costs, releasing, &c.; for the verdict is evidence to charge him in various ways, e. g. for a devastavit, and this especially if he has admitted assets by his plea. (*Conrad v. Keyser*, 7 Serg. & Rawle, 370, 1. See also per *Duncan, J.* in *Wood v. Ludwig*, 5 Serg. & Rawle, 447.) *A fortiori* without a release, &c. (*Dehuff v. Turbett*, 3 Yeates, 157. *Sinks v. English*, 3 Blackf. 138.) A garnishee in a foreign attachment, being liable for costs, if he contest the plaintiff's claim, is not a competent witness against the plaintiff, even though he pay the debt due from him into court. (*Wood v. Ludwig*, 5 Serg. & Rawle, 446, 7.) A party defendant sued with others as a partner, is not competent for the plaintiff, to prove the partnership, though willing to be sworn; for his testimony discharges himself for so much as he throws upon the other defendants. (*Miller v. McClenachan*, 1 Yeates, 144.) One of several defendants in chancery, conveyed all his interest *pendente lite*, taking an indemnity from his grantee against the costs in the cause, and was then offered as a witness for the defendants; but was held incompetent. (*Shelby v. Smith's heirs*, 2 A. K. Marsh. 504, 507.) Where a judgment confessed was opened, at the instance of junior judgment creditors, and a trial awarded, the defendant was held admissible for either party. (*Summer v. Summer*, 1 Watts, 303.) In debt by a vendor against both his vendee and the assignee of the latter, brought in on notice as a terre-tenant, in order to fix him with the original purchase money as being an equitable lien on the land, the defendant, the vendee, was held incompetent for the plaintiff, because, though a defendant, and in that sense a witness against himself, yet he might throw the whole upon his assignee, who, it appeared, had no remedy over. (*Long v. Long*, 1 Watts, 265, 270.) In a case in Pennsylvania, it was held that one defendant was inadmissible for the other, the plaintiff objecting, even though his interest in amount were against the party calling him, and in favor of the plaintiff. The action was ejectment. (*Lies v. Stub*, 6 Watts, 48, 51.) The court say no such interest could countervail the immediate one which he had to testify in his own favor. (*Id.* 51.) In such case, though he disclaim and abandon the possession, and all costs be paid to the time of disclaimer, he is still liable to a suit for mesne profits, in which the record will be evidence against him. Therefore he is not competent for his co-defendant. (*Stub v. Leis*, 7 Watts, 43.) In *Connecticut*, it has recently been held, after much consideration, by the supreme court of errors, that a nominal plaintiff being willing to testify, was admissible for the defendant, although the real plaintiff, the assignee, objected. (*Johnson v. Blackman*, 11 Conn. Rep. 342, 6.) So of a real plaintiff, not named as such, e. g. a lessor in

ejectment, may, if he will, be received, and testify for the defendant, the other lessors objecting. (*Stanberry's lessee v. Nelson*, 1 Wright, 766. *Ohio*.) But he cannot be compelled. (*Id.*) And such is the general rule in regard to a real or nominal party plaintiff or defendant, not being interested to testify in favor of the opposite party. And if he be willing, the right to object does not lie with any nominal or real party on the same side. (Per White, J. in *Whatley v. Johnson*, 1 Stew. Rep. 488, 9. *Prewett v. Marsh*, 1 Stew. & Port. 17, 18, 19. *Owings v. Henderson*, 5 Gill & John. 134, 146. *Albers v. Wilkinson*, 6 Gill & John. 358. *Hain v. Martin*, 5 Watts, 179, 80. *Gravier's curator v. Cullion*, 11 Lou. Rep. (Curry) 269, 276.) See ante, note 122, p. 136.)

The rule is about the same in chancery. (*Douglass v. Holbert*, 7 J. J. Marsh. 2. *O'Neill, J. in Capehart v. adm'rs of Huey*, 1 Hill's Ch. Rep. 403.) Even there, a party cannot be compelled to be a witness against himself independent of his answer. A decree against him cannot be founded, in whole or in part, on his testimony before an examiner. (*Palmer v. Van Doren*, 2 Edw. Ch. Rep. 192.) One of several complainants, though disinterested, cannot be a witness for the complainants. The only way to make him competent, is, if the nature of the proceeding will admit of it, to obtain an order to strike out his name as a complainant, and make him a defendant. Neither a sole nor joint complainant can be examined as a witness against the defendant. (*Eckford v. De Kay*, 6 Paige, 565.)

The general rule we have spoken of, which receives a party in a court of law, must of course be understood as not extending to those courts which absolutely exclude parties as witnesses on the merits, irrespective of their interest. That there are several such courts, we saw by cases cited ante, note 122, p. 135, 6. Others may be added. (*Page v. Page*, 15 Pick. 368, 373. *Norton v. Woods*, 5 Paige, 249. *Gilmore v. Bowden*, 3 Fairf. 412, 13. *Kennedy v. Niles*, 2 Shepl. 54. *Jackson, ex dem. Titus, v. Myers*, 11 Wend. 533, 537, per Savage, C. J. And see per Shaw, Ch. J. in *Columbian Manuf. Co. v. Dutch*, 13 Pick. 127. *Benjamin v. Coventry*, 19 Wend. 353.) The rule, however, seems to be undergoing a course of relaxation in Massachusetts. (*Beardslee v. Neal*, 16 Pick. 501.) In *Jackson, ex dem. Titus, v. Myers*, supra, the landlord of a defendant in ejectment was said to be a real party within the rule which would preclude the right of the plaintiff to call him. Therefore his declarations were received against the defendant. In *Page v. Page*, supra, an executor plaintiff, though indemnified by his cestui que trust against costs, and though released by the defendant, was still held incompetent for the latter.

The sturdy rejection of a party, though entirely disinterested, by the courts in New-York, has operated to extend the jurisdiction of chancery there. In a cause by three persons as nominal plaintiffs, though only one was interested, tried before Cowen, J. at the Washington circuit, the defendant offered B., one of the plaintiffs, who was willing to be sworn, as a witness, against the real plaintiff. The latter objecting to this, and the witness being rejected, the chancellor sustained a bill, filed with the view to be relieved against the rule; and, in his court, gave the defendant the benefit of the more liberal rule which prevails there. (*Norton v. Woods*, 5 Paige, 249, 251.)

If a party be, in truth, interested, all the books agree that he cannot, if objected to, be received in favor of his interest, even under the more liberal rules of a court of equity. As if he be offered in a cause wherein he has been properly made a party, and therefore may be subject to costs, even though he be not interested in the subject mat-

ter. (*Ormsby's adm'r's v. Bakewell*, 7 Ham. Rep. pt. 1, p. 112. *Dwight v. Brown*, 9 Conn. Rep. 83.)

In Tennessee, the rule sanctioned by many cases in Pennsylvania, that a nominal plaintiff, who assigned before suit brought, is competent to prove the demand, is denied, though there is a statute in that state expressly exempting the assignor from all liability for costs in such a case. (*Anderson v. Bradie*, 7 Yerg. 297.)

A party may, of course, be made a competent witness by statute, either in his own favor, or against himself; as to prove usury, &c. (*Watkins v. Watkins*, 2 Stew. Rep. 485. Laws N. Y. sess. of 1837, p. 487, ch. 430, § 2.) And see ante, note 276, p. 276.

In assumpsit, in the name of the assignor of a chose in action, for the benefit of the assignee, the nominal plaintiff being offered as a witness by the defendant, the supreme judicial court of Maine held him incompetent, and said, "the common law rule is, that a party to the record cannot be a witness, unless in actions of *tort*. In no other case can a party to the record give evidence to go to the jury, on the merits of a cause;" citing and relying on some of the cases stated ante, in note 122, p. 135 and 138, from the N. Y. and South Car. Rep. (*Hackett v. Martin*, 8 Greenl. 77, 9.)

NOTE 118, p. 133; NOTE 122, p. 138. *When a party or other person interested, is yet competent to testify as to facts, laying the foundation for receiving secondary evidence.*

That a party or interested witness is competent to give evidence, preliminary to the introduction of secondary evidence, see note 118, p. 133, note 122, p. 138, and several additional cases. (*Shrowders v. Harper*, 1 Harringt. 444. *Schuylkill, &c. Navigation Co. v. Diffeback*, 1 Yeates, 367. *Woods' lessee v. Pindall*, 1 Wright, 507. *Drake's adm'r's v. Vaughan*, 6 J. J. Marsh. 145.) An administrator was received to show that the book of his intestate was a book of original entries, it appearing that no other evidence of that fact could be obtained. (*Ash v. Patton*, 3 Serg. & Rawle, 300, 303.) The plaintiff, in an action to recover a lottery prize, was received to show the loss of the ticket; (*Snyder v. Wolfley*, 8 Serg. & Rawle, 323;) but not till he had proved possession of the ticket in himself by other evidence, which, it was said, might, however, be inferred from his purchasing it. (*Id.* 330, 1.) A stockholder was held competent for his bank, to show that he was the depository of the corporate muni-ments. (*Union Bank, &c. v. Ridgely*, 1 Har. & Gill, 324, 408.) In an action against a bank, on its notes, held, that the plaintiff might himself testify to their loss by fire; but not to their contents. (*Burridge v. Geauga Bank*, 1 Wright, 688.) A clerk who had kept the books of the plaintiff's testator, though interested in favor of the plaintiff, was yet received to state the circumstances, in order to let in the books themselves as secondary evidence. (*Van Horne's ex'r v. Brady*, 1 Wright, 452.)

But this exception to the general rule, which precludes a party, does not prevail in Vermont, where the court refused to receive the plaintiff as a witness to prove the loss of a bond; (*Penfield v. Cook*, 1 Aik. 97;) nor in South Carolina, where he was rejected as incompetent to prove the loss of a note. (*Davis v. Benbow*, 2 Bail. 427.) The court said that chancery, which possesses the power to decree an indemnity, is the best jurisdiction to be resorted to in such cases. The evil of the former practice in a court of law has been felt in New-York, as to negotiable paper; and power ac-

cordingly given to the courts of law to require an indemnity, before permitting the party to recover, on his own oath of loss. (2 R. S. 327, 8, § 95, 6, 2d ed.)

It was said in *Drake's adm'rs v. Vaughan*, 6 J. J. Marsh. 145, that the party's testimony of loss of a paper should be confined to such as are in his possession, or under his control. But of this, *quere*.

NOTE 122, p. 134, and NOTE 127, p. 140. *Party, or other person interested, sometimes a witness on the merits in his own favor.*

There are two cases in Pennsylvania, in one of which the party in ejectment, and in another, an interested witness, were received to testify to the jury as to what were called *collateral facts*, viz. to identify a certificate of marriage, (*Davis v. Houston*, 2 Yeates, 289,) and to identify the blocks cut from marked trees. (*Coxe's lessee v. Ewing*, 4 Yeates, 429.) But the testimony of a party was denied to prove that he found a paper produced, in a certain place, though said, it would have been otherwise, if the court had required information of the place, as a warrant or preliminary to receiving the paper in evidence. (*Lodge v. Phipper*, 11 Serg. & Rawle, 333, 335.) And to the latter point, see *Union Bank &c. v. Ridgley*, 1 Harr. & Gill, 324, 408, *Edwards v. Nichols*, 3 Day, 16, and *Seekright v. Bogan*, 1 Hayw. 178, note; and see several cases ante, note 127, p. 140, wherein the party has been received, and sworn in chief, from necessity. See also *Porter v. The Hundred of Regland*, Peak. Add. Cas. 203.

A person is not disqualified as a witness merely because he happens to be a party to the cause in his corporate capacity, as if he be mayor, president, alderman, director, trustee or one of the company or commonalty of the corporation suing or sued. But he is still competent, even though interested as a corporator, if the corporation be public or municipal, and equally so as to a private corporation, if he have no interest, but stand as a mere trustee. In short, he comes within the reason of the rules illustrated by many cases in these notes, passim, in respect to receiving corporators, independent of the question whether they be parties to the record or not. (*Randel v. The Chesapeake and Delaware Canal Company*, 1 Harringt. 233, 395. *Middletown Savings Bank v. Bates*, 11 Conn. Rep. 519, 592. *Van Wormer v. The Mayor, Aldermen and Commonalty of the city of Albany*, 15 Wend. 262, 3. *Methodist Church v. Wood*, 1 Wright, 12. And see *Selectmen of Bennington v. M'Gennes*, 1 N. Chipm. 45.)

NOTE 130, p. 142; NOTE 131, p. 143.—*Of acquitting one defendant in an action for a tort, to the end that he may be a witness.*

At note 130, p. 142, and note 131, p. 143, was considered the rule, that one of two joint wrong doers, against whom nothing is proved, may be acquitted and sworn for his co-defendants. There is no dispute of the rule; (*Rigdon's heirs v. Rigdon's devisees*, 6 J. J. Marsh. 53;) and some books hold that the courts are bound, in a proper case, to direct an acquittal, even where the defendants have joined in a plea, unless it be one of justification; (*Bates v. Conkling*, 10 Wend. 389, 392, and the cases there cited;) though others say it is matter of discretion. (*Weston, C. J. in Gilmore v. Bowden*, 3 Fairfield. 412, 414, and the cases there cited. *Sawyer v. Merrill*, 10 Pick. 18.)

But we saw in note 130, p. 142, that there was some difficulty as to the time when the acquittal should be directed; whether at the close of the plaintiff's proof, or not

till the other evidence for the defence be closed. The English judges have recently adopted the former stage. (*Child v. Chamberlain*, 6 Carr. & Payne, 213.) In a trial of replevin under distinct cognizances as to several defendants, the plaintiff having consented that one defendant should be acquitted, this was considered equivalent to an actual acquittal of the person under whom the cognizance was made, and he was received as a witness for the defendant. (*King v. Baker*, 2 Adolp. & Ellis, 338.) In tort against three, the jury found two guilty and acquitted one. On a motion for a new trial by the two, on the ground of a newly acquired witness in A. by reason of his acquittal, the court allowed that he would be competent on the new trial, though the plaintiff moved for a new trial against him. (*Ranny v. Church*, 2 Root, 420.) Though one of several defendants sued for a wrong, be acquitted in a justice's court, yet if the opposite party appeal, the former is not therefore a competent witness in the trial of the appeal. (*Bates v. Conkling*, 10 Wend. 389.)

NOTE 121, p. 134; NOTE 511, p. 730; NOTE 534, p. 779.—*Whether a witness be admissible, when competent as to only part of the matter in question.*

Whether a witness competent as to part of the matter in dispute, should be rejected for the whole, the cases are conflicting. (Ante, note 121, p. 134. And see also per Hosmer, Ch. J. in *Beers v. Broome*, 4 Conn. Rep. 256.) The plaintiff called a witness, and, by him, proved a fact for which he was competent. The defendant then proposed to prove a distinct fact in his own favor, to show which the witness would have been, if originally introduced by the defendant, incompetent, by reason of interest. The plaintiff objecting, the court held him incompetent. (*Shields' lessee v. Miller*, 4 Harr. & John. 1, 6, 9.) *Quere.* See note 511, p. 730, and note 534, p. 779. A witness was offered for the defendants, without excepting any of them, and acknowledging that he was not competent for all, being interested in favor of some, was rejected. Held proper. (*Norton v. Sanders*, 1 Dana, 18.)

TEXT 76 and NOTE 141.—*Of one defendant suffering a default and being introduced as a witness for or against his co-defendant.*

In trover, one of two defendants having suffered a default, was received as a witness for the other. (*Ward v. Ventom*, Peak. Add. Cas. 127.) But see *id.* note (b), p. 128, which shows that the contrary should be holden for law; and so does our note 141, and the cases there cited. The annotator on Peake, (Tho's Peake, jun.,) objects that the costs are to be taxed jointly against both defendants. That alone is enough to raise an interest. This case of *Ward v. Ventom* is reported in 2 Esp. Rep. 552, by the title of *Ward v. Hayden & Ventom*, and is cited in the text of our author, at p. 75. We have seen at note 141, and the cases there cited, that the witness is also interested in the amount of damages, for these must be jointly assessed. Indeed, beside the defendant being technically inadmissible as a party, according to the rule in New-York and some other states, he is palpably interested. (See per Williams, J. in *Bill v. Porter*, 9 Conn. Rep. 29.) So of a joint promissor suffering judgment by default, for the same reason, (*Pillsbury v. Cammet*, 2 N. Hamp. R. 283,) though he be released by his co-defendant. (*Marshall v. Nagel*, 7 Bail. 308, in connection with *id.* 386, S. C.) But since the revised statute of Massachusetts, ch. 100, § 6, 7, authorizing a plaintiff in an action against several, to take judgment against one or more, a defaulted defend-

ant is, with his consent, a competent witness in favor of his co-defendants. (*Bradlee v. Neal*, 16 Pick. 501.) But it was held by another court, that a defaulted defendant is not competent, for his co-defendant, though the latter defend on the ground of infancy, and, in such case, the recovery need not necessarily be joint; (*Gilmore v. Bowden*, 3 Fairf. 412.) Nor is he a witness for the plaintiff, whether the action be on contract or for a tort; for his testimony goes to fix the other defendant with a portion of the liability, without which the witness would stand liable for the whole; (*Albers v. Wilkinson*, 6 Gill & John. 358 to 363, and the cases there cited;) and it is said that, by charging the other defendant, he puts it in the power of the plaintiff to collect the whole from that other if he shall think proper. (*Id.* 361, 2.) In such case, according to a well settled distinction, the witness would, as to contract, be at all events relieved of a portion, and as to tort, he may be relieved of the whole; for, as between wrong doers, contribution cannot be compelled. (*Ante*, note 84, p. 87.) This was held in *Columbian Manufacturing Co. v. Dutch*, (13 Pick. 125, 127. 8,) for the same reason; nor, added Ch. J. Shaw, does it balance his interest that by proving the demand joint he would defeat the action both as to himself and his co-defendant, under the rule that where more than one is sued the plaintiff must recover against all or none; for he thus lays the foundation of an action against himself for the whole; whereas by testifying against the other defendant, he fixes him equally with himself; equally liable for the whole debt in the first instance, and ultimately liable *prima facie* for contribution. To which he cites the English cases as going on that distinction.

These several questions will strike the learned reader as being parallel with those considered under other heads, where a plaintiff, having sued one of two joint contractors or wrong doers, introduces the other who is off the record, as a witness to charge the defendant.

TEXT, p. 77; NOTE 142, p. 147, and NOTES 155, 6, p. 151, 2.—*That neither the husband nor wife are in general admissible as witnesses against each other.*

It is well settled that, in general, neither husband nor wife are admissible as witnesses for or against each other. (*Corse v. Patterson*, 6 Harr. & John. 153. *Tackett v. May*, 3 Dana, 20, per Robertson, Ch. J. *Rigdon's heirs v. Rigdon's devisees*, 6 J. J. Marsh. 54. *Sadler v. Houston*, 4 Porter, 208.) Some cases go so far as to maintain the rule though they have been divorced *a vinculo*. (*State v. Phelps*, 2 Tyler, 374; but see *State v. J. N. B.* 1 *id.* 36, contra.) In cases of book account, where the party is a witness, *quere*, whether his wife may be received also? (*Stanton v. Wilson*, 3 Day, 37.) But she is competent in a prosecution against her husband, for a personal outrage to herself. (Text, 84. Notes 155, 6, p. 151, 2. *State v. Boyd*, 2 Hill, 288. Per Broxson, J. in *The People, ex rel. Ordronaux, v. Chegaray*, 18 Wend. 642.)

In an action by a woman as a *feme sole*, her husband is an incompetent witness to prove a marriage. (*Bentley v. Cooke*, 3 Doug. 422.) But though each supposed they were married, if in fact the marriage were void, as where the wife had a former husband living, she was held competent as a witness against him, even to prove conversations of her supposed husband during cohabitation. (*Wells v. Fletcher*, 5 Carr. & Payne, 12. 1 Mood. & Rob. 99, S. C. nom. *Wells v. Fisher*.) The marriage of slaves in North Carolina is void; therefore the husband or wife, (slaves,) may be witnesses against each other, even in a capital case. (*The State v. Samuel*, 2 Dev. & Bat. 177.)

NOTE 144, p. 149, with the Text, p. 80; NOTES 142, 3, p. 147, 8; NOTE 81, p. 84; NOTE 114, p. 125.—*How far husband and wife, when not parties, shall be permitted to testify in conflict with each other, or adversely to each other's interests, or to disclose on oath confidential communications between them.*

The cases in note 144, p. 149, and the text, 80, will be found to qualify the proposition that husband or wife are not receivable to make statements contradictory of each other, or such as affect each other. And even the wife is receivable to shew the criminality of the husband, except in cases where her evidence would influence a suit or prosecution against him. (See also per Park, J. and Best, C. J. in *Henman v. Dickenson*, 2 Moore & Payne, 239, 291; 5 Bing. 193, S. C. *Corse v. Patterson*, 6 Harr. & John. 153. *Wilmot's lessee v. Talbot*, 3 Harr. & M'Henry, 2. *Redman v. The State*, 1 Blackf. 429, 430, 1. *The People, ex rel. Ordronaux, v. Chagaray*, 18 Wend. 637. *Capehart v. Adm'rs of Huey*, 1 Hall's Ch. Rep. 409. *Bell v. Coil*, 2 id. 110.) The notion of such testimony being inadmissible from policy seems to be pretty much given up in England, though, as we saw ante, notes 142, 143, p. 147, 8, several American cases have gone on that ground. (See also *Poultny v. Fairhaven*, Brayt. 185.) The cases are quite uniform that the wife shall not be received to disclose conversations of the husband, even though he be dead when she is examined. (Per Williams, J. in *Edgell v. Bennett*, 7 Verm. Rep. 537.) But the rule is confined to conversations, and does not extend to distinct facts. (*Williams v. Baldwin*, 7 Verm. Rep. 503, 506. *Wells v. Tucker*, 3 Binn. 366.) It seems, however, that, to be admissible, the fact must be of such a nature, that it cannot be supposed the wife learned it in consequence of confidence reposed. In assumpsit for board of the defendant's child, his wife was refused as a witness against him to prove his promise to pay, while she was his wife, though now divorced by act of parliament. It was said that her knowledge might have been acquired in consequence of confidence reposed in her by her husband. (*Monroe v. Twisleton*, Peak. Add. Cas. 219, 221; and see note (a) at the last page for several English cases.) The reasoning of Lord Alvanley in the principal case is very strong. The rule does not extend to those who have cohabited as husband and wife without being married, especially after they have separated. (*Wells v. Fletcher*, 5 Carr. & Payne, 12.)

It was said by Lord Mansfield, in *Goodright v. Moss*, (Cowp. 594,) that it is a rule founded in decency, morality and policy, that a husband or wife shall not be permitted to say, after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party, and that the point had been solemnly decided at the delegates. (See *Cope v. Cope*, 1 Mood. & Rob. 274.) In Bull. N. P. 113, a case is referred to as showing that the wife might be examined after her husband's death, to prove the child a bastard, which is inconsistent with the principle adopted by Lord Mansfield. Lord Hardwicke, (Rep. Temp. Hardw. 83,) puts the incompetency of the wife to give evidence of non-access upon the ground of interest, a ground which would only apply in particular instances, as in orders of filiation. It does not appear clearly how the circumstance of the wife being the offending party can affect the question.

That the wife's competency in point of interest follows her husband's, see note 81, p. 84; note 114, p. 125; *Corse v. Patterson*, 6 Harr. & John. 153; *Stanton v. Wilson*, 3 Day, 37; *Beach v. Swift*, 2 Conn. Rep. 269; *Wilmot's lessee v. Talbot*, 3

Harr. & M'Henry, 2; Williams v. Baldwin, 7 Verm. Rep. 503, 506, 7; Jackson v. Heath, 1 Bail. 355, 6; Pyle v. Maulding, 7 J. J. Marsh. 202, 3; Chambers v. Spencer, 5 Watts, 404; Van Deusen v. Frink, 15 Pick. 449; Thomas v. Catheral, 5 Gill & John. 23; Cornish v. Pugh, 8 Dowl. & Ryl. 65; Rex v. Smith, Mood Cr. Cas. 259; Capehart v. Adm'rs of Huey, 1 Hill's Ch. Rep. 409; Bell v. Coil, 2 id. 110. But this rule ceases to apply after his death. It is, therefore, no objection then, that he was interested during his life time in the fact now sought to be proved by his widow. (Edgell v. Bennett, 7 Verm. Rep. 534. Caldwell v. Stewart, 2 Bail. 574. Chambers v. Spencer, 5 Watts, 404.)

The wife may testify against the interest of the husband in a cause between third persons, if he, being present, do not himself object. (Jackson v. Heath, 1 Bail. 355. Pedley v. Wellesley, 3 Carr. & Payne, 558.) She cannot be a witness for the defendant in a suit against her husband's surety, without a proper release from the surety to the husband. (Thomas v. Catheral, 5 Gill & John. 23.) The husband being the beneficial, though not the nominal plaintiff, his wife is not an admissible witness for him. (Pyle v. Maulding, 7 Marsh. 203.) Nor is the husband a witness for the wife's trustee in an action (trover) by him for her use. (Hopkins v. Smith, 7 J. J. Marsh. 263.)

NOTES 234, 5, 6, p. 252. *Of the competency of the party injured, on the trial of an indictment for the offence.*

We saw at the notes last above cited, that the party injured is a competent witness for the state, in a criminal prosecution. The cases are generally uniform to this effect, on the ground which prevails in civil causes, that the record cannot be used as evidence either for or against the witness. (State v. Hasset, 1 Tayl. 55. Commonwealth v. Oliver, 3 Bibb, 474.) But they are conflicting as to his competency in those cases where he may, by special provision, derive actual benefit from a conviction.

The rule that he is competent, was applied to a suit *qui tam* for usury. (Banner v. Gregg, 1 Harringt. 523. Ante, note 235, p. 252, S. P.;) and to a prosecution for playing with false dice. (The King v. Chapman, stated by McKean, C. J. in *Respublica v. Keating*, 1 Dall. 111.) The general rule was held not to be altered even by a statute making the prosecutor liable for costs. (Commonwealth v. Shriver, Whart. Dig. 331, pl. 734, 2d ed. Quere. Vid. Commonwealth v. Gore, 3 Dana, 475.) Where a statute made him liable only in the event of the prosecution appearing to be frivolous or malicious, he was received as but contingently liable. (The State v. Blennerhassett, Walker's Rep. 7, and 15, 16.) The prosecutor in forcible entry under the statute, is not competent for the state, for he is entitled to restitution. (State v. Fellows, 2 Hayw. 340. Ante, note 235, p. 252, S. P.) The rule, that the injured party is competent, &c., was applied to the person who owned, and from whom a bank bill was stolen, though a conviction would entitle him to a restitution of the property. (State v. Casados, 1 Nott & McCord, 91, 99.) But this was denied of the party swindled, against the alleged swindler; for a statute gave the former double value, on conviction. (State v. Vaughan, 1 Bay, 282, 3.) So of an informer, who is entitled to a share in the penalty. (City Council v. Haywood, 2 Nott & McCord, 303. Van Eyour v. The State, id. 309, note (a). But see State v. Bennett, 1 Root, 249.)

On trial of an indictment for perjury committed by A. on trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution, merely

on the ground that he has not paid the debt and costs, and has filed a bill in equity. But *semble*, that if B. expect A. will be a witness against him in a similar action, coming on for trial soon after the indictment, that is such an immediate interest in B. as will disqualify him from being a witness. (*Rex v. Hulme*, 7 Car. & Payne, 8.)

Of the competency of the person entitled to a reward on the conviction of the offender.

See text, 129, that persons entitled to a reward on conviction, are competent witnesses for the prosecution. (*Mac Nally's Ev.* 61, 63, and the cases there cited. *United States v. Wilson*, 1 Baldwin's Rep. 90, S. P.) An attorney who, by arrangement with the trustees of a corporation, was to have 10 per cent. on all fines collected in their behalf, was held incompetent as a witness for the commonwealth, in a prosecution for a fine belonging to the corporation. (*Commonwealth v. Moore*, 5 J. J. Marsh. 655, 6.)

NOTE 250, p. 258; NOTE 497, p. 707, and NOTE 498, p. 709. *Of the voir dire.*

At note 250, p. 258, note 497, p. 707, and note 498, p. 709, the use of the *voir dire* is considered. We add some cases. A witness, on her *voir dire*, states that she was the wife of the party; *semble*, she may restore her competency by stating that she had been divorced, *a vinculo*, though it was objected that the record should have been produced. (*Wells v. Fletcher*, 5 Carr. & Payne, 12.) Note 498, p. 709, ante, contains several like cases. Though the witness, on his *voir dire*, being offered for the defendant, answered that he was not liable to pay the costs of defence, the plaintiff's counsel was allowed to show him a letter of his own, to the defendant's wife, and then repeat the question. (*Homan v. Thompson*, 6 Carr. & Payne, 614.) The court said, that, after an examination on the *voir dire*, other evidence to show interest could not be produced. But yet, if it come out in the course of the witness' examination in chief, that he is interested, he may be rejected. (*Davis v. Barr*, 9 Serg. & Rawle, 138.) Said, you may offer direct proof of interest after failing to show it by the *voir dire*. (*Hamblett v. Hamblett*, 6 N. Hamp. Rep. 351.) In an action by the endorsee against the endorser of a note, the maker, on his *voir dire*, expressed his doubts whether he was interested, stating his interest to depend on the question whether a demand he had against the defendant, was barred by the statute of limitations, in case he should be sued by the defendant, on a recovery against him, in the pending cause. Held a competent witness for the defendant, this not being either a declaration that he was interested, or that he believed himself to be so. (*Bank of Columbia v. Magruder*, 6 Harr. & John. 172. *Galbraith v. Galbraith*, 6 Watts, 112, 122, S. P. Ante, note 497, p. 709, S. P.) It was said, the judge may, in his discretion, allow a resort to the *voir dire*, after other modes of impeaching the witness have failed of effect, though it is doubtful whether he is bound to allow it. (*Butler v. Tufts*, 1 Shepl. 302.) On the *voir dire*, a witness may be required to verify his signature to an instrument, which may then be read in proof of his interest. (*Hamblett v. Hamblett*, 6 N. Hamp. Rep. 353 351.)

NOTE 236, p. 253, in connection with the text, p. 124. *Of the competency of a person whose name is forged, in a public prosecution for the offence.*

Whether the party whose name is averred to be forged, is competent to prove the forgery on the trial of an indictment for the offence, we gave many conflicting cases at note 236, p. 124. Additional cases that he is not competent, are the following: *Rex v. Young*, Peak. Add. Cas. 228. *State v. Whitten*, 1 Hill, 100. That he is, are the following: *Simmons v. The State*, 7 Ham. Rep. pt. 1, p. 116. *State v. Hinson*, cited in 1 Hill, 102, 3, by O'Neill, J. Smith's case, and Shepherd's case, cited in 2 Dall. 240, and 2 Yeates, 4; Whart. Dig. 331, 2, 2d ed. pl. 730, S. C.

NOTE 247, p. 256, and note 497, p. 707. *When and how the objection for interest, or other cause of incompetency should be made.*

We saw ante, note 247, p. 256, 7, and note 497, p. 707, that the objection of interest may, in general, be made against a witness, at any time during the trial, even though it appear after the failure of an attempt, in another mode, to show the interest. The cases are quite uniform to this effect. (*Bank of North America v. Wycoff*, 4 Dall. 151. *Schillinger v. McCann*, 6 Greenl. 364.)

To make the objection in respect to competency available on error, the party must expressly *except* to the judge's decision. It is not enough to say he *objects*, even though the objection be stated in a sealed bill of exceptions. (*Bank of Alabama v. M'Dade*, 4 Porter, 252, 265. *Willard v. Warren*, 17 Wend. 257, 9.)

A bill of exceptions cannot be taken, on the ground that the judge received improper evidence on the question of competency; for exceptions cannot extend beyond the evidence offered, or admitted to go to the jury. (*Quin v. Crowell*, 4 Whart. Rep. 334, 337. *Brown v. Downing*, 4 Serg. & Rawle, 494.)

NOTE 249, p. 258; NOTE 497, p. 709.—*Proof of interest, without a resort to the voir dire.*

The cases cited at note 249, p. 258, are to the point, that a party is not bound to resort to the *voir dire*; but may show the witness' interest by any other kind of proof. To this the cases are uniform. (*Carroll v. Pathkiller*, 3 Porter, 279, 287.) The witness could not, on his *voir dire*, state either generally or from particulars whether he was interested or not. Held, that other evidence of his interest might be given. (*Galbraith v. Galbraith*, 6 Watts, 112, 122. *Bank of Columbia v. Magruder*, 6 Harr. & John. 172, and ante, note 497, p. 709, S. P.) The plaintiff offered, first, to show the interest of the witness by his uniform declarations, which were overruled. He then attempted to prove it by the defendant's declarations, but failed; in consequence of which the *voir dire* was excluded. But the witness being sworn in chief, his interest appeared on his cross examination. Held, that he should be rejected: (*Butler v. Tufts*, 1 Shepl. 302, 5, 6, and see *Schillenger v. M'Cann*, 6 Greenl. 368.)

It is no ground for a new trial, that the court, on trying a question of competency, allowed improper evidence to be given in presence of the jury. (*Ackley v. Kellogg*, 8 Cowen, 223.) But the witness was held competent, and gave evidence to the jury.

NOTE 249, p. 258; NOTE 497, p. 707; NOTE 526, p. 749.—*Of proving incompetency by the admissions of the party and the unsworn declarations of the witness.*

In *Bean's ex'r v. Jenkins' ex'r*, 1 Harr. & John. 135, (Maryland,) both the declarations of the party offering the witness, and the out door declarations of the witness himself, were received to prove his incompetency. That the former were correctly, and the latter improperly received, by many books, and even on the later Maryland cases, see ante, note 249, p. 258, and note 497, p. 707, and also per Skinner, chancellor, in *Nichols v. Holgate*, 2 Aik. 138, 140. *Doe, ex dem. Ingram, v. Watkins*, 1 Dev. & Batt. 442, 5. Two persons being offered as witnesses for the plaintiff were objected to, and a witness for the defendant stated he heard the plaintiff say he was not to pay the costs of this suit if he lost it, as he had somebody between him and danger, which the witness *understood* to mean the two witnesses offered. This was held insufficient to establish their incompetency by reason of liability for costs. (*High v. Stainback*, 1 Stew. Rep. 24.) See the cases ante, note 526, p. 749.

Semb. Though the judge should receive the declarations of the witness as to interest in presence of the jury, it would not be cause for a new trial, if he receive the witness as competent, and submit his credit to the jury. (*Ackley v. Kellogg*, 8 Cowen, 223.)

NOTE 256, p. 260.—*Of the proof of the instrument or other matter by which competency is restored.*

We stated ante, note 256, p. 260, 1, some cases as to the manner, other than by the *voir dire*, of proving the discharge of a witness' interest when it appears that he is incompetent. The amount of those cases seems to be, that if his interest appear otherwise than by his own examination, he himself is incompetent to testify to the facts by which it was removed. And so is the case of *Fay v. Green*, 1 Aik. Verm. Rep. 71. Otherwise, if the objection arise out of his own examination, though in chief. (Ante, note 256, p. 260, 1.)

NOTE 257, p. 261.—*Of restoring competency by means of a release.*

This head, as we partly saw, ante, note 257, p. 261, involves the various questions of the person who has the power to release, whether in his own right or as an agent, trustee, &c.; the person who is to take the release, the form of the release, the manner of execution, the time when it should be given, its consideration, and its effect, when every thing legally within the power of the party and the witness has been done in order to attain their purpose.

The person having such a legal claim or interest in himself as to bar the admission of the witness, whether it be the party or the witness himself, may release it *bona fide*, even though he be an infant; (*Walker v. Ferrin*, 4 Verm. Rep. 523, 527; and see *Rogers' ex'rs v. Berry*, 10 John. Rep. 132, stated ante, note 46, p. 60;) though the release from an infant would be void, if it were a part of a system of collusion to present the appearance without the reality of a release, however binding it might be on an adult as between the parties. (*Walker v. Ferrin*, ut supra.) A *prochein amy* or *guardian ad litem*, has no power to release the right of the infant. (Id.) Nor has

an attorney to prosecute or defend the cause, without a special power for that purpose, authority to release the rights of his client. (*Walker v. Ferrin*, 4 Verm. Rep. 523, 8. *Murray v. House*, 11 John. Rep. 464.) The attorney should have a special power for the purpose duly sealed, if the party intends to be absent at the trial; and then his release, and even his stipulation to give one, if the witness be examined in virtue of such stipulation, will be valid; for the court said they would compel him, on motion, to give a release. (*Heming v. English*, 6 Carr. & Payne, 542, 1 Cr. Mee. & Rose, 568, and 5 Tyrwh. 185, S. C. See ante, note 259, p. 265.) Where a town is a party, it may release its treasurer or other officer by a vote. (*Ford v. Clow*, 8 Greenl. 334.) And this must be done by the town; for the selectmen, as such, have no power to release. (Ante, note 264, p. 269. *Yuran v. The Inhabitants of Randolph* 6 Verm. Rep. 369, 373, 4.) Yet doubtless this would be otherwise where town officers are themselves parties as such. Nothing is perceived in such case to prevent their releasing any more than an executor or other trustee, who may clearly do so. (*Seymour's adm'r v. Beach*, 4 Verm. Rep. 493, 501.) A covenant of warranty running with the land, may and should be released, not by the covenantee, if he have parted with the title; but by the present owner of the land claiming under the covenantee, though all the deeds through which he claims be with warranty. (*Leighton v. Perkins*, 2 N. Hamp. Rep. 427. *Pile v. Benham*, 3 Hayw. 176. *Abby v. Goodrich*, 3 Day, 433, explained in *Clark v. Johnson*, 5 Day, 373. See ante, notes 264 to 266, p. 269. Also note 268, 9, p. 270. See also ante, note 263, p. 267, 8.) A husband, a defendant in ejectment, claiming to be seized *jure uxoris*, may release a covenant for quiet enjoyment in a deed given to his wife, and so make the covenantor a competent witness for him. (*Ford v. Walsworth*, 19 Wend. 334. See *Capehart v. Adm'rs of Huey*, 1 Hill's Ch. Rep. 409.)

The form of the release should be adapted to the interest. The words *all demands* are of the broadest import, and will discharge future rights and common possibilities. They were held sufficient to cut off the right of a releasing partner to a surplus of the partnership effects. (*Wilson v. Hirst*, 4 Barn. & Adolph. 760.) A release by the attorney of the plaintiff to a witness who was liable to him for costs, of "all fees, costs and charges," was held sufficient. (*Doe, ex dem. Dully, v. Allbutt*, 6 Carr. & Payne, 131.) A release to an executor, of all claim on the estate, renders the releasor having an interest in the estate competent for the executor, though it omit the name of the latter. (*Oliver v. Vernon*, 4 Mason, 275.) Whether a private corporator, in order to restore his competency as a witness for his corporation, must release his whole interest as a corporator, or only that which he has in the subject matter of the suit, *quere*. (*Richardson v. Freeman*, 6 Greenl. 57. See a case ante, note 263, p. 268, and two cases decided in Maine, ante, note 257, p. 263.) A release of a warrantor of a horse being by mistake dated before the sale, and so void on its face, the court received parol proof of the time of the delivery of the release, and thus gave it effect. The sale and warranty, though ostensibly by the witness alone, was, in legal effect, from him and his partner; yet a release to the witness alone was held to extinguish his interest. The words were "from all and every claim and demand growing out of or arising from the sale." (*Churchill v. Bailey*, 1 Shepl. 64, 70.) In assumpsit by the holder against the maker of a note, a release to the endorser of *his interest in the particular action pending*, will not render him competent for the plaintiff, because it leaves him open to a subsequent action on the note. (*Kennon v. M'Rae*, 2

Porter, 389, 400. See *Commercial Bank v. Hughes*, 17 Wend. 94, 97.) See farther as to the form of the release, ante, note 268, p. 269.

The release need not be actually delivered from the releasor to the releasee. If it be intended to operate, (see ante, note 271, p. 272,) or present the appearance of an operation to the court, it shall have that effect, though the releasee give his note intending still to be liable; and, on being rejected for the fraudulent attempt to impose upon the court, the releasor destroy the release, without its ever coming to the hands of the releasee. But a release given by an infant under such circumstances, though sanctioned by his guardian ad litem, was holden to be a mere nullity. (*Walker v. Ferrin*, 4 Verm. Rep. 523, 6, 7.) A release to a witness examined on commission in New-York, purported to be certified by notaries; and the commissioners returned the release with the commission certifying that the release was handed to them and accepted by the witness from them, who then swore that he had no interest. Held, that the release was sufficiently proved and properly executed. (*Allen v. Lacy*, Dudley, 81.) A release good in form is available, though not actually delivered, but only entered on the minutes of the court. (*M'Causland v. Neal*, 3 Stew. & Port. 131.) But it is void, if it be neither signed nor sealed. (*Kennon v. McRae*, 2 Porter, 389. See ante, note 271, p. 272.)

As to the time when a release is to be given, the cases all agree that, on detecting the interest at any time before the witness has left the stand, he may then be released, and examined over again. (Ante, note 257, p. 261, and note 497, p. 709, cites *Wake v. Lock*, 5 Carr. & Payne, 454.) The wife accepted a release to her husband, and then made her deposition; but her husband did not accept it till afterwards. Yet her deposition was received. (*Van Dusen v. Frink*, 15 Pick. 449.)

With regard to the consideration, whether of a release or other instrument intended to remove interest, there need be none actually passing between the parties, especially if the releasor be an adult; for, per curiam, "Where a party has so divested himself of interest that he cannot resume his title by compulsion of law, he is competent." (*Dellone v. Rehmer*, 4 Watts, 9, 10.)

The effect of the release when duly executed by the proper party, depends on the nature of the interest and the various relations which the witness holds to the parties in the cause. It may, we think, at this day, be safely affirmed, though with some exceptions, (see ante, note 263, p. 267,) that any interest which disqualifies the witness may be released or discharged in some way. If it be without the reach of a release, &c. it is such an interest as the law would pronounce so remote as not to exclude the witness. Henderson, C. J. very sensibly remarked, in *State v. Kimbrough*, 2 Dev. 431, 8, 9—"The argument is entirely incomprehensible to us, how an interest so remote and contingent, so much of a bare possibility, so much of a *nothing*, if I may so express it, that it cannot, by reason thereof, be released or assigned, should disqualify a witness." In that case a witness was received for the state in a capital case, on releasing his estate expectant on the death of the accused. So a bankrupt may release his allowance even before he has obtained his certificate. (*Schneider v. Parr*, Peak. Add. Cas. 66. Farther, as to the kind of interest releasable, see ante, note 263, p. 267.)

A legal interest can be released, though mere prejudice or feeling, &c. cannot. The latter must, therefore, be endured, and go to the credibility of the witness. But if he will not release his interest, he will not be trusted as competent; and this is

the true ground of his incompetency. The law goes as far as it effectually can towards removing an improper influence upon the witness' mind. It does not stand upon the degree of interest, therefore, but whatever its amount, it demands that it should be removed. (Best, C. J. in *Hovill v. Stevenson*, 5 Bing. 493.)

The general doctrine that a witness may be restored to competency by a proper release, though entered into expressly for that purpose, is impliedly asserted in all the cases on the subject, and expressly by some. (*Lilly's lessee v. Kitzmiller*, 1 Yeates, 28. *Dawson v. Morris*, 4 Yeates, 341.) And when a case of difficulty or nicety arises, it is examined on the same principles as if the release were pleaded or given in evidence by the releasee, in an action to enforce the right intended to be cut off. (See *Bank of Pennsylvania v. McCalmont*, 4 Rawle, 307, 310, 11.) On its being found operative in itself, its relative effect in the restoration of competency arises in various ways; sometimes it works a total obliteration of all interest, sometimes the creation of a balance, sometimes an inclination of the witness against the party calling him, and sometimes as the reduction of an interest otherwise effectual, to such remoteness, contingency or uncertainty, as no longer to be regarded by the law. We shall continue the examples furnished by the cases, without much attention to the particular ground on which the release works its intended effect. In most instances that is quite obvious.

The release by the vendee, of his vendor or warrantor, of lands or goods, whether the warranty be express or implied, in order to render the vendor competent in an action by or against the vendee concerning the title, is a familiar instance. (*Clark v. Johnson*, 5 Day, 373, 381. *Caston's ex'rs. v. Ballard*, 1 Hill, 406. *Van Hoesen v. Benham*, 15 Wend. 164.) So a release of the assignor of a mortgage in an action by his assignee. (*Lithgow v. Evans*, 8 Greenl. 330.) In an action by a bailee against a stranger, his bailor may be released, and made competent for the plaintiff. (Said in *Chesley v. St. Clair*, 1 N. Hamp. Rep. 190.)

The surety being sued alone, his principal may be released by him, and so made competent. (*Reed v. Boardman*, 20 Pick. 441.) In an action by the endorsee against one who endorsed for the maker's accommodation, the latter was thus rendered competent for the defendant. (*Van Schaack v. Stafford*, 12 Pick. 565.) So in assumpsit against the surety, one of two joint makers of a note, the other being principal, was held competent for his surety, on a like release. (*Harmon v. Arthur*, 1 Bail. 83.) And in such and the like cases, a release of the costs alone restores the competency of the principal, by creating an equal interest between plaintiff and defendant. (*Perryman v. Steggall*, 5 Carr. & Payne, 197.) And see *Bank of Limestone v. Pennick*, 2 Monroe, 100, 101. A constable's sureties being sued, he was held to be a competent witness for them, on their giving him a proper release. (*Willard v. Wickham*, 7 Watts, 292.)

Another instance is of a witness releasing his interest in a fund which his testimony may affect beneficially to himself; as if he be called in behalf of a decedent's estate, to a share of which he is entitled as a distributee or legatee. (*Van Horne's ex'r v. Brady*, 1 Wright, 452. *Boon v. Nelson's heirs*, 2 Dana, 391, 2. *Cox v. Norton*, 1 Pennsylv. Rep. 412, 414.) Sometimes this may be done on his releasing his interest, not generally in the fund; but merely in the subject matter of the suit. (*Torrence v. Graham*, 1 Dev. & Batt. 284, 6.) For other like instances, see ante, note 268, 269, 70.

So a witness supposed to have a lien on the subject of recovery, was received for the plaintiff, on releasing it. (*Raymond v. Howland*, 12 Wend. 176, 9.)

In an action against a sheriff for his deputy's neglect, the latter may be made competent for the sheriff, by a release. (*Jewett v. Adams*, 8 Greenl. 30.)

In an action by a bankrupt's assignee, the bankrupt was denied to be competent for the plaintiff, till three releases were executed, one by himself to his assignee, secondly by all the creditors to the bankrupt, third by the assignee, who was not a creditor to the bankrupt. A year after the commission issued having elapsed, it was presumed that all the creditors had come in and proved their debts. And therefore a release from all who had proved was held sufficient. (*Cartér v. Abbott*, 1 Barn. & Cress. 444. And see *Perryman v. Steggal*, stated ante, note 527, p. 262.)

The son conveyed his land to his father; then McKee obtained judgment against the son alone; and then Gilchrist obtained a judgment and execution against the son and his father; and caused the land to be sold. McKee alleging that the son's sale was fraudulent, claimed the avails of the execution sale on his senior judgment. On the trial of an issue upon the question of fraud between these two judgment creditors, the father, on being released from all liability to the junior judgment creditor, was held a competent witness for him. (*McKee v. Gilchrist*, 3 Watts, 230, 4.)

NOTES 528 and 257, p. 264. *Of the means of rendering the parties in the cause competent witnesses; and various means of restoring competency to other persons, which are not arranged under any particular head.*

It may, perhaps, be now taken as settled, both in the English, and a majority of the American courts, that the exclusion of a party, whether nominal or real, or both, from being a witness in his own cause, rests mainly on the ground of his interest; and that policy, though it operates in some instances, exerts an influence comparatively small. (Ante, note 122, p. 134 to 138, and the cases there cited.) There are several other decisions verifying this remark, some of which we shall proceed to give here, and others will present themselves in various parts of these notes. The case of *Stevens v. Bransford*, 6 Leigh, 246, was the case of a sheriff who had taken a bond on seizing property, pursuant to the Virginia statute, to pay all persons having claim to the property, their damages. In an action in the sheriff's name, on the bond, the sheriff was willing to be sworn as a witness for the defendant, who offered him; and the question whether he was competent, was debated by the judges upon his interest in defeating the plaintiff, to whom he might be liable, if he had a real claim, and the sureties should prove insufficient. Four judges sat; and they were equally divided. But none of them raised a serious doubt whether his merely being a party, should exclude him.

It is remarked in the 8th ed. of this work, by Amos & Phil. p. 47, note (1,) that the privileges of parties to suits, in not being compelled to appear as witnesses, has often been confounded with their interest. The privilege is considered under a distinct head, at p. 157, 8, where the general rule is laid down and illustrated that "a party on trial before a jury, is never *compelled* to give evidence for the opposite party against himself; and this rule is applied to nominal and real parties; though it is said that he may, by his own consent, give such evidence against himself, or a party join-

ed with him, the privilege being personal to himself. (See ante, note, 122, p. 136, note 123, p. 139, note 129, p. 142.)

It is added, p. 158, note (3,) that it does not appear to have been considered whether persons whose admissions are evidence against parties to a suit, on the ground of their being the real, though not nominal, parties to a suit, are privileged from giving evidence. It need scarcely be observed that such privilege has often been recognized on this side the Atlantic. (Ante, note 122, p. 134; note 128, p. 141.)

In England, it has been recently said, that, where one defendant out of several justifies a trespass in right of A., but submits to a verdict, A. not having employed the attorney, is a competent witness for the other defendants on distinct issues; and that one who is, without his consent, made lessor of the plaintiff, (see ante, note 128, p. 141,) may, after a verdict for the defendant on his demise be called as a witness in support of other counts. (Lord Denman, C. J. in *King v. Baker*, 2 Adolph. & Ellis, 333.) In that case, several defendants in replevin, made several cognizances under distinct persons. The plaintiff consenting to the acquittal of one defendant, the person under whom he made cognizance, was received as a witness for the other defendant. *Upton v. Curtis*, cited text 64, is corrected by the case now cited. These are instances of parties real, though not nominal. So, by the decision of an American court, a merely nominal party may be received on being divested of all interest. An administrator, one of the plaintiffs, was held competent for them, on releasing to the distributees all his claim for commissions, and paying to the prothonotary all the costs of the suit past and to come, and agreeing that, in no event, should they be refunded, it not appearing that he was in danger of being charged for a devastavit. (*Patton's adm'r's v. Ash*, 7 Serg. & Rawle, 116, 123, 4. See ante, note 122, p. 137, 8.) All this is necessary, however, or he cannot be received. (*Gebhart v. Shindle*, 15 Serg. & Rawle, 235. *Beard v. Cowman's ex'r*, 3 Har. & McHen. 152.) Nor would like steps render him competent, if he had been an administrator defendant. (*Conrad v. Keyser*, 5 Serg. & Rawle, 370.) One defendant in ejectment having quit the possession, and assigned all his interest to the other defendant, and being released from all liability to the person of whom he purchased, was held admissible as a witness for the plaintiff, he, the witness, not objecting. (*Patterson's lessee v. Hagerman*, 2 Yeates, 163. *Diermond's lessee v. Robinson*, 2 Yeates, 324, S. P.)

In Pennsylvania, a party plaintiff may be rendered competent in one of two ways. In the first place, by a simple assignment before suit brought, which is holden to throw the whole interest, and an exclusive liability for costs on the assignee, who afterwards sues in the assignor's name, and so to make him competent for his assignee. (*Wistar v. Walker*, 2 Brown, 166, 169, to 171; a leading case, and the principle of this practice fully shown. *Steele v. The Phoenix Ins. Co.* 3 Binn. 312. *Canby v. Ridgway*, 1 Binn. 496. *Fetterman v. Plummer's adm'r*, 9 Serg. & Rawle, 20, 1, 2. *Davis v. Barr*, 9 Serg. & Rawle, 137. *Clement v. Bixler*, infra. *Martin v. Stille*, 3 Whart. Rep. 337.) And though the assignment be simple and absolute, the assignee need not release the assignor. (*Martin v. Stille*, 3 Whart. Rep. 337, 342.) There is an exception, however, where the assignment was made in order to pay a precedent debt of the assignor, unless it was expressly agreed to take it in payment; for a failure to recover would revive the absolute liability of the witness for the debt. (*M'Ginn v. Holmes*, 2 Watts, 121.) Another method, though he be both the real and nominal

plaintiff, is an assignment of all his interest in the cause, before or at the time of trial; and the payment of all the costs so far accrued on the part of the defendant; with the deposit of a sum of money, deemed sufficient by the court to cover the future costs of the defendant, and a stipulation that the deposit shall go towards defraying such future costs absolutely and without recall. (*Ash v. Patton*, 3 Serg. & Rawle, 300. *Patton's adm'r v. Ash*, 7 Serg. & Rawle, 116, 123, 4. *Conrad v. Keyser*, 5 Serg. & Rawle, 370. *North v. Turner*, 9 Serg. & Rawle, 244. *Browne v. Weir*, 5 Serg. & Rawle, 401, 403. *Washington, J. in Willings v. Consequa*, 1 Pet. C. C. Rep. 308. *Willing v. Peters*, 12 Serg. & Rawle, 177. *Fetterman v. Plummer's adm'r*, 9 Serg. & Rawle, 20, 22. *Richter v. Selin*, 8 Serg. & Rawle, 425, 437. *Clements v. Bixler*, *infra*. *Hoak v. Hoak*, *infra*. *Campbell v. Galbreath*, 5 Watts, 423. *McLughan v. Bovard*, 4 Watts, 308, 312.) Some cases say the stipulation not to claim a return, need not be express; but is implied by the payment and deposit for such a purpose. (*Conrad v. Keyser*, 5 Serg. & Rawle, 370. *North v. Turner*, 9 Serg. & Rawle, 244, 249. And see *Clement v. Bixler*, *infra*.) Merely giving security for costs will not do. (*Clement v. Bixler*, 3 Watts, 248.) Nor a deposit for past, and a promise by the plaintiff to pay future costs, if any more should accrue. (*Hoak v. Hoak*, 5 Watts, 80.) *A fortiori*, a mere stipulation to pay both past and future costs, (*Campbell v. Galbreath*, 5 Watts, 423,) or a mere assignment, without more. (*Harris v. Ohio Ins. Co.* 1 Wright, 544.)

But the right is not reciprocal. The defendant has no power to restore his own competency, (*Conrad v. Keyser*, 5 Serg. & Rawle, 370, and see *Shelby v. Smith's heirs*, 2 A. K. Marsh. 504, 507,) which has led some of the Pennsylvania judges to think the rule a hard one. (*Hoak v. Hoak*, 5 Watts, 81, 2, per Kennedy, J. *Cox v. Norton*, 1 Pennsylv. Rep. 412, 414, per Huston, J.)

Nor can a plaintiff, even under the the liberal doctrine of Pennsylvania, at all times make himself competent by the usual assignment, payment and deposit. His interest may not be assignable in its nature, as if it arise from a personal tort. See cases *infra*. And it is said in one case of a trustee, that a mere formal assignment for such a purpose, either before or after suit brought, does not divest his interest; that he can still claim the trust fund on its being recovered, and it was so held, where the administrator had assigned the debt to the distributee before suit, and brought an action for the assignee's use. (*Sypher v. Long*, 4 Watts, 253.) Quere; for an administrator may assign a particular debt; though he cannot assign his *trust*, as such. The machinery being adequate, it is not perceived that the objection is so great as in case of a party having the beneficial interest. (See *Patton's adm'r v. Ash*, and *Beard v. Comnan's ex'r*, *supra*.) The rule is universal, that a mere trustee, not being a party, nor personally interested, is a competent witness in favor of the trust fund. An assignment legally effective, though the witness may expect a re-transfer of the right, restores competency in other cases, (*Dellone v. Rehmer*, *infra*.) and why not in this? But in *Sypher v. Long*, the counsel was retained by the administrator. That would sustain the decision; for he was liable for costs. (See 4 Watts, 254.)

Another case for discharging interest is, where the witness to be rendered competent occupies the position of a real, but not a nominal plaintiff, or (it is presumed) defendant. That the rule applies to a real though not a nominal defendant, see *Benjamin v. Smith*, 12 Wend. 404. In such a case the books all seem to agree that his competency

may be restored; but, as most books say, not by a simple release, assignment, or other discharge of his interest; for he is, if a plaintiff, moreover liable for costs to the opposite party. This has been often held in respect to real plaintiffs who are considered such by reason of their being cestuis que trust or assignees of the whole or any part of the money in dispute; (*Gallagher v. Milligan*, 3 Pennsylv. Rep. 177; *Mackinley v. McGregor*, 3 Whart. Rep. 369, 374, 5, 399, 400; *Ontario Bank v. Worthington*, 12 Wend. 593; *Lake v. Auburn*, 17 id. 18;) and in *Benjamin v. Smith*, 12 Wend. 404, a real defendant: though *quere* of this, since the case of *Miller v. Adsit*, 18 Wendell, 672. There must be an actual payment for past, and an absolute deposit for future costs, as in other cases. (*Campbell v. Galbreath*, 5 Watts, 423.) But this is denied in New-York, and a bond of indemnity to the assigning party held sufficient. (*Lake v. Auburn*, 17 Wend. 18, 19.) It was held in one case, that an assignment, by a cestui que trust must, in order to restore his competency, be not only legally effective in form, but on actual consideration; (*Hoak v. Hoak*, 5 Watts, 80, 83;) but this case seems to stand alone, and is contrary to the practice, because an assignment or release expressing without seal, or importing a consideration *by seal*, removes the legal and equitable interest as between the parties, whether there be an actual consideration or not. In *Martin v. Stille*, the assignment was expressed to be for the nominal consideration of \$1, and was in truth a mere gift; yet held good. (3 Whart. Rep. 342, §.) The whole is reduced at least to a mere honorary interest, or a belief of interest, which never disqualifies. And that very point was held in *Dellone v. Rehmer*, (4 Watts, 9, 10,) where counsel sought to question the consideration of the assignment. In that case a distributee assigning under hand and seal, to her mother, who gave her a bond, at one year, to pay her nett distributive share, after deducting the claim in question in a suit against the administrator, was held competent for the latter. And *per curiam*: "Where a party has so divested himself of interest that he cannot resume his title by compulsion of law, he is competent, though he believe himself interested." They likened it to an expectation of benefit, a matter of mere honorary obligation or belief of interest. (*Taylor's adm'r v. Colvin*, 1 Wright, 449, §. P.) In *trespas quare clausum fregit* and issue on the title, the cestuis que trust of the plaintiff were received as witnesses to support the title, on a simple release, without paying or making a deposit for the costs of the defendant, (*Martin v. McCord*, 5 Watts' Rep. 493,) which seems incompatible with several other cases, *supra*, especially in Pennsylvania. The cases in New-York are not uniform on this point. In *Soulden v. Van Rensselaer*, 9 Wend. 293, it was held that the cestui que trust parting with his interest, was liable to the costs of defence, but only on the contingency that the real party should become insolvent. The case was, therefore, one of contingent and remote liability, which never goes to competency. (*Nelson*, J. p. 295, 6.) That reason, though it seems to be very sound, has certainly been disregarded in later cases. (*Ontario Bank v. Worthington*, 12 Wend. 593, 7.) It is doubtful, however, whether in this case, the cestui que trust had parted with his interest; he seems still to have had a claim upon a deposit, if the suit succeeded. (See *id.* p. 595, 6, 7.) In *Ward v. Lee*, (13 Wend. 41, 43,) which was *assumpsit* by one for a sum of money due to two, on the party off the record releasing, though a partner with the plaintiff, he was received as competent for the plaintiff, without any thing more. The point of liability for costs to the defendant does not appear to have been raised or thought of. (*Ante*, note 88, p. 95. *Curcier v. Pennock*, 14 Serg. & Rawle,

51, 54.) *Pickett v. Cloud*, 1 Bail. 362, contra; for he is accountable for the debts of the firm, and so is interested to increase the fund, beside being liable to the defendant for the costs; (id. 364, 5;) but this, in *Curcier v. Pennock*, supra, is called too remote and indirect to form an objection. (Per Tilghman, C. J.) In like manner, where a bill was filed by one distributee against an administrator to compel a distribution to the complainant and several others, including P. and his wife; on P. assigning all his and his wife's interest to the complainant, he was held a competent witness for the complainant. (*Blackerby v. Helton*, 5 Dana, 520, 3.) The case of a real, though not a nominal defendant, illustrative of our present head, we before instanced in *Benjamin v. Smith*, 12 Wend. 404, 407. The action was case for a false return to the plaintiff's *fi. fa.* against the sheriff, who defended, under the indemnity of A. and B., having applied the proceeds of the levy and sale in question upon their *fi. fa.* as being prior to the plaintiff's. Although B. assigned and was discharged of all his interest, as between him and A. and the sheriff, still he was held incompetent by reason of his liability for costs to the plaintiff. But we may doubt, as said before, whether, since *Miller v. Adsit*, 18 Wend. 67, such liability be any longer an objection.

The practice of assigning the interest of the plaintiff, &c. with a view to render him competent, was pointedly censured and denied to be law, by M'Lean, J. in *Scott v. Lloyd*, 12 Pet. 145, 149; and see per Huston, J. in *Cox v. Norton*, 1 Pennsylv. Rep. 414; though the case recognizes the right to restore the interest of any other person by assignment, release, &c. Where a suit was brought on a bond of principal and sureties, the former, having confessed judgment and been discharged from execution under the United States insolvent law, was held competent as a witness for the other defendants on being released by them. (*United States v. Leffler*, 11 Pet. 86.) So where the maker and his surety, the endorser, were sued jointly, the former, having confessed judgment and being released by the endorser, was held competent as a witness for him. (*Tilford v. Hayes*, 2 Yerg. 89.) *Quere*, unless in such a case, there would be a separate taxation of costs. The interest of a legatee, &c. e. g. where he is offered to sustain a will, may be removed as well by an assignment of his interest to a third person as by its release to the executors, &c. (*Cates' adm'r v. Wacter's heirs*, 2 Hill, 442.) A *cestui que trust* who stood by in silence and saw his trustee convey, was holden to be concluded, and to have parted with his interest for the purpose of restoring competency. (*Taylor v. Taylor*, 2 Watts, 357.)

A claim for a trespass *de bonis*, &c. was held assignable for such a purpose; but it was doubted of one for a slander, assault, &c. or other personal wrong. (Vid. *The People, ex rel. Stanton, v. ———*, 19 Wend. 73.) It was held that though the assignee be absent, his assent will be presumed if the assignment be beneficial to him. (*North v. Turner*, 9 Serg. & Rawle, 244.) The plaintiff, an assignor, is still incompetent, if he have guarantied the payment to his assignee, though the latter may have assigned to another without guaranty; for the guaranty was said to run with the bond into whose hands soever it might pass. (*Reed v. Garvin*, 12 Serg. & Rawle, 100, 103, 4.) *Quere*.

A plaintiff in a pending action, who had obtained his certificate as a bankrupt, was held competent for his assignees, though their names were not formally substituted; (*Browne v. The Ins. Co. of Pennsylvania*, 4 Yeates, 119; *M'Clenachan v. Scott*, stated in a note to *Field v. Biddle*, 2 Dall. 172; *M'Ewen v. Gibbs*, 4 id. 137, S. P.;)

but the last case states that the assignees first entered into security for costs, and the nominal plaintiff (the bankrupt) released his interest at the bar.

We now proceed to some miscellaneous means of restoring interested persons who are not parties, to competency.

Several observations made under the next preceding head in respect to restoring competency by release, will in substance apply to this, especially to the means of restoring by an assignment or transfer of interest. This assignment being between proper parties and drawn up in due form, need not always be actually delivered to the assignee. A stockholder of a bank, who executed a transfer of his stock to his daughter, then at a distance, and delivered it to the cashier without her knowledge, but for her use, was held competent for the bank. (*Smith v. The Bank of Washington*, 5 Serg. & Rawle, 318. And see *North v. Turner*, supra.) As we also saw by several cases supra, no actual consideration for the payment is necessary.

A widow distributee having accepted a specific legacy in full of all her claim upon the estate, including dower, was held a competent witness for the estate. (*Gebhart v. Shindle*, 15 Serg. & Rawle, 235.) See *Seagar's ex'rs v. The State*, 6 Har. & John, 162, for a restoration of competency by a singular concurrence of circumstances. A vendor with warranty was held competent for his vendee, on being discharged under the Maryland insolvent act. (*Quimby v. Wroth*, 3 Harr. & John, 249.) A married woman, a distributee of an intestate, was held not to be rendered competent for the administrator, by her husband's written receipt in full of her interest. (*Dunnington's ex'r v. Dunnington's adm'x*, 3 Harr. & John, 279.) An endorser of a writ (which in several states binds him as security for costs to the defendant) may be restored by the plaintiff depositing a sum which the court shall deem sufficient to cover the defendant's costs, if he succeed. (*Roberts v. Adams*, 9 Greenl. 9.) The endorser of a note having obtained his certificate as a bankrupt, was held competent for the endorsee, in an action by him against the maker. (*Murray v. Marsh*, 2 Hayw. 290.) A stockholder was held competent for a solvent bank, on assigning his interest to the bank in payment of his debt. (*Bank v. Green*, 3 Watts, 374.) In a suit for contribution, founded on advances by one part owner of a vessel against another who held his share as trustee, the cestui que trust of the defendant was sworn as competent for him, on his (the witness') releasing his interest. (*Clark v. Longworth*, 1 Wright, 159.) One interested as having engaged to pay the amount to be recovered, was holden restored to competency, on the principal depositing with him a check for a sum of money equal to his liability; and on his executing a sealed receipt to the principal for the sum, expressed to be in full for all claim as surety. And *Savage*, Ch. J. said the witness thinking it sufficient and discharging the defendant, and it being apparently so in fact, all interest was removed. "If the plaintiffs recovered, the witness would pay the amount out of the money, and return the balance. If the defendant succeeded, he was bound to return the whole." And he was accordingly held a competent witness for the defendant. (*Manchester Iron Manuf. Co. v. Sweeting*, 10 Wend. 162, 5.) A stockholder was held competent for his company, on simply assigning his stock, though indebted to the company, whose by-laws forbade a debtor so to assign without notice and consent, &c.; for all his interest is gone, subject to the lien created by the by-law on the stock. (*Gilbert v. Manchester Iron Manuf. Co.* 11 Wend. 627. Ante, note 93, p. 104. S. P. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296.) And this though he declare

his intention to repossess himself of the stock, and that he assigned it for the purpose of being a witness, there being no express understanding with the assignee that it should be restored. (*Stall v. The Catskill Bank*, 18 Wend. 466. See also ante, note 269, p. 274.) A receptor of goods attached in the cause, may be rendered competent, like bail, by depositing a sum of money sufficient to indemnify him, though it was doubted whether a bond of indemnity would be sufficient. (*Allen v. Hawks*, 13 Pick. 79, 85. *Beckley v. Freeman*, 15 id. 468.) And in the last case the same thing was also held as to one who had become liable as security for costs, by endorsing the writ. In assumpsit against a surviving partner, the defence was, that the plaintiff with A. and the deceased partner, had covenanted to discharge all the firm debts. The plaintiff, on releasing A., offered him as a witness to prove that the covenant was delivered to the deceased to be delivered to the defendant on a condition which had never been complied with. Held admissible, for he was interested to prove an absolute delivery, as that would work payment and take away all liability from the witness. *Quere*, therefore, whether any release was necessary. (*Whitaker v. Salisbury*, 15 Pick. 534, 543.) In replevin by executors for slaves, the testator's widow was offered as a witness for the plaintiffs. She had renounced all right under the will; and by an agreement with the plaintiffs was entitled to certain substituted provisions for her maintenance, which appeared not to depend on or have any connection with the property in question, but were personally binding on the plaintiffs. And she was held competent. (*Callis v. Tolson's ex'rs*, 6 Gill & John. 80, 90, 1.) In a like action, the widow, not having renounced, she, on the trial, released to the plaintiff all interest in the negroes, he releasing to her all claim for costs, and depositing in court money equal to those which had accrued. Held sufficient to restore her competency. (*Cole v. Hebb*, 7 Gill & John. 20.) In an action in the sheriff's name on a jail bond for an escape from custody under a ca. sa. in favor of A. & B. the latter was, on being released by A. and the attorney, offered as a witness by the sheriff, and stated that he had just now agreed by parol with A. that he should have the whole debt in question; should pay B. one fourth of its amount, and, as the witness understood, A. was to defray all the expenses of the suit. *Quere*, whether this was an assignment so as to divest B.'s interest. But held, that it was not explicitly shown that B. was discharged from the costs which had accrued in the cause. (*Seymour v. Harvey*, 11 Conn. Rep. 275.) A legatee and devisee having been paid in full, executed a release to the executor; and it not appearing that the sum in controversy would be necessary to prevent a resort to the refunding bond, was held a competent witness for the estate. (*Higgins v. Morrison's ex'r*, 4 Dana, 100, 106.) In trover by a bailee, the bailor may be a witness for him, where he has settled with the bailee, who has agreed to allow him a certain sum for the goods lost. (*Maine State Co. v. Longley*, 2 Shepl. 444.) One transfers a note, with guaranty; on the transferee delivering up and cancelling the guaranty, with intent to make the guarantor a witness, he becomes competent for the transferee. It is equivalent to a release. (*Watson's ex'rs v. McLaren*, 19 Wend. 557, 561.)

A new head of restoring competency in England has been raised by the late stat. 3 and 4 W. 4, c. 42, § 26, 7. It provides that where a witness would be held incompetent, by reason that the verdict or judgment would be evidence for or against him, he shall nevertheless be examined, his name being first endorsed on the record, the effect of which as evidence is thus to be deemed taken away.

As we are not aware of any similar statute in the United States, the decisions giving application to the above statute can be but remotely useful; and we shall do no more than cite them, with the remark that the earlier of these decisions withheld the statute from several cases to which it has been since extended. The only cases which we have been able to find are these: *Braithwait v. Coleman*, 8th ed. Phil. Ev. 109. *Burgess v. Cuthill*, 1 Mood. & Rob. 315; 6 Carr. & Payne, 282, S. C. *Mitchell v. Hunt*, id. 351. *Hodson v. Marshall*, 7 id. 16. *Faith v. M'Intyre*, id. 44. *Pickles v. Hollings*, 1 Mood. & Rob. 468. *Creevey v. Bowman*, id. 495. *Stewart v. Barnes*, id. 472.

NOTE 270, p. 270.—*Of restoring the competency of bail and other sureties for the party in the cause.*

The competency of special bail may be restored on motion to add and justify other bail. (*Whatley v. Fearnley*, 2 Chit. Rep. 103.) And it was restored at nisi prius by an order to strike his name from the bail piece on depositing with the marshal of the lord chief baron £200, he being bail for £100. (*Pearcy v. Fleming*, 5 Carr. & Payne, 503, cor. Lord Lyndhurst, C. B.) The surety for a plaintiff on his appeal from an award of arbitrators, was discharged by the court, and he received as a witness for the plaintiff. (*Salmon v. Rance*, 3 Serg. & Rawle, 311, 314.) The plaintiff, to restore the endorser of the writ, (thereby becoming surety for the defendant's costs,) was allowed to deposit so much as in the opinion of the court, would pay the defendant's costs, should he prevail; and thus render the endorser competent for the plaintiff. (*Roberts v. Adams*, 9 Greenl. 9.) So to deposit money with his sureties, equal to the penalty in a replevin. (*Hall v. Baylies*, 15 Pick. 51, 3.) So the defendant to deposit money with the receiptor of goods attached, equal to their value. (*Allen v. Hawks*, 13 Pick. 79. *Beckley v. Freeman*, 15 Pick. 468.) The surety in a replevin bond may be rendered competent for the plaintiff by the substitution of other security. (*Bailey v. Bailey*, 1 Bing. 92, 7 Moore, 439, S. C.) and a witness for the plaintiff who is liable to the defendant in a bond for the costs of the action may be rendered competent by his depositing the penalty of the bond with the proper officer of the court. (1 Mood. & Rob. 329.) Appeal bonds may be cancelled, and others substituted, to let in the sureties as witnesses. (*M'Culloch v. Tyson*, 2 Hawks, 336. *Lavender v. Pritchard*, 2 Hayw. 337.) So an attachment bond. (*Garmon v. Baringer*, 2 Dev. & Bat. 502.)

NOTE 273, p. 272.—*Of a witness voluntarily disqualifying himself by acquiring an interest.*

We considered the cases, at note 273, p. 272, on the question whether a party shall lose his witness where the latter voluntarily acquires an interest after the former had a right to his testimony. Where he has attested a paper, his hand-writing may sometimes be proved. (*Ford, J. in Henrie v. Maxwell*, 5 Halst. 298.) But in general the only way in which the difficulty can be obviated, is still to admit him as competent. (*Commonwealth v. Gore*, 3 Dana, 474. *Den, ex dem. Rem. v. Jackson*, 2 Dev. 187, 189, 90.) This was refused where the witness had married a wife who was interested. (*Van Horne's ex'rs v. Brady*, 1 Wright, 452.)

The commonwealth in a case where it is not bound to prosecute without security, acquires no interest in a witness' testimony till the indictment be found. Therefore,

where a witness agreed before that, to indemnify the prosecutor, he was held incompetent for the commonwealth. (*Commonwealth v. Gore*, 3 Dana, 474.)

Several courts also, as we saw by the notes cited, require, in addition to the fact, that subsequent interest has been acquired, that a want of bona fides in its acquisition should also appear. If honestly incurred in the usual course of business, and without any intent to deprive the party of his testimony, either in the witness or opposite party, he may in this way, render himself incompetent. (*Eastman v. Winship*, 14 Pick. 44, 6, 7. See *Manchester Manufact. Iron Co. v. Sweeting*, 10 Wend. 162, 4, S. P., per Savage, C. J.)

If the party introducing the witness have assented to his taking an interest, he is incompetent. In *Hovill v. Stephenson*, (5 Bing. 493,) the plaintiff having assigned an interest in the charter party on which he sued, to the subscribing witness, and the latter refusing to release, evidence of his hand-writing was precluded, and the action in consequence failed. See the case more at length, note 881, p. 1267, and see several other cases to the same point cited in the same note.

NOTES 275 to 288, p. 275 to 288; NOTES 525, a, and 525, b.—*Confidential communications.*

An attorney's clerk is privileged to the same extent as the attorney. (*Mills v. Oddy*, 6 Carr. & Payne, 728. *Bowman v. Norton*, 5 Carr. & Payne, 177. Ante, note 232, p. 279.)

As to the subject matter of the privilege, an attorney refusing to produce his client's papers on notice, is not admissible as a witness to prove their contents. (*Bothomley v. Osborne*, Peak. Add. Cas. 99, 101. *Mills v. Oddy*, 6 Carr. & Payne, 728, and note (a) to that case, citing per Lord Lyndhurst, C. B. in *Bate v. Kinsey*, 1 Crompt. Mees. & Rosc. 38. *Marston v. Downes*, 6 Carr. & Payne, 381. See also *Walker v. Wildman*, 6 Madd. 47, and *Cook v. Hearn*, 1 Mood. & Rob. 201.) A bankrupt went to an attorney's clerk to consult him as to the state of his affairs. In an action by the assignees, they called the clerk to prove the conversation. The offering counsel, conceding that the clerk was privileged, and that the conversation was in its own nature so, insisted that the privilege followed the right of suit, which having passed to the assignees, they might waive it. Beside, he added, that the assignees represented the bankrupt's person, and might waive the privilege for him. But the offer was disallowed. Tindal, C. J. put the case of the commission being set aside; and asked—"Are the man's secrets told to his solicitor to be let out?" (*Bowman v. Norton*, 5 Carr. & Payne, 177.)

But the attorney, &c. to protect the communication, must be consulted strictly in his professional character. (See *Rex v. Brewer*, 6 Carr. & Payne, 363, and *Hill v. Elliott*, 5 id. 436. *Farquano v. Knight*, 2 Mees. & Welsb. 100.) In *Annesly v. Ld. Angelsea*, 17 How. St. Tr. 1221, the attorney of the prosecutor of an indictment was allowed to state what his client had observed to him, pending the proceedings on the indictment, viz. that he would give a large sum of money to have the prisoner hanged. And we saw ante, note 288, p. 281 to 283, various instances in which the communications, though made to an attorney, &c. were holden unprotected because not made with a view to professional advice. The books furnish additional illustrations of the kind. Thus, though we have just seen that a bankrupt's communications shall

not be disclosed if he go to consult the attorney on the state of his affairs, yet in another case, although the communication was made to his acting attorney retained in his affairs, and though it related to them, it was holden not to be privileged. The attorney suggested to his client that a meeting of his creditors should be called; and the client asking him if he could safely attend without being arrested, was advised to remain behind in the attorney's office till it could be ascertained whether his creditors would give him a safe conduct. This was offered in evidence as an act of bankruptcy, and the attorney was allowed to disclose it. *Abbott, Ch. J.* said the privilege must be confined to questions asked with a view to legal advice which it was a part of the duty of the attorney to give as attorney; but a question asked with a view to obtain information as a matter of fact, being addressed to an attorney where it might have been addressed to any other person, and being addressed to him where his character and office of attorney is not called into action, has never been held to be within the protection. (*Bramwell v. Lucas*, 4 Dowl. & Ry. 367, 372; 2 Barn. & Cress. 745, S. C.) So he may be asked by whom he was employed in the cause. (*Brown v. Payson*, 6 N. Hamp. Rep. 443;) and in what capacity his clients employed him, whether as executors; (*Gurney, B. in Beckwith v. Benner*, 6 Carr. & Payne, 681;) when the instrument in question was put into his hands for collection or suit, (*Walworth, C. in Driggs v. Rockwell*, 11 Wend. 504, 7, 8;) though he cannot be compelled to state its situation or appearance at that time. (*Brown v. Payson*, 6 N. Hamp. Rep. 443. *Wheatley v. Williams*, 1 Mces. & Welsb. 533.) He was compelled to state the fact of giving a check to his client for money collected for him; and what he then said as to being in funds. (*Johnson v. Farmers' Bank*, 1 Harringt. 117, 18, 19.) So of the execution of a deed by his client in his presence. (*Sandford v. Remington*, 2 Ves. jun. 189;) and he compellable to disclose any other private communication or transaction independent of his character as attorney. (*Hodges v. Mullikin*, 1 Bland, 509. *Bogert v. Bogert*, 2 Edw. Ch. Rep. 399, 403. *Rogers v. Dare*, 1 Wright, 136, 7.) On this principle, he is bound to disclose a statement made by request of his client, to the adverse party. (*Ripon v. Davis*, 2 Nev. & Mann. 310.) And *Gainsford v. Grammar*, 2 Camp. 9 contra, was questioned, and *semble*, overruled as there reported. (*Id. Griffith v. Davis*, 5 Barn. & Adolph. 502, S. P.)

Whether the communications to an attorney, &c. in order to be privileged, must relate to a suit depending or at least prospective, as we saw ante, note 280, p. 277, 8, the authorities are conflicting. (And see *Brown v. Payson*, 6 N. Hamp. Rep. 445, and the cases there cited by Parker, J.) That either is necessary was denied in *Beltzhoover v. Blackstock*, 3 Watts, 20, 2, 27, 8. And this seems to be now the settled doctrine of Westminster Hall, besides being sustained by a decided preponderance of American authority. (See *Taylor v. Blacklow*, 3 Bing. N. C. 235, and the cases there cited by the counsel and the court. (*Doe, dem. Peter, v. Watkins*, id. 421. *Walker v. Wildman*, 6 Madd. 47.)

The question arose in *Foster v. Hall*, 12 Pick. 89, where it was much considered. Mr. R., an attorney, was consulted by and gave advice to a grantor concerning a proposed deed. He knew nothing but what the grantor communicated in a conversation and consultation held in relation to the making of the conveyance, which was now assailed as fraudulent. Mr. R. had been recently licensed as attorney, and felt that he was entitled to a fee for the directions he gave; but had never received one. The

counsel for the grantor objected to his being examined, though his advice had not been given in respect to any pending suit; nor with express reference to a prospective one. The objection was allowed; and on motion for a new trial it was denied. The question was debated and decided on the assumption, that the advice had no connection with a present or prospective suit. Shaw, C. J. delivered the opinion of the court. He examined the English cases very fully, (A. D. 1831,) cited the 6th ed. of Phillips, p. 134, (A. D. 1824,) repeated in the present edition at p. 143, 4, which he approved, and concluded as follows—"On the whole, we are of opinion, that, although this rule of privilege, having the tendency to prevent the full disclosure of the truth, ought to be construed strictly; yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defective title, by obtaining a release, to avoid litigation by compromise, to ascertain what facts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court." In this case, the well known limits of the rule in most other respects are noticed by the learned Ch. J. on English authority, 12 Pick. 93 to 99, not differing materially from those already pointed out in the text or notes. See also a learned examination of the same head of evidence upon the English and many of the American cases, by Parker J. in *Brown v. Payson*, 6 N. Hamp. Rep. 444, to 449.

To *Foster v. Hall*, may now be added the still later cases of *Bolton v. The Corporation of Liverpool*, 1 Mylne & Keen, 88, and *Greenough v. Gaskell*, id. 98, (A. D. 1833,) *Moore v. Terrell*, (same year,) 4 Barn. & Adolph. 870. The reporter's note to *Greenough v. Gaskell* is thus: "And, generally, *it seems*, that a solicitor can not be compelled, at the instance of a third person, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing, or in contemplation." In *Moore v. Terrell*, Parke, J. said, "In *Greenough v. Gaskell*, the lord chancellor consulted with Tindal, C. J., Lord Lyndhurst, and myself; and we all thought the client's privileges extended much beyond communications in respect of a suit. The language of the lord chancellor is also given in a note to *Moore v. Terrell*. An attorney for A. lending money to B. peruses the abstract of B.'s title. He is not admissible as a witness concerning them. (*Doe, dem. Peter, v. Watkins*, 3 Bing. N. C. 421.) So of any thing communicated by a client in respect to the sale or purchase of an estate. (*Mynn v. Joliffe*, 1 Mood. & Rob. 327. And see *Ex parte Aitken*, 4 Barn. & Ald. 47, and *Ex parte Yeatman*, 4 Dowl. Pr. Cas. 309, per Little Dale J. See also Hare on Discovery, ch. 3.) In *Doe, ex dem. Shellard, v. Harris*, 5 Car. & Payne, 592, Mr. Justice, J. Parke extended it to knowledge acquired on an application to an attorney to draw a deed in fraud of creditors, and he refused to make an exception, because the advice might relate to an unlawful transaction, repeating what he said in *Moore v. Terrell*, as to the decision of the lord chancellor. He concluded by saying, "I am of opinion that the privilege applies to all cases where the client applies to the

attorney in a professional capacity; and an application to draw a deed is, I think, of that description." He said, in the course of the trial, that he considered the cases to the contrary, as overruled. He said, "there is a great deal of difficulty in the witness' disclosing whether the conference between him and his client, was for a lawful or unlawful purpose, without our being told what it was. It might be that the party asked if a particular thing could legally be done." See also *Bowman v. Norton*, and *Mills v. Oddy*, supra, which are also substantially that the retainer need not relate to a suit.

The consequence is that where no suit is pending, an attorney may be employed for both parties as in conveyances, and, therefore, cannot disclose the secrets of either, without his consent. (*Doe, dem. Peter, v. Watkins*, 3 Bing. N. C. 421. See also *Taylor v. Blacklow*, id. 235. *Doe, ex dem. Stroder, v. Seaton*, 2 Adolph. & Ellis, 171.)

The privilege is that of the party, who may waive it. Ante, note 277, p. 276. If the attorney in the cause submit to be examined, his assent, it seems, shall be taken for that of the client. *Bishop of Winchester v. Fournier*, 2 Ves. sen. 446. *Maddox v. Maddox*, 1 id. 61, 2.) But as we saw in *Bowman v. Norton*, supra, the assignees of a bankrupt have no power, as such, to waive his privilege.

An attorney making a communication between two parties, is compellable by either to disclose them. (*Cheever v. Powell*, 1 Mood. & Rob. 223. *Braughe v. Cradock*, id. 182.) A party assignor may waive his privilege, and let in the testimony of his attorney against his (the party's) assignee, as to what the assignor said previous to the assignment. (*Benjamin v. Coventry*, 19 Wend. 353.)

Whether, under the New-York statute, the privilege of concealing knowledge acquired professionally, as a physician or surgeon, be that of the patient, and waivable by him? *Quere.* (*Johnson v. Johnson*, 14 Wend. 637.) *Savage*, Ch. J. at p. 641, said it was undoubtedly that of the party, not the witness. (4 Paige, 460, 468, S. C. and see S. C. but not S. P. in 1 Edw. Ch. Rep. 439.)

All the cases seem to agree that the privilege continues after the particular suit is terminated, and extends to causes with which the client has no concern. (See *Parker v. Yates*, 12 Moore, 520.) It extends to the professional advisers of a stranger to the suit. Though if the judge improperly receive the evidence, it has been held that the party to the cause cannot avail himself of the objection. (Ante, note 824, p. 1173.) Yet counsel may argue as to the admissibility at the trial. (*Rex v. Woodley*, 1 Mood. & Rob. 391.) *Quere;* for the privilege is not allowed out of regard to the interests of the parties. (But see *Doe, dem. Peter, v. Watkins*, 3 Bing. N. C. 421.)

In respect to the production of papers, the privilege of the attorney seems to be co-extensive with that of the client; but not more so. (Ante, note 279, p. 276, note 5, p. 12, note 824, p. 1173.) But he is not bound to produce a case made for his client, a stranger, and submitted to counsel. *Rex v. Woodley*, 1 Mood. & Rob. 390.)

The court will direct at the trial, as to the attorney's privilege. (Ante, note 5, p. 12. *Nixon v. Mayoh*, 1 Mood. & Rob. 76. See also ante, note 824, p. 1173.)

As to incompetency or privilege, on the ground of policy, from disclosing knowledge acquired in the course of state, judicial, or other official duty, see ante, notes 524, 525, a, and 525, b. A senator was held admissible to disclose facts which transpired in secret session, after he had applied to have the injunction of secrecy removed, and that was re-

fused. (*Law v. Scott*, 5 Harr. & John. 438.) The court refused a subpoena duces tecum to compel a state governor to produce a paper filed with him, containing charges alleged to be libellous. (*Gray v. Pentland*, 2 Serg. & Rawle, 23, commented on and approved in *Youter v. Sanno*, 6 Watts, 166.) 'The county attorney is inadmissible as a witness to disclose the proceedings before the grand jury. (*McLellan v. Richardson*, 1 Shepl. 82, 86.) The court say the object of the grand juror's oath of secrecy, is to prevent escapes, and promote freedom of deliberation, by preventing timid jurors being over-awed. In another case, a grand juror was received to prove who was the prosecutor. *Huston, J.* argues that the oath, "The commonwealth's counsel, your fellows and your own, you shall keep secret," restrains merely from all voluntary disclosure, because that may affect the prosecution, or jurors, or witnesses, injuriously; but not disclosures on oath to promote justice. (*Huidekoper v. Cotton*, 3 Watts, 56, 7, 8.) He cites *Wheat. Selw.* 815, as in point. And so it is. See that page of the 2d Am. ed. The case is *Sykes v. Dunbar*.

Communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; as a letter written by a private individual to the secretary of the postmaster general, complaining of the conduct of the guard of the mail. (*Blake v. Pelfield*, 1 Mood. & Rob. 198.)

When the purposes of public justice require that certain evidence should be given, which the court, from a regard to decency, would be disposed to suppress, (whether upon indictment for crimes, or on questions of private right or private wrongs,) the evidence, however inconvenient, must be disclosed. It has, therefore, been considered that Mr. Justice Burnet was wrong in refusing to try an action of defamation in which a woman charged a man with proclaiming to the world that she had a secret defect in her person, and the defendant, by plea, justified that it was true she had such defect. (Per Lord Mansfield, in *Da Costar v. Jones*, Cowp. 733.) But the courts have frequently refused to try wagers, on the ground of their leading to the admission of indecent evidence, or as unnecessarily injuring the feelings of third parties. (*Id. Ditchburn v. Goldsmith*, 4 Camp. 152.)

Semble. An arbitrator is privileged from disclosure out of protection to his situation. (Note to *Johnson v. Durant*, 4 Carr. & Payne, 327, cites *Ellis v. Saltau*.)

A petit juror may, of course, be examined to any material fact, though it come to his knowledge in the course of duty as a juror. (*Dunbar v. Parks*, 2 Tyl. 217.) And in crim. con. the executor of the defendant's uncle was compelled to answer what amount of property the defendant had acquired by his death, this being material to the question of damages. *Abbott, C. J.* said, "I do not say that an executor is bound to answer all questions; but I do not see why you should not answer this." (*Peter v. Hancock*, 1 Carr. & Payne, 375.)

NOTE 326, p. 428. *Of incompetency because the party will not state what he proposes to prove.*

It is very properly holden, that, in order to enable the court to judge of relevancy, you must state, if required, what you propose to prove by a witness. (Ante, note 326, p. 428.) But you are not bound to do this before the witness is sworn. If he be, therefore, precluded his oath for such a refusal, and not by reason of personal incompetency, it will be error. (*Force v. Smith*, 1 Dana, 151.)

NOTE 522, p. 728. *Of incompetency because the questions to the witness may be criminating.*

It lies with a witness, even after he is sworn, and not with the party, to assert his privilege from answering a criminating question, as we saw ante, note 522, p. 748. *A fortiori*, it is not for the party to object to the witness being sworn, because he may criminate himself. (Macarty v. Bond's adm'r, 9 Lou. Rep. 351, 355, 6.)

NOTE 511, p. 730; NOTE 534, p. 779. *Of a party objecting the incompetency of his own witness.*

A party cannot object to his own witness as incompetent, or discredit him. Under what qualifications this is held, see ante, note 511, p. 730, and note 534, p. 779. (Winston v. Moseley, 2 Stew. Rep. 137, 139.) But in one case, a plaintiff was allowed to call a witness, and examine him to one fact, and then to exclude him as interested for the defendant to prove another and distinct fact. (Shield's lessee v. Miller, 4 Har. & John. 1, 6, 9.) *Quere.* Helm v. Handley, 1 Litt. 219, 221, is *directly contra*. A witness offered and sworn by a party cannot be withdrawn by him on the ground of interest; but he must allow the opposite party to cross-examine. (Bogert v. Bogert, 2 Edw. Ch. Rep. 399, 403.) Yet the rule that a party cannot object to the incompetency of a witness, is confined to the particular trial. If there be a new trial, the opposite party has no right, therefore, to insist on his being received as competent; nor if he be dead, can he insist on what he swore at the former trial, being evidence. (Crary v. Sprague, 12 Wend. 41, 45. Ante, note 440, p. 575, S. C.)

END OF COWEN AND HILL'S NOTES.

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